EMPLOYMENT TRIBUNALS

Claimant: **Mr Grzegorz Perzanowski**

Respondent: **Asda Stores Limited**

Heard at: London South Employment Tribunal

On: 7 – 8 April 2021

Before: Employment Judge A. Beale

Representation
Claimant: In person
Respondent: Mr A. Rozycki (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims for holiday pay and unauthorised deductions from wages are dismissed upon withdrawal.

2. The Claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Introduction

1. By an ET1 presented on 2 November 2019, the Claimant brought a claim of unfair dismissal and a claim for holiday pay/unauthorised deductions from wages.

2. The claim was heard by CVP, and a Polish interpreter, Ms Danuta Carty, attended remotely to interpret for the Claimant.

The Claims

3. At a telephone case management preliminary hearing, on 13 July 2020, the Claimant was ordered to provide further information about his claim for holiday pay. It appears that the possibility of a claim for unpaid wages "in lieu" may also

have been discussed on this date. The Claimant did not provide any written information about his holiday pay/wages claim, and no such information appears in the bundle.

4. At the start of this full merits hearing, I asked the Claimant to explain what he said he was owed by the Respondent. The Claimant was unable to provide me with a figure, but referred to an email from an employee of the Respondent, dated 27 July 2020, which he said contradicted the information in the Respondent's Grounds of Resistance. Following a discussion, in which the Claimant was referred to his payslip dated 14 September 2019 (p. 214 of the bundle), the Claimant was satisfied that the position relating to his holiday pay and pay in lieu had been clarified. He then withdrew his claims for holiday pay/unauthorised deductions from wages, as recorded in my Judgment above.

The Issues

5. The only remaining claim was therefore a claim for unfair dismissal. The issues in that claim were agreed at the outset of the hearing to be as follows:

    5.1 Was the Claimant dismissed for a potentially fair reason pursuant to s. 98(2)(b) ERA 1996, namely conduct? The conduct relied upon by the Respondent was "ghost picking", which the Respondent contends involves falsification of records.

    5.2 If so, did the Respondent act reasonably in treating that conduct as a sufficient reason for dismissing the Claimant pursuant to s. 98(4) ERA 1996?

    5.3 In particular:

        (a) Did the Respondent form a genuine belief that the Claimant was guilty of gross misconduct?

        (b) Did the Respondent have reasonable grounds for that belief?

        (c) Was the Respondent's belief based on a reasonable investigation in all the circumstances, to include the question of whether a fair procedure was followed by the Respondent. The Claimant raised the following particular issues:

            i. he alleged that the investigation had taken too long;

            ii. he alleged that the investigation meeting had been carried out in circumstances where he was unfit to attend;

            iii. he alleged that the charge against him had changed from "ghost picking" to "falsification of records" following the disciplinary hearing;

iv. he alleged that the decision to dismiss had been pre-determined as the dismissal letter was dated 15 August 2019 (the date of his initial adjourned disciplinary hearing) when the decision to dismiss was not said to have been made until 22 August 2019.

5.4 Was the dismissal of the Claimant fair in all the circumstances (having regard to equity and the substantial merits of the case)? In particular, was the dismissal within the band of reasonable responses available to the Respondent? The main points relied upon by the Claimant in this respect were:

(a) that the conduct alleged against him was insufficiently serious to justify dismissal, and that this was demonstrated by the Respondent's failure to suspend him;

(b) that the Respondent had failed to take into account the effect of the strong painkillers he was taking at the time of the alleged offence.

Remedy (unfair dismissal)

5.6 If the Claimant was unfairly dismissed, should compensation be awarded to the Claimant?

5.7 If so, what level of compensation should be awarded to the Claimant?

5.8 In particular:

(a) Did the Claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

(b) If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by how much would it be just and equitable to reduce the compensatory award?

(c) To what extent, if any, has the Claimant mitigated his losses?

6. This case was originally listed for a three day hearing, but I was only available to hear it over two days. Furthermore, the start on the first day was delayed by the failure of the booked interpreter to attend with a device capable of connecting to the CVP hearing. The hearing eventually started at noon, with a replacement interpreter, Ms Carty. In the circumstances, I informed the parties that this hearing would deal only with the liability issues set out at paragraphs 5.1 – 5.4 above, and (should the Claimant succeed in his claim for unfair dismissal) the issues of contributory fault (issue 5.8(a)) and whether any *Polkey* reduction should be applied (issue 5.8(b)). Any remaining remedy issues would

be dealt with at a further hearing. The evidence and submissions were completed within the time available, and I reserved my judgment.

Documents

7. I was provided with an electronic bundle numbering 284 pages, which both parties had before them. The Claimant had sent to the Tribunal a small number of additional documents (which had been copied to the Respondent), which I only considered where they were brought to my attention.

Witnesses

8. On behalf of the Respondent, I heard evidence from Michael (known as Noel) Boland, Transport Operations Manager, Erith CDC, who dismissed the Claimant, and Adam Mydlowski, General Manager, who heard the Claimant's second level appeal. I heard evidence from the Claimant on his own behalf and from two other witnesses, Sebastian Jabczanik and Martin Cvecka.

Facts

9. The Claimant was employed by the Respondent between 10 January 2017 and 22 August 2019. At the date of his dismissal, he was employed as a Warehouse Picker at the Erith CDC Depot.

10. On 13 September 2018, the Claimant was "counselled" under the Respondent's informal counselling system for "cherry picking". "Cherry picking" is the name the Respondent gives to a practice whereby employees pick from different pallets in the warehouse, in order to get better pick rates. Employees are meant to pick goods for stores following an "in line" system. The counselling note was to remain on the Claimant's file for 6 months.

11. In January 2019, so still within the life of the counselling note, the Claimant was alleged to have been "cherry picking" again. Following a disciplinary hearing on 31 January 2019, the Claimant was found to have cherry picked, and was given a verbal warning, to remain on his file for 6 months (as confirmed in a letter dated 3 February 2019; p. 112). The Claimant did not appeal against this warning.

12. At some point in 2019, although it is not clear precisely when, the Claimant began to suffer from shoulder pain. There are two "fit notes" in the bundle, one signing the Claimant fit for "amended duties" from 28 May – 11 June 2019, with the condition given as "Seizures NOS", and the second signing the Claimant unfit for work by reason of shoulder pain from 1 July – 14 July 2019 (p. 113 – 114). The Respondent's absence records show that the Claimant was absent for 7 days with seizures and shoulder pain from or ending on 30 May 2019, and for a further 7 days with shoulder pay from or ending on 22 July 2019 (it is not clear whether the date given is the start or the end of the absence period, although I think it most likely that it is the end date). The Respondent's case is

that it was never provided with the fit note covering the period 1 – 14 July. It is common ground that the Claimant attended work on 1 – 3 and 5 – 8 July 2019.

13. On the morning of 6 July 2019, the Claimant was working in the warehouse. Two of his colleagues raised a concern that the Claimant had stopped picking from his original, depleted cage, and had pulled over another better stocked pallet ("cherry picking"). When confronted about this, they alleged that he had started taking the stock from the original cage and throwing it randomly into cages destined for different stores, without checking the pick labels.

14. The two colleagues and Dominika Cross, a manager in the Claimant's warehouse, were interviewed on the same day by Michael Tabaaro, Department Manager (p. 116 – 121). Ms Cross said that following the incident, the Claimant had approached her and said he was feeling dizzy with new medication and needed to go home. The note records that he also told her he was not sure what he was doing and that he might have cherry picked. He asked whether he was going to be in trouble, and whether he could do anything to fix this. He did not in fact go home.

15. A file note (p. 122) records a meeting the following day attended by the Claimant, Martin Cvecka (one of the Claimant's warehouse colleagues), Ms Cross and Mr Tabaaro, at which the Claimant stated that he had changed his medication from co-codamol to tramadol-hydrochloride tablets. The notes record that the Claimant said the new medication made him dizzy, and that the prescription for the medication stated that he could become sleepy, and should not drive machinery or use tools. Because of his previously advised medication, the Claimant was already on restricted duties, under which he could not drive machinery or use tools.

16. On 25 July 2019, the Claimant attended an investigation meeting relating to the incident on 6 July 2019 (p. 127 – 138). The meeting was conducted by Mr Tabaaro, and the Claimant was accompanied by Sebastian Jabczanik. The notes are headed "Investigation into Ghost Picking". In their witness statements, Mr Boland and Mr Mydlowski both state that "ghost picking" is the process of systematically confirming that cases of stock have been picked, when the employee intentionally chooses not to physically pick them, meaning that the store will receive an invoice for stock that they have not actually received.

17. The Claimant stated at the start of the meeting that he was not happy to continue because he was on strong medication similar to morphine, meaning that he was having difficulty even understanding his own language, let alone English (p. 127). This was different medication from the Tramadol he had previously been prescribed. Mr Tabaaro decided to continue the meeting, noting that the Claimant could ask his companion to translate if necessary. He also noted that the Claimant had attended work confirming that he was fit to carry out his duties (p. 128).

18. Mr Tabaaro explained his investigation thus far and told the Claimant that the last five picks done on 6 July 2019 had not been allocated to the correct stores. The Claimant's response to Mr Tabaaro's questions about 6 July 2019 was that he was on very strong medication and could not remember what had happened. Mr Tabaaro asked the Claimant some questions about the immediate past week, and he was able to confirm that he had received refresher scanning training on Monday, and gave the name of the colleague who had provided the training. The Claimant stated that he wanted the investigation to be rescheduled so that a union representative could attend with him, in view of the confusion caused by the medication. Mr Jabczanik gave his view that the Claimant appeared dizzy and was having difficulty speaking in English and in Polish. Mr Jabczanik also said that the investigation meeting should have been held within 14 days of the incident.

19. In his oral evidence, the Claimant said that Mr Jabczanik had translated everything he said during this meeting, although the notes differentiate between responses by the Claimant himself, and responses translated by Mr Jabczanik. This was in contrast to Mr Jabczanik's oral evidence, where he said that he had translated the odd word for the Claimant here and there, in addition to the sections which state that he was translating for the Claimant. Based on the notes and Mr Jabczanik's evidence, I find that the responses noted to have been made by the Claimant were largely made by him, in English, during this meeting.

20. Following an adjournment, Mr Tabaaro informed the Claimant that the matter would be going forward to a disciplinary hearing for gross misconduct. He explained that he considered the Claimant had "ghost picked" on 6 July to cover up his previous cherry picking, and did not accept that the Claimant had not known what he was doing because of his medication, in view of his answers during the meeting.

21. On 26 July 2019, the Claimant's company sick pay was stopped because he had gone off sick with shoulder pain pending a disciplinary hearing for gross misconduct (p. 143, 147). The Claimant appealed against this and his sick pay was reinstated on 8 August 2019 (p. 152).

22. By letter dated 8 August 2019, the Claimant was invited to a disciplinary hearing to be held on 15 August 2019, to respond to an allegation that on 6 July 2019 he had ghost picked. The Claimant was informed that this was regarded as gross misconduct; that he could call witnesses, and of his right to representation (p. 153).

23. The Claimant attended the hearing on 15 August 2019, accompanied by his representative, Aron Vernon and another colleague to interpret (p. 157 – 8). Shortly after the meeting had begun, Mr Boland took the view that the Claimant was not fit to continue on the basis that he had taken too much pain medication,

and the meeting was adjourned. The Claimant was invited to a further meeting on 22 August 2019 (p. 162 – 3).

24. On 22 August 2019, the Claimant attended the hearing with Aron Vernon and this time with Mr Cvecka as his translator (notes p. 164 – 166). The Claimant confirmed at the start of the hearing that he was fit to continue.

25. During the hearing, Mr Boland took the Claimant through the timeline of 6 July 2019 as he understood it, what had been picked and what had been recorded.

26. In his oral evidence, Mr Boland explained that the Claimant had started picking from one cage, then left his grid, and came back with another pallet of product. The Claimant was then challenged by his two colleagues, and went back to his original cage, and threw the remaining cases into random cages that were close. When employees are picking in the warehouse, they verbally confirm into their headsets the products they have picked. The printout relating to the Claimant showed that, prior to allocating the last cases from his original cage to random stores, he had already confirmed that they had been picked for the correct stores.

27. Mr Boland explained in oral evidence that this could potentially create three sets of false records: (a) the Claimant's pick data could have been inflated (although in fact it was not as he did ultimately pick these cases, albeit allocating them to the wrong stores); (b) the depot would unknowingly invoice stores for goods that had not in fact been sent to them; and (c) the perpetual inventory for the store would be incorrect.

28. When asked about the incident on 6 July 2019, the Claimant said he could not remember clearly as he had been on a lot of medication. He also said he had no need to pick from a better filled pallet as his targets had been adjusted due to his shoulder pain. Mr Boland disagreed with this, on the basis that the Claimant was not allocated to pick heavy goods, but his targets remained the same.

29. The Claimant's representative asked why the usual escalation process of warnings had not been followed in relation to this allegation of ghost picking. In his witness statement, Mr Boland states that he summarised during the hearing why ghost picking was regarded as gross misconduct, namely that it was deemed to be falsifying company records for the reasons given above. The notes of the disciplinary hearing are extremely difficult to read, but this discussion is not recorded, so far as I can see – although it is also apparent that the notes are not verbatim.

30. The meeting was adjourned for Mr Boland to consider his decision and on his return, he informed the Claimant that he was to be summarily dismissed for gross misconduct. Mr Boland's reasons are summarised in a letter which is dated 15 August 2019 (the date of the originally convened disciplinary hearing).

Mr Boland gave evidence that this was a clerical error. The reasons given by Mr Boland in the letter for reaching his decision were:

(a) As the Claimant said he could not recall the events of the day, Mr Boland had made his decision based on the material he had to hand, and the CCTV, the confirmed pick sheet and the witness statements of the Claimant's colleagues clearly showed that that he had ghost picked as alleged.
(b) Whilst the Claimant was on adjusted duties in relation to his shoulder, this did not alter his pick rate target. Mr Boland believed that, consistently with his repeated prior history of "cherry picking", the Claimant had abandoned his original cage to cherry pick a much bigger and more convenient pallet.
(c) Ghost picking constituted gross misconduct because it was deemed to involve falsifying records. In this case, if the Claimant had not been challenged, it could have resulted in store shortages and availability issues for customers, and stores would have been charged for stock not received.
(d) Mr Boland considered that the Claimant had done this deliberately, had failed to follow his training and that this brought into question his integrity, meaning that he should be summarily dismissed.

31. Mr Boland also considered a point made by the Claimant's representative about the length of time taken to carry out the investigation and considered that this was reasonable in view of the need to collate witness evidence and the Claimant's sickness absence, rest days and holiday.

32. In an unchallenged section of his witness statement, Mr Boland stated that he had considered the mitigating factors put forward by the Claimant, in particular his new medication. He did not consider that the Claimant had provided evidence to support his mitigation. He concluded that, in view of the Claimant's repeated previous counselling and warning for "cherry picking", he would not change his behaviour with regard to following company processes, and thus that summary dismissal was the appropriate sanction.

33. The Claimant appealed against the decision to dismiss him on 28 August 2019 (p. 167). His grounds of appeal were:

(a) the Respondent had just decided what should be classed as falsification and what shouldn't to allow them to ignore the escalation process;
(b) he had been told in the meeting that ghost picking was specifically mentioned in the policies, but it was not;
(c) management had had plenty of time to do the investigation as they could take witnesses off the floor immediately;
(d) falsification of documents had not been mentioned until it was shown that ghost picking was not on the list of gross misconduct offences.

34. The Claimant was invited to an appeal hearing with Jon Dennis, General Manager, which took place on 11 September 2019 (p. 169 – 170). He attended with Mr Cvecka as translator and Rafael Rey of USDAW as his representative

(p. 171 – 176). During the hearing, Mr Dennis went through the Claimant's appeal points with the Claimant and Mr Rey and Mr Cvecka.

35. Mr Rey confirmed that the Claimant was not saying that he had not "ghost picked", rather that there was an issue about whether he had done so wilfully in view of the medication he was taking. The Claimant said he had a medical certificate to show he was not fit for work from 1 – 14 July, but had attended because Mr Tabaaro had said he was needed as they were short-handed. The Claimant did not provide the fit note at the hearing, and whilst he offered to provide it to Mr Dennis subsequently, he did not do so.

36. The other main focus of the appeal hearing was the question of whether "ghost picking" constituted gross misconduct, and whether the charge had changed to falsification of records. Mr Rey questioned whether there had genuinely been a breach of trust such as to justify summary dismissal when the Claimant had been allowed to carry on picking whilst the long investigation was carried out.

37. Following this meeting, Mr Dennis re-interviewed Mr Tabaaro and Ms Cross (p. 177 – 181). Both said they had not been told by the Claimant that he had changed his medication to one with significant side effects prior to 6 July 2019, nor had he tried to give them a doctor's note stating that he was unfit to work between 1 July and 6 July 2019. Ms Cross said that the Claimant had not appeared drowsy or under the influence of medication at any point before the "ghost picking" incident, and he had not reported experiencing side effects with his medication. Mr Tabaaro said that immediately after the incident, when the Claimant came to him concerned that he would be in trouble for ghost or cherry picking, he seemed fine and coherent.

38. Mr Dennis dismissed the Claimant's appeal in a comprehensive outcome letter dated 19 September 2019 (p. 182 – 186). He detailed the further investigations he had undertaken. He confirmed that, although it should have been clarified that "ghost picking" was not specifically identified as gross misconduct in the Respondent's policy, it did constitute falsification of records, which was so identified. Having reviewed the available medical evidence, he noted that the doctor's letter the Claimant had provided showing he was on Tramadol was dated 26 July 2019, and gave no details about the period of time the Claimant had been taking the medication. Taking into account his interviews with Mr Tabaaro and Ms Cross, he concluded that the Claimant had known what he was doing on 6 July 2019, and had panicked when caught out by his colleagues, hence his suggestion that the medication had influenced his actions. He did not accept that the Claimant had provided a doctor's certificate signing him off sick to Mr Tabaaro and Ms Cross prior to the incident. He concluded that the Claimant had deliberately and knowingly ghost picked, thereby falsifying company records, and that his dismissal should be upheld.

39. As permitted under the Respondent's agreement with the GMB union in cases of dismissal for gross misconduct, the Claimant raised a further appeal on 3

October 2019 (p. 187). This appeal was based on exactly the same grounds as his first appeal.

40. The Claimant was initially invited to attend an appeal hearing with Mr Mydlowski on 29 October 2019, by letter dated 14 October 2019 (p. 188). This hearing was postponed to 14 November 2019 at the Claimant's request, on the basis that he felt unwell owing to the medication he had taken (p. 190).

41. In his witness statement, Mr Mydlowski explained that he had told the Claimant that the purpose of this second appeal was for him to listen to the Claimant's appeal points and consider any information he felt had not been considered, or any new evidence the Claimant wished to bring to his attention, rather than to re-hear the original case. He confirmed this in oral evidence.

42. The notes of the second appeal hearing appear at p. 191 – 198 of the bundle. The Claimant was again represented by Mr Vernon and Mr Cvecka attended as translator. At the meeting, the Claimant supplied a copy of the fit note declaring him unfit to work from 1 – 14 July. Mr Mydlowski checked and confirmed that this was not on the Claimant's file, and that the Claimant had attended work between 1 – 3 July and 5 – 8 July 2019. The Claimant said he had been asked to come back to work by his manager and had done so as a favour despite being on heavy medication. There was a discussion about when the medication had changed and Mr Cvecka said it had been "on or around the ghost picking date" (p. 194). Mr Mydlowski asked some more questions to try to clarify this, but no date is recorded in the notes.

43. At the close of the meeting, Mr Vernon summarised the Claimant's grounds of appeal, which were: (1) the date on the dismissal letter showed pre-judgment; (2) the ghost picking/falsification of records issue; (3) the fact that the Claimant had not been suspended demonstrated that his integrity was not in question as alleged in the outcome letter; (4) that if falsification of records was not permitted as a reason for dismissal, the only issue remaining was cherry picking, which was not sufficiently serious to result in dismissal; (5) the effects of medication had not been properly considered and occupational health had not been consulted.

44. In his witness statement, Mr Mydlowski stated that during the meeting, he had overheard a discussion between the Claimant and Mr Cvecka in Polish, in which the Claimant said he could not prove he had informed anyone of his medication change, so he was going to amend the notes and state Mr Cvecka was there when he was not. At the end of the meeting, the Claimant had amended the notes of a comment made by Mr Cvecka to read (amendment in italics): "This is in his file meeting with Mr Tabaaro Dominika Cross update on increasing of strength of medication *(Martin was present at this meeting)*" (p. 194). Both the Claimant and Mr Cvecka gave evidence that this passage referred to the meeting which took place on 7 July 2019, the day after the "ghost picking" incident, not to a meeting prior to that date as Mr Mydlowski alleged.

When I asked Mr Mydlowski about this point, taking him to the file note of the 7 July 2019 meeting at p. 122, Mr Mydlowski accepted that the discussion could have referred to that meeting. He also accepted that he had not raised his suspicions with the Claimant at the time. However, he said that this point had not affected his decision on the appeal, and that the reasons for his decision were as set out in his letter and his statement.

45. Mr Mydlowski wrote to the Claimant on 18 November 2019 to inform him that his dismissal would be upheld (p. 199 – 201). In his letter, Mr Mydlowski addressed the Claimant's grounds of appeal as follows (in summary):

    (a) He noted that the Claimant had not in fact taken time off sick during the period of the sick note, and that if he had been ill, he should have reported sick.
    (b) There was no evidence that the Claimant had changed his medication, or informed his managers that he had done so, prior to the ghost picking incident.
    (c) The date on the dismissal letter was the result of an administrative error.
    (d) The reference to the Claimant's integrity was in the context of summing up what had happened, and was not the reason for dismissal.
    (e) The ghost picking/falsification of records issue had been fully explored at the first stage of appeal.
    (f) Ghost picking was an act of gross misconduct; cherry picking was not, hence the two were treated differently.
    (g) As the Claimant had not been able to evidence that his medication had changed or at what point, the point about occupational health was not relevant.

46. Mr Mydlowski summarised his reasons for upholding the dismissal in his witness statement: he considered the Claimant's conduct to be extremely serious, and agreed that dismissal without notice was the starting point. The Claimant had not provided evidence in support of his mitigating arguments relating to his alleged change in medication.

THE LAW

Unfair Dismissal

47. Pursuant to section 98 Employment Rights Act ('ERA') 1996, it is for the employer to show the reason for dismissal, and that it is a potentially fair reason within the meaning of section 98. A reason relating to the conduct of an employee is a fair reason within section 98(2)(b) of the Act.

48. If a fair reason can be shown, section 98(4) ERA 1996 provides that the Tribunal must consider whether the dismissal was fair or unfair, which will depend on whether in the circumstances (including the size and administrative resources of the employer), the employer acted reasonably or unreasonably in treating

the reason as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

49. Where the reason for the dismissal is conduct, as is alleged in the present case, it is established law that the guidelines contained in *British Home Stores Ltd –v- Burchell* [1980] ICR 303 apply. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) having carried out such investigation into the matter as was reasonable in all the circumstances of the case. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

50. The Tribunal must further determine whether the sanction imposed by the employer fell within the range of reasonable responses.

51. At the stages set out at points (ii) and (iii) in paragraph 48 above, as well as paragraph 49 above, the Tribunal must consider whether the employer's conduct fell within the range of reasonable responses open to it (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; and see *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111, where it is confirmed that this principle also applies to the investigation carried out and procedure adopted by the employer). It is not open to the Tribunal to substitute its view for that of the employer.

CONCLUSIONS

The Reason for the Dismissal and "genuine belief"

52. I have no hesitation in concluding that the reason for the Claimant's dismissal was his conduct in "ghost picking" on the morning of 6 July 2019. Whilst the Claimant suggested in his claim form (p. 8) that he was dismissed because of his shoulder condition, he does not pursue this point anywhere in his witness evidence and the point was not put to the Respondent's witnesses. I have no basis on which to conclude that the dismissal was for any other reason.

53. I further accept the evidence of Mr Boland and Mr Mydlowski that they genuinely believed that the Claimant had committed this act of misconduct. The Claimant did not dispute at any point during the investigatory or disciplinary and appeal process that he had "ghost picked" as alleged; as his representative said during the first appeal, the question he raised was as to his state of mind at the time. I accept, having heard their evidence, that Mr Boland and Mr Mydlowski genuinely believed the Claimant to have "ghost picked" deliberately, in order to cover up his earlier "cherry picking" from a better pallet.

Reasonable Grounds and Reasonable Investigation

54. I deal with the issues of whether the Respondent's managers had reasonable grounds for their conclusions, reached after the Respondent had carried out as much investigation as was reasonable in the circumstances, below. As the procedural issues raised by the Claimant largely relate to the investigation carried out by the Respondent, I also deal with the question of whether a fair procedure was followed in this section.

55. The Respondent clearly had reasonable grounds to believe that the Claimant had committed the acts alleged against him. I accept the evidence of Mr Boland that the sequence of events was clearly shown on CCTV; it was supported by the evidence of the Claimant's two colleagues, who provided witness statements on the day, and by the checks Mr Tabaaro subsequently did on the relevant cages. As noted above, the Claimant did not deny "cherry picking" or "ghost picking".

56. The central question in this case is whether the Respondent had reasonable grounds to believe that the Claimant had acted deliberately as Mr Boland, Mr Dennis and Mr Mydlowski concluded, and this is intertwined with the question of whether a reasonable investigation was carried out.

57. My reading of the dismissal letter, and the outcome letters produced following the two appeals, as well as the Respondent's witness statements, is that all the relevant managers found that the evidence before the Respondent showed that the Claimant did know what he was doing on 6 July. The evidence of the witnesses to the "ghost picking" events on 6 July suggested he was fully aware of his actions and their import, as did the evidence of the immediate aftermath from Ms Cross and Mr Tabaaro. Whilst it was the Claimant's case that he did not know what he was doing due to the effects of medication (a) that was not supported by the witnesses' contemporaneous accounts and (b) the evidence relating to his medication did not specify when it had first been prescribed, and it also did not suggest that its effects could have caused him to undertake the apparently deliberate acts that the Respondent reasonably found he had carried out. I therefore consider the Respondent had reasonable grounds to conclude that the Claimant deliberately "ghost picked" to cover up his earlier "cherry picking".

58. I then have to consider whether these conclusions were reached following a reasonable investigation.

59. The Respondent followed what was outwardly at least a model procedure, with an investigation including a meeting with the Claimant, statements taken from witnesses, a review of the CCTV footage, a disciplinary hearing and two stages of appeal. At all meetings, the Claimant was accompanied by a representative and a translator.

60. The Claimant has raised a number of concerns about the process followed, which I consider in the paragraphs below.

61. The Claimant first contends that the investigation took too long, given that Mr Tabaaro, who conducted it, had been able to obtain statements on the day, but the Claimant was not interviewed until 25 July 2019. I do not agree with this point. The Respondent's disciplinary policy does not give any time frame within which an investigation should take place. The investigation took place over a period of less than three weeks, and I note from the dismissal letter (p. 160), supported to some extent by the Claimant's sickness absence record, that holidays, rest days and sickness absence also intervened over this period. In any event, the Claimant has not provided any basis on which it could be said that the period of time spent investigating the allegation could have made his dismissal unfair.

62. The Claimant further alleges that the investigation meeting with him should have been postponed because he was not sufficiently well to continue owing to the medication he was taking. The Claimant did raise this point at the outset of the investigation meeting on 25 July 2019 and his position was supported by the evidence of Mr Jabczanik. However, I note that the Claimant had presented himself as fit to work that day; he was able to respond to questions in English and he was also able to recall the events of the preceding week, as recorded in the notes. On balance, I therefore find that Mr Tabaaro's decision to continue with the meeting was something a reasonable employer could have done. Furthermore, the Claimant was given several further opportunities to put his case at the disciplinary hearing and the two appeal hearings. I note that on each of these occasions, his position was the same as at the initial investigation, namely that he could not remember the events of 6 July 2019. Even if, therefore, Mr Tabaaro should have postponed the investigation, I do not consider that this could render the dismissal unfair, viewing the disciplinary process as a whole.

63. The Claimant then argues that the Respondent acted unfairly because it changed the charge against him from "ghost picking" to "falsification of records" in the dismissal letter, after his representative had pointed out that "ghost picking" was not specifically listed as an act of gross misconduct in the Respondent's disciplinary procedure. I reject this challenge. It is clear to me, based on the description given of the Claimant's conduct by the Respondent that the "ghost picking" in which he was said to have engaged necessarily involved falsification of records, as set out in detail above. Indeed, the Claimant accepted this when it was put to him in cross-examination. The Respondent did not change the charge against the Claimant, but instead explained to him that the charge of "ghost picking" encompassed falsification of records, which was listed in the Respondent's disciplinary procedure as an example of gross misconduct. As is apparent from the dismissal and appeal letters, the charge of "ghost picking" remained the same throughout.

64. I also accept the evidence given by Mr Boland that the date on the dismissal letter (15 August 2019) was a clerical error. I found Mr Boland to be a clear and honest witness, and I find that he made his decision to dismiss the Claimant only after hearing the Claimant's account of events and mitigation on 22 August 2019.

65. I have considered more broadly whether the Respondent carried out a reasonable investigation into the Claimant's suggestion that he did not know what he was doing on 6 July 2019 because of the effects of his medication. As I have noted above, the evidence from witnesses present on the day, including Ms Cross and Mr Tabaaro, strongly indicated that the Claimant was fully aware of what he was doing; knew that he had done something wrong, and was concerned to see whether he would be in trouble. As the Respondent's managers noted, the Claimant also had a history of "cherry picking", so this action was not out of character for him. The Respondent gave the Claimant several opportunities – at the investigation meeting, at the disciplinary hearing, and at his two appeals, to produce evidence that his medication had affected him in the way alleged. I find that the evidence produced by the Claimant fell a long way short of making such a case; it did not even demonstrate that the Claimant had changed his medication on or shortly before 6 July. Still less did it show that the medication was capable of having such a significant effect on the Claimant as to lead him, without knowing, to "cherry pick" and "ghost pick" as shown on the CCTV and in the witness evidence. In all the circumstances, I consider that the Respondent's investigation into this aspect of the case was reasonable, and it was not incumbent upon the Respondent e.g. to seek advice from occupational health as suggested by the Claimant.

66. Finally, I was concerned by paragraph 42 of Mr Mydlowski's statement, where he made a serious allegation that the Claimant had told his colleague, Mr Cvecka, in Polish, that he was going to alter the notes of the second appeal hearing to make an untruthful assertion that Mr Cvecka had been present when the Claimant informed his manager of a change in his medication. Mr Mydlowski accepted during the evidence that the amended note in question could refer to the meeting which took place on 7 July 2019, when Mr Cvecka was present – and thus that it could have been entirely accurate. In my view, reading the note as a whole, it was indeed intended to refer to the 7 July meeting, and the Claimant did not engage in untruthful collusion with Mr Cvecka as Mr Mydlowski alleges.

67. Mr Mydlowski accepted that he had not given the Claimant the opportunity to dispel his impression that the Claimant was asking Mr Cvecka to collude in an untruth. If this point formed part of Mr Mydlowski's reasoning in upholding the dismissal, it would not have been fair for him to rely upon it without raising it with the Claimant and giving him the opportunity to explain.

68. However, after giving this point careful consideration, I accept that this issue did not form part of Mr Mydlowski's reasoning in upholding the appeal. It does

not appear in his appeal outcome letter at p. 199 - 201. That is not surprising given that Mr Mydlowski's task as the second appeal manager was not to rehear the case, but consider any new or additional points raised by the Claimant. I accept that this was the exercise Mr Mydlowski conducted; that his conclusions were as set out in his outcome letter, and that this point did not form part of his reasoning.

69. I therefore conclude that the Respondent had reasonable grounds for concluding that the Claimant had committed the misconduct alleged, reached following a reasonable investigation, and applying a fair procedure.

Did the sanction of dismissal fall within the range of reasonable responses?

70. I have already concluded that it was reasonable for the Respondent to take the view that the Claimant's behaviour was not caused by any medication he was taking. In such circumstances, it was also reasonable for the Respondent to conclude that the Claimant had advanced no mitigation for his admitted "ghost picking".

71. I accept the Respondent's case that the Claimant's actions on 6 July 2019 necessarily involved falsification of the Respondent's records, which is listed as an example of gross misconduct in the Respondent's disciplinary policy (p. 68). I also accept that both Mr Boland and Mr Mydlowski considered whether an alternative sanction should be applied. However, in the absence of mitigating circumstances, and taking into account (as Mr Boland did) the fact that the Claimant received previous warnings for "cherry picking", I consider that it was reasonable for the Respondent to conclude that the Claimant would not change his behaviour in future. I find that the decision to dismiss fell within the range of reasonable responses open to the Respondent.

72. I therefore conclude that the Claimant's claim for unfair dismissal fails, and is dismissed. In those circumstances there is no need for me to consider the remaining issues of contributory fault or *Polkey*.

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Employment Judge A. Beale

Date: 10th May 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS: