EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107999/2021 (V)

Final Hearing Held by Cloud Video Platform (CVP) on 6, 7 and 8 July 2021

Employment Judge: Russell Bradley

Mr P Kelly	**Claimant** **In Person**
Costco Wholesale UK Limited	**Respondent** **Ms G Hirsch - Barrister** **Instructed by:** **Ms D Ingham - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed. The claim is therefore dismissed.

REASONS

Introduction

1. The Claimant maintained the single claim of unfair dismissal. It was resisted. On 19 April 2021 the tribunal issued standard orders in advance of this final hearing which was held by CVP. They included orders in relation to documents and the preparation of a single file or hearing bundle. Prior to the start of the first day of the hearing, a bundle containing 73 pages was lodged. In the course

of the hearing various additions were made. The third and final version had 114 pages. The index was updated to reflect the additions. The respondent separately provided a chronology and a cast list.

2. For the most part, the technology allowed the hearing to proceed without interruption. There were however several occasions when the claimant was not able to continue as his device was malfunctioning.

The issues

3. The issues for determination were:-

    1. Did the respondent believe in the guilt of the claimant on the allegation which resulted in his dismissal, the allegation being leaving company premises during working shift without permission of management on 6 occasions over 5 specified days between 11 and 23 November 2020?

    2. Did the respondent at the time of dismissal, or at least by the end of the appeal have a reasonable basis on which to sustain its belief; in particular, in the context of its:-

        i. use of or reliance on CCTV footage

        ii. consideration of the claimant's claims of inconsistent treatment/victimisation and of the custom and practice of clubbing together breaks

        iii. consideration of his explanation of being told in Health and Safety meetings and/or by management to leave the building if he felt unsafe in the light of the pandemic

        iv. consideration of the claimant being singled out for dismissal and treated differently by the investigating officer William Nevitt and by having discretion exercised to discipline and dismiss him

    3. By that time had the respondent carried out sufficient of an investigation so as to result in that belief? And in particular was it unreasonable for the respondent not to have viewed CCTV footage to ascertain whether other employees had taken extended breaks

4. Was the dismissal fair in terms of section 98(4) of the Employment Rights Act 1996 and in particular taking account of his explanations of:-

    i. exercising for stress and his symptoms of stress and his reluctance to discuss those issues with management; and his health issues generally, supported by a GP letter

    ii. Clubbing together breaks to take medication and for breathing exercises

    iii. Helping members to their cars

    iv. His length of service and clean record

5. If the claimant was unfairly dismissed

    i. To what basic award is he entitled?

    ii. To what compensation is he entitled taking account of

        1. The respondent's contention that but for a procedural unfairness he would have been fairly dismissed in any event?

        2. The extent to which the claimant caused or significantly contributed to his own dismissal?

Evidence

4. Evidence was heard from William Nevitt, investigating officer, Derek Munro, dismissing officer, William Thompson, who heard the appeal, the claimant and William Clugson, employee of the respondent.

Findings in Fact

5. From the evidence and the Tribunal forms, I found the following facts admitted or proved.

6. The Claimant is Paul Kelly. The respondent is Costco Wholesale UK Limited. It trades from premises in Springburn, Glasgow. It employees about 290 staff there. On average the site hosts about 3000 customers (or members) per day.

7. The claimant was latterly employed as a merchandising stocker/warehouse operative. Typically his hours of work were 5am to 1.30pm (Monday to Friday) and 1.30pm to 10.00pm on a Saturday. At the time of the circumstances which resulted in his dismissal (November 2020) he had been employed for over 20 years. At that time his gross weekly wage was £299.89. His net pay was £277.57 per week. His line manager was Andrew (Drew) Magunnigal. At that time, William Nevitt was an assistant general manager in Springburn. The general manager was Jim McGlone. He was due to retire in January 2021.

8. By November 2020, the claimant had read the respondent's handbook many times. It contained various agreements and statements which included **pages 94 to 114** of the bundle. He had thus read that material. He was familiar with it. He was aware of the respondent's rule against leaving its premises "*during working shift without permission of management*." That rule was an express example within the respondent's disciplinary procedure of a cause for termination without notice. In the claimant's opinion it was a rule which was not religiously applied. He believed it was only applied to certain people, including himself. He knew that if he needed time off for health reasons he should have asked for prior permission.

9. On 11 November 2020 Drew Magunnigal spoke with Mr Nevitt. The conversation came about in the context of a visit that day by a director of the respondent, Peter Kelly. Mr Kelly was travelling to the Glasgow store from England. The discussion included reference to the whereabouts of various members of Mr Magunnigal's team. In that discussion, they noted that they did not know the whereabouts of the claimant. The next day, Mr Magunnigal went over some notes from Mr Kelly's visit. In the course of doing so, it was noted that he had not seen the claimant for a large portion of that day, 12 November. It was agreed with Mr Nevitt that Mr Magunnigal would keep an eye on the claimant. In the days immediately following, Mr Magunnigal was off, then was Mr Nevitt. On their return, they agreed to check the respondent's AS400 system. That system is used for a variety of tasks related to the respondent's business. One of them is to record information from employee "*clocking cards*". On checking, they noted details of the claimant not having clocked out but not

being at his work, which they found strange. The normal practice for an employee who wishes to leave during his shift is to speak to his manager, which the claimant had not done.

10. On Saturday 21 November, Mr Magunnigal carried out a "*targeted*" search for the claimant. He was not in the warehouse. From enquiries, the respondent learned that the claimant had clocked out but neither Mr Magunnigal nor Mr Nevitt had seen him at any point that day.

11. On Monday 23 November, there were two discussions involving Mr Magunnigal, Mr Nevitt and the claimant. Mr Nevitt made a typed note of them (**page 42**). It refers to the two conversations. The first was between Magunnigal and Mr Nevitt. The second was a discussion which involved all three.

12. The note refers to at least four occasions when Mr Magunnigal and Mr Nevitt had not been able to locate the claimant. It also records that those periods were of time which far exceeded any authorised break period. The note records that Mr Magunnigal told Mr Nevitt (in the first conversation) that the claimant had told him that he took no extended breaks at any point stating "*check the cameras*". The note did not record the claimant also saying, "*you can't can you?*" It did not reflect that the claimant had said these things in a "*jokey manner*".

13. The second discussion referred to on **page 42** occurred after the claimant had been issued with a letter dated 23 November suspending him from his duties (**pages 43 to 44**). Mr Nevitt's note of that discussion records that the claimant initially claimed he was "*clubbing his breaks together*" to take as a singular block which would explain his prolonged disappearances but later stated he "*was heading out at times as a result of medication/medical ailment that he did not wish to discuss*.

14. The letter of 23 November invited the claimant to a meeting on Wednesday 25 November. The letter referred to six periods of time over four days (November 11, 12, 16 and 21) where it was alleged that the respondent was not able to

locate the claimant at work. The six times were specific. For example, the earliest in time was detailed as 11.06am to 12.33pm on 11 November.

15. The claimant attended the meeting on 25 November with a colleague, Willie Clugston, as his representative. Jayne Barlow, an employee of the respondent, took notes. Mr Nevitt believed that the note (**pages 45 to 46**) was accurate. Mr Clugson was asked if he would take notes for the claimant. He declined.

16. The note records that in answer to a question as to his whereabouts, the claimant said that he needed his personal sort of space, which was his house. It records him as saying, "*I did go down the road, not saying never done it, I did but there are a multitude of people in here do it in front of your eyes*." The note records that the claimant remained suspended pending further investigation. The conclusion after the meeting was that the circumstances warranted a disciplinary hearing.

17. On 27 November, Mr Magunnigal emailed Mr Nevitt. In it he said that; on 23 November he had spoken to the claimant about why he could not be found in the building after 10 o'clock on a few occasions; and that the claimant replied that he had gone home on his break but was back in time.

18. By letter dated 30 November (**page 52-53**) Mr Nevitt invited the claimant to a disciplinary hearing. It was fixed for 3 December at 12 noon. The letter referred to the respondent's employee agreement section 11.2 and in particular the example (number 25) of circumstances which could result in summary termination; "*Leaving Company premises during working shift without permission of management*". That agreement formed part of the handbook. The letter listed five dates on which it had been "*difficult to ascertain your whereabouts*". The letter referred to six occasions over those five days. The days were as per the letter of 23 November but with the addition of a time on 23 November. The various times coincided with those listed in the letter of 23 November but with one omission being the period between 12.54pm and 13.05pm on 11 November.

19. As per the right of representation of which the claimant was reminded in the letter, he attended on 3 December with Mr Clugson. The letter of 30 November enclosed the following material. Where it was produced for this hearing, I have included the bundle page number:-

    1. Investigation meeting notes (**pages 45-46**)
    2. Clock Card Reports w.c 9/11, 16/11, 23/11
    3. Statement from Drew MaGunnigal Merchandise Manager Glasgow (**page 51**)
    4. CCTV Breakdown on USBs. (**pages 47-48**)
    5. Breakdown of missing times and dates along with ½ hour break allocation. (**pages 49-50**)
    6. Notes from discussion with the claimant on 23/11 from William Nevitt AGM Glasgow. (**page 42**)
    7. Copy of invitation to initial investigatory meeting (**page 43**)
    8. Invitation to Disciplinary meeting. (**pages 52-53**)
    9. 9. 3x USB sticks

20. **Pages 47 to 50** were compiled for the claimant as a breakdown and further information on the CCTV footage. They were compiled by Mr Nevitt.

21. As per the letter of 30 November the meeting was chaired by Derek Munro. He was the assistant general manager of the respondent's Edinburgh warehouse. Prior to the meeting, he had no knowledge of the claimant. He received a "*pack*" of material on the morning of the meeting on his arrival in Glasgow. The pack contained the nine items listed above. He also received on arrival the "*employee file*" for the claimant.

22. The meeting was noted by Linda Anderson. Her note (**pages 54 to 62**) was a fair record of what was said at it. Her note appears to be a verbatim record of what was said by everyone present. It is not a minute of the proceedings. The note records that William Clugston was present as a witness for the claimant.

23. The note records that in the course of the meeting the claimant said that; the notes for the meeting of 25 November were not accurate; he clubbed together his breaktimes to take medication; he did breathing exercises at home; the times alleged against him were taken from CCTV cameras which was illegal, contrary to his human rights and data protection law; he had mental health issues for which he attended consultations provided by external agencies away from work; other members of staff "*do it*" meaning take breaks away from work longer than permitted; he considered that he was being persecuted or subject to an "*agenda*" by Mr Nevitt; sometimes he was asked to help customers outside the warehouse which times might explain his absence from it; on one occasion he had a telephone consultation with his doctor and forgot to swipe back in to work; he is a carer for his mother; at health and safety meetings the staff were told that if they felt unsafe they could leave; his employee file would vouch his sick lines for mental health and anxiety issues in the previous months and he was leaving work ("*going down the road*") to help manage his mental health by going home, to his safe place.

24. A recurring theme within the note is the claimant's belief that the use by the respondent of its CCTV footage to support the allegations was illegal. In particular it was his belief that its use in that way was contrary to his human rights and data protection laws. The note also records the claimant's admissions (at various times in the meeting) that on the occasions alleged he had left the building.

25. The note records a break of 33 minutes. The note then records that on the resumption Mr Munro referred (several times) to the respondent's handbook. The note records his position that the handbook did not prohibit the use by the respondent of the CCTV footage. He believed that the respondent had been within its rights to use the footage. Further, the note records Mr Munro's belief that while Mr Nevitt used the CCTV footage as a basis to convene the disciplinary hearing, the claimant had "*verified the times and dates are accurate and cannot verify why* [he was] *not in the building.*" The claimant reiterated his knowledge of the handbook, and his position to the effect that it did not comply with the law in permitting the use of CCTV footage.

26. The note then records a series of questions from the claimant which make a challenge to Mr Munro's integrity in deciding on the allegations. For example one question noted was, "*Who told you, who made the decision, was it higher up?*"

27. The note does not record any suggestion by the claimant in the meeting that the record from 23 November was incomplete in that it should have said after the words, "*check the cameras*", the words "*you can't can you?*", or that those words were said in a jokey manner or in a way that should not be taken seriously.

28. Mr Munro believed that on the question of the use of CCTV footage, the claimant was just looking for a reason or excuse in answer to the allegations. He recalled the claimant saying that it was "*not the law of the land*" to have used it. He believed that the claimant did not understand that this was not a case of being followed around the warehouse with a camera. Mr Munro believed there was a distinction to be made between that situation, and one where the CCTV footage for the warehouse had been checked to see the times when the claimant had left and had come in to it. Prior to reaching his decision on the allegations Mr Munro did not check the footage on the USB sticks. He believed that the claimant was falsifying company records and was being paid for time while "*he was sitting in the house.*" Prior to deciding on the sanction of dismissal, Mr Munro went through the claimant's file. He took account of the claimant's length of service. In his view that made the position worse, as the claimant knew the rules and what times were break times, but still behaved dishonestly. The respondent summarily terminated the contract on Thursday 3 December 2020.

29. In an undated letter (**page 63**) the respondent confirmed its decision to dismiss the claimant. The letter repeated the allegation from the invitation letter. It confirmed to the claimant that he had been dismissed at the hearing on 3 December. It advised him of the right of appeal and the period within which he should make it. It recorded that it enclosed the minutes from the meeting.

30. The claimant did not receive the letter before he made an appeal also in an undated letter (**pages 64 to 67**). In summary his grounds of appeal were:-

    1. Use of the CCTV footage contrary to various laws

    2. There was an agenda against him which led to ill-health

    3. The respondent's advice which he followed to leave from unsafe situations, which had been disregarded

    4. Inconsistent treatment/use of the disciplinary process in comparison with others

31. On 15 December, the claimant's appeal was considered by William Thompson. At the time he was the respondent's general manager in Aberdeen. He believed he had been brought in for the appeal as he was independent from Glasgow and impartial. Also, he was aware that Mr McGlone was due to retire in January 2021.

32. The meeting on 15 December was noted by Linda Anderson. Her note of the meeting (**pages 68 to 70**) was a fair record of what was said at it. Her note appears to be a verbatim record of what was said by everyone present. It is not a minute of the proceedings. The note records that William Clugston was again present as a witness for the claimant.

33. Mr Thompson had previously had training on the conduct of appeals. He had heard several appeals prior to hearing the claimant's. He had on occasion allowed appeals. He was aware that he had the power to allow the claimant's appeal. The claimant's letter of appeal had been forwarded to him in Aberdeen prior to 15 December.

34. The note records that Mr Thompson read from the appeal letter. In particular it noted him referring to human rights and data protection. It noted Mr Thompson's question as to what the claimant meant by that reference. It noted the claimant explaining that "*if cameras are used for crime prevention you cannot use them to spy on people. You have to notice when looking at something else*." Mr Thompson believed that its use was retrospective to find

out when he had been leaving the warehouse. In his view its use was because the claimant had been regularly leaving the building with no recollection of the length of times that he did so.

35. There was no mention in the appeal notes that the record of the discussion on 23 November was incomplete in that it should have said after the words, "*check the cameras*", the words "*you can't can you*?" or that those words were said in a jokey manner or in a way that should not be taken seriously.

36. On the issue of permission to leave the warehouse Mr Thompson took it to refer to advice to do with the pandemic. He was aware that the respondent had advised its staff that if any of them felt compromised by proximity of others or being in a crowd, they could take themselves away from that situation. He was of the view that it did not mean that employees in that situation could leave work and go home. He regarded such an interpretation as preposterous. He regarded it as a poor, ridiculous excuse for what the claimant had done. In his experience, it was a view that no-one else shared.

37. On the question of the identity of the dismissing officer, Mr Munro (someone who did not know the claimant), Mr Thompson's view was that such a situation was not uncommon within the respondent's business and was probably favourable for the claimant in that Mr Munro had no previous knowledge of him. On the issue of the claimant's mental health issues, Mr Thompson's view was that the claimant was duty bound to bring to the respondent's attention anything which could impact on doing the job properly, but he had not done so in advance in relation to needing to take time away from the warehouse. On the question of clubbing breaktime together Mr Thompson's position was; employees were not permitted to do so, they were required to take breaks when they were told; and in any event his review of the material suggested that the time the claimant had taken away from his workplace far exceeded the total break time.

38. On his review of the material, Mr Thompson formed the view that the claimant had honestly admitted what he had done. He did not regard the various explanations as particularly valid. He knew that the claimant was aware of the

rule from the policies and handbook and that his breach of the rule was irrefutable.

39. Mr Thompson believed that there was no doubt that the claimant had been leaving his workplace for extended periods. He believed that he was very familiar with the handbook. He believed that his explanations were "*after the fact*" and mostly "*smoke and mirrors*".

40. Mr Thompson also considered the question of the sanction of dismissal. In his view and even with the claimant's length of service "*theft of time*" (which he believed this was) was a breach of trust which ruled out the possibility of a sanction short of dismissal. Mr Thompson told the claimant that he would bring to the attention of the Glasgow warehouse management the claimant's comments that other employees there were doing the same as was alleged against him.

41. On 23 December the claimant received both a written decision on his appeal and the notes from it. On 26 December his general practitioner wrote a letter for him headed "*Appeal against being dismissed from work*". The claimant had requested it prior to 26. He had attended the medical practice on 18 or 19 December in an attempt to collect it.

42. The claimant left the warehouse on the occasions specified in the letters of 30 November. He admitted to the respondent that he had done so in the disciplinary hearing and in the appeal meeting.

43. On Tuesday 8 December the claimant began work for AFS Logistics Limited. He worked for them as a driver until 28 January 2021. The claimant's schedule of loss (**page 29**) disclosed earnings from that work of £2457.00. There then followed a period of unemployment. The schedule of loss noted that the claimant received state benefits of £374.00. Those payments were of universal credit. The claimant was repaying them by instalments. On 1 April 2021 the claimant began work as a driver for TGK Logistics Scotland Limited. Invoices issued by him to TGK in the ten week period between 14 April and 23 June show the total paid (gross) to the claimant of £2723.79 (**pages 83-91**).

Comment on the evidence

44. The claimant had a tendency to provide an answer which was not quite an answer to the question. For example, when asked about the passage from the note of the meeting on 25 November (**page 46**) where Mr Nevitt says, "*next step decides whether it will be disciplinary action or just a chat to see where we go from here, what we can do to help you or counselling notice*", the claimant's evidence was "*They had already made up their minds*." That is not a criticism of the claimant. But he had a tendency to give evidence which he saw was relevant to his claim irrespective of whether it was an answer to the question he had been asked. In his evidence he accepted that "*things pop in and out of my head*". My impression was that an extension of that state of affairs meant that his answers to questions varied, depending on what was in his head at a particular time. That said, my view was that the claimant was telling the truth and trying to be helpful. I should also note that despite promptings from Ms Hirsch to the claimant to have in front of him a copy of various documents to which reference was being made, the claimant persisted in relying on his memory. This was the claimant's choice, albeit he was limited by having one device via which he participated in the hearing and no paper copy of the bundle. It was made clear to the claimant that to the extent that this method hampered his participation he did so at his own peril.

45. Mr Clugson's evidence was very brief and of no relevance to the issues for determination.

Submissions

46. Both parties made oral submissions. Ms Hirsch focussed on the issues. On the first, there was no dispute on the question of belief. She referred to the ET3 form and the dismissal letter (**page 63**).

47. On the question of use or reliance on CCTV footage, her submission was that while the respondent had the footage, the decision to dismiss was based on the claimant's admissions in the course of the disciplinary process. She referred to the note of the investigation meeting on 23 November (**page 42**) wherein the claimant was recorded as saying he "*claimed he took no*

extended breaks at any point stating "check the cameras"". The claimant's position was paradoxical and there could be no question about the fairness of the use of CCTV footage when he himself suggested to the respondent that they should check the cameras both in that reference and to his suggestion of doing so for others who he said were doing the same as him. On the question of clubbing together of breaks, even if he had done so, that total did not equate with the total time that he had taken away, but in any event it was against the rules to do so. On the question of inconsistent treatment, the claimant had not identified any others said by him to be in a similar position, and what he was asking of the respondent was the equivalent of looking for a needle in a haystack given the volume of CCTV material they would have had to view. On his explanation of reliance on a management instruction to leave the building if he felt unsafe, this was not his first explanation, and it was neither credible nor reasonable to suggest that he believed he could simply leave the premises without advising his manager where the respondent had a responsibility for his health and safety. On the question of being singled out by Mr Nevitt, this was a mere assertion. There was no evidence to support it. The argument was based on an unreasonable interpretation of events by the claimant. While there was no dispute that both Mr Nevitt and Mr Magunnigal had gone looking for the claimant, they did not immediately "*jump*" to disciplinary action against him.

48. On the issue of the alleged failure to view footage of others, this was not an unreasonable failure (the needle in the haystack argument) but in any event the respondent had sufficient material on which to rely; the claimant had admitted his absences albeit after an initial denial but at each stage he had been invited to explain his position and produce evidence to support it.

49. Ms Hirsch submitted that both a fair procedure and a fair investigation was the respondent's basis for its finding of guilt on the allegation. Within that process, the claimant had admitted that he was aware of the rule, was aware that it was an example of gross misconduct and had admitted the occasions on which it was said he had broken it.

50. On the explanatory issues, the claimant had had the opportunity to vouch his symptoms with material from his GP but had not done so, the GP's letter post-dating the appeal hearing. Ms Hirsch said that it was not credible for the claimant to have not referred to or sought information from his GP much earlier in the process. She said he had been evasive about information from his GP records, and it appeared that he had had no assistance from his GP since March 2020, and there was no evidence from the GP about recent ailments. Further, the letter within the bundle was a "*typically routine*" GP letter which made no reference to neck or back pain. On the question of helping members (customers) to their cars, there was evidence that he had done so only on one of the occasions cited and he should have told a manager at the time (which he did not do); and in any event he accepted that it was not part of his role as a stocker.

51. On the claimant's right to a private life (Article 8) Ms Hirsch said that interference was permitted on various grounds including the monitoring of staff at work. She contrasted the situation of "*constantly following*" an employee with the circumstances here, where the respondent had used its footage to check on the times that the claimant had come into and left the warehouse. The respondent had a variety of reasons reflected in its policies to operate CCTV cameras on site. The claimant did not have a reasonable expectation of privacy where the respondent was using the footage to see if he was at his work. Under reference to the Data Protection Act, the processing of information was necessary. The respondent had a right to expect (with the claimant under a corresponding obligation) that he would perform his work duties and not exceed his breaks. It was permissible for the respondent to access evidence in the exercise of its rights and to end the contract if the claimant had broken it. If the claimant had not swiped in and out accurately to record his start and finish times, then it was reasonable and proportionate for the respondent to use CCTV footage records to "*fill in the gaps*."

52. In reply on the question of the fairness of the dismissal, the claimant referred to his Article 8 rights and an employer's duty to make it clear to employees

that they are being monitored and the reasons why. He also referred to the Data Protection Act. He further referred to the fact that at the meeting with Mr Munro on 3 December the respondent could not locate the public notice which it said was displayed for members. The claimant disputed Mr Nevitt's account that he had not accessed the CCTV footage before his suspension. He said that he had given a true and accurate account of the episode in the disciplinary process. He argued that the respondent's protocol had been bypassed in bringing in Mr Munro. He criticised Mr Munro for not viewing the CCTV footage. He reiterated the point of inconsistency in that both Mr Nevitt and Mr Magunnigal had been provided with information about other staff doing as he had been accused of. He argued that the respondent had within his personnel file an amount of information about his health issues which would have supported his position had Mr Munro looked at it. On the timing of the report from his GP, he said that he had made an appointment in good time but could not force himself ahead of others in the GP's queue of patients.

The law

53. Section 98(1) of the Employment Rights Act 1996 provides that *"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.*" One reason with subsection (2) if it relates to the conduct of the employee.

54. Section 98(4) of the Act provides "*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*."

55. The three-part test which Tribunals and courts apply in cases of alleged misconduct is well known, derived as it is from ***British Home Stores v Burchell*** [1980] ICR 303. "*First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case*." Equally well known and often cited is what was said in ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17. The Tribunal "*must not substitute its decision as to what was the right course to adopt for that of the employer*." And "*The function of the employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted*." The band of reasonable responses applies to the consideration of the investigation by the Tribunal as well as the decision to dismiss (***Sainsbury's Supermarkets plc v Hitt*** [2003] IRLR 23.

56. "*A "* ***Polkey*** *deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done*." And "*the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.*" ***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691 at paragraph 24).

57. Section 123(6) provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. A Tribunal must identify the conduct which is said to give rise to possible contributory fault. Having identified that conduct, it must ask whether that conduct is blameworthy. The Tribunal must ask if that conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did then the Tribunal moves to the next question; by what proportion is it just and equitable, having regard to that finding, to reduce the amount of the compensatory award?

58. Section 122(2) provides that where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

Discussion and decision

59. The Claimant does not argue that the first part of the ***Burchell*** test was not met. The reason for the Claimant's dismissal related to his conduct. I answer the first issue "*yes*"; the respondent did indeed believe in the claimant's guilt on the allegation which resulted in his dismissal. That was evident from the evidence of both Mr Munro and Mr Thompson.

60. It is important to recognise (as noted above) that it is an error for an employment tribunal to substitute its view for that of the respondent. The claimant argued throughout the disciplinary process and before me that his dismissal was unfair because the respondent was not permitted to rely on the CCTV footage as part of the evidential matrix. Put shortly, the claimant argued that the illegality in using the CCTV footage tainted the whole process which then inevitably rendered his dismissal unfair.

61. In my view it was not unreasonable for the respondent to use or rely on CCTV footage. I do not accept the argument that while it had the footage, the

respondent's decision to dismiss was based on the claimant's admissions in the course of the disciplinary process. The CCTV footage was part of the evidence provided to the claimant before the disciplinary hearing. The respondent had summarised that evidence. In the case of ***City and Council of Swansea v. Gayle*** [2013] IRLR 768 the EAT considered the question of reliance by an employer on clandestinely obtained CCTV footage. In that case, Mr Gayle was seen by a colleague at a sports centre playing squash when he had not clocked-off work for the day. On a later occasion, he was seen again by a colleague at the sports centre and, shortly after, sent a message to the employer saying that he was at work and just finishing. The employer arranged for covert surveillance of him by a private investigator. The resultant video footage showed him at the sports centre on five occasions when he should have been at work. In that case in allowing the employer's appeal the EAT said that "*We do not consider that generally the taking of photographs or the making of observations of individuals in public places will constitute a breach of Article 8 because such individuals will not in those places have the reasonable expectation of privacy*." It also said that "*It is a feature of an employment contract that an employee is subject to the reasonable direction of his employer. An employer is thus entitled to know where someone is and what they are doing in the employer's time. An employee can have no reasonable expectation that he can keep those matters private and secret from his employer at such a time. To do so would be to run contrary to the contract he had entered with his employer."* Also of note from that case is the EAT's view that an employment tribunal cannot adjudicate upon any freestanding claim of a breach of Article 8. The claimant argued that the use of CCTV footage was a breach of his human rights and illegal under the data protection legislation and that of itself rendered his dismissal unfair. I do not agree. First, the question is one of reasonableness under section 98. Second, on that question, the respondent had a reasonable basis on which to sustain its belief in that the claimant admitted in the disciplinary process that he had absented himself from the warehouse on the dates and times alleged. Both Mr Munro and Mr Thompson relied on those admissions. Third, the respondent had a reasonable

basis on which to conclude that it could use the CCTV footage based on its witnesses' review of its handbook.

62. On the issue of inconsistent treatment, the question becomes; was it unreasonable for the respondent to find the claimant guilty of the allegation where there was evidence that other employees were doing the same? In my view it was not unreasonable for it to do so. Mr Munro and Mr Thompson said in their respective meetings that they were there to decide on the allegation against the claimant, not on the guilt of others. Separately, Mr Thompson made the claimant's comments known to the Glasgow warehouse management team. On the question of victimisation, the respondent had no basis to conclude that Mr Nevitt was victimising the claimant. In any event, the choice of decision-makers was intended to ensure that the allegation against the claimant was heard by managers who were independent.

63. On the claimant's position that he had followed a management instruction in going home, Mr Thompson's view was that was preposterous. That was not an unreasonable view to hold. The logical extension of the claimant's position was that if any employee regarded their workplace as unsafe, they could leave it without the need to ask or tell their manager. In my view it was not unreasonable for the respondent to regard that as an incredible untenable position.

64. On the question of being singled out and treated differently by Mr Nevitt, two points are relevant. First, it was not unreasonable for Mr Nevitt to exercise his discretion to bring a formal allegation. Second, and more importantly, it was fair and reasonable to have the allegation considered by managers from other locations. That step was indicative of impartiality and thus fairness. If it had been an unreasonable exercise of Mr Nevitt's discretion by making a formal disciplinary complaint, the counter was the independence of the disciplining managers.

65. Separately, was it unreasonable for the respondent not to have viewed CCTV footage to ascertain whether other employees had taken extended breaks?

Or was it outside the range of reasonable responses for them not to have done so? I answer this question "*no*" for three reasons. First, on the claimant's case to have done so would have been as illegal in relation to those colleagues as it was to him. It contradicted a significant argument in his own case. Second, and more importantly, it was not unreasonable for the respondent to decide that to have done so would have been an enormously time-consuming exercise. Third, even if it had shown others taking extended breaks that may only have led to them in turn being disciplined. It was not a reason not to find the allegation against the claimant well-founded.

66. On the specific issues identified at paragraph 3.4 above, the respondent took account of such material as there was within the disciplinary process on the claimant's health. While the claimant recognised the relevance of and need for a letter from his GP, it was not produced to the respondent prior to the conclusion of his appeal. Nor was it in any event entirely consistent with the position adopted by the claimant about his medical conditions and how they were reasons for his absence. On clubbing together of breaks, the respondent concluded that they did not explain the lengths of time taken by the claimant away from his work, and there was no challenge by the claimant to that conclusion. Similarly, his evidence about helping members (even if believed) could not explain any more than one absence from work. Finally, the respondent's evidence was that his service was taken into consideration. It was not unreasonable for the respondent to impose the sanction of dismissal where it had found that the claimant was guilty of an express example of gross misconduct.

67. The claimant was not unfairly dismissed. The claim falls to be dismissed.

Employment Judge: Russell Bradley
Date of Judgment: 31 August 2021
Entered in register: 06 September 2021
and copied to parties