



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Richards

**Respondent:** Mitie Security Limited

**Heard at:** London South Employment Tribunal (by CVP)  
**On:** 26 and 27 May 2021

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

## Representation

**Claimant:** Mr M Laing, barrister, of Employment Law Associates Ltd

**Respondent:** Ms A Greenley, barrister, instructed by Pinsent Masons LLP

# JUDGMENT

1. The name of the Respondent is amended to Mitie Security Limited.
2. The claim for unfair dismissal is not well-founded and is dismissed.
3. The claim for wrongful dismissal succeeds: the Claimant was dismissed in breach of contract in respect of notice.
4. The remedy to which the Claimant is entitled in respect of his claim for wrongful dismissal shall be determined at a further hearing, if not agreed.

# REASONS

## Introduction

1. The Claimant, Mr Jason Richards, was employed by the Respondent, Mitie Security Limited, as Site Supervisor assigned to the Crawley site of Thales UK, to which the Respondent provides security management services. His employment began on 7 January 2013 (with continuous service back to 7 July 2008 due to previous TUPE transfers), and ended with him being summarily dismissed on 20 September 2018.
2. The Claimant brought claims for unfair dismissal and wrongful dismissal (failure to pay notice pay). The Respondent denied the Claimant's claims.

3. The case came before me for Final Hearing on 26-27 May 2021. The hearing was held fully remote through the Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
4. The Claimant was represented by Mr Moray Laing of Employment Law Associates Ltd, provided a witness statement and gave oral evidence. He called no other witnesses. The Respondent was represented by Ms Anna Greenley instructed by Pinsent Masons LLP, and called evidence from Mr Anatolijs Rauza (the investigating manager), Mr Tom Martin (the disciplinary manager) and Mr Rian Barnard (the appeal manager), who each provided witness statements and gave oral evidence. I was also provided with a 528-page Bundle of Documents and an agreed chronology and cast list. After completion of the evidence, Mr Laing and Ms Greenley provided written closing submissions, and also addressed me orally. As insufficient time was available to deliver an oral judgment on the day, I reserved judgment.

Issue for determination

5. At the outset of the hearing, I agreed with the parties the issues to be determined. As the hearing progressed it was evident that the Claimant was not in a position to address remedy issues, nor was there sufficient time to do so. The issues to be determined in this judgment are therefore as follows:

**1. UNFAIR DISMISSAL**

1.1 Did the Respondent conduct a reasonable investigation?

1.2 Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct, specifically:-

- 1.2.1 That the Claimant was responsible for the fact that a contractor was allowed onto site on the 7<sup>th</sup> of August at around 9am without contractor verification, not signed in, no pass issued, no confirmation of site induction and not collected by the host, which is a breach of the site procedure,
- 1.2.2 That the Claimant failed to follow the clients' instruction to post an officer at London Road gate, which allowed the contractor to sneak under the barrier on 7<sup>th</sup> of August at around 13:30 without being detected by security.
- 1.2.3 That on the 7<sup>th</sup> of August at around 11am, a security officer fell off a chair, the Claimant allowed the officer to leave site and another officer to take him to the walk-in centre without contacting either his line manager or MITEC (Mitie's control room) despite being previously advised to do so.
- 1.2.4 The company mobile phone was switched off while on duty, which prevented Mitie management to obtain full information about the incident.
- 1.2.5 That the Claimant failed to distribute officer cover sufficiently on the 10<sup>th</sup> of August at 12:58, despite the client specifically requesting London Road gate to be covered at all time, via the email on the 9<sup>th</sup> of August.
- 1.2.6 That the Claimant chose to ignore specific directions provided to him by the client relating to security cover for the gate.

1.2.7 Activities which cause loss of faith in his individual integrity and bring the company into serious disrepute.

1.3 Did the Respondent believe that he was guilty of the conduct detailed above?

1.4 Was dismissal within the range of reasonable responses open to the Respondent?

1.5 Did the Respondent and the Claimant comply with the ACAS Code of Practice and its own disciplinary procedures?

## **2. WRONGFUL DISMISSAL**

2.1 Did the conduct of the Claimant breach their contract of employment?

2.2 If so, was that breach serious enough to be a repudiatory breach?

2.3 Did the Respondent waive the breach?

6. Although paragraph 17(c) of the Grounds of Complaint attached to the ET1 suggests an ulterior motive to the Respondent's decision to dismiss (specifically, the Respondent's desire to avoid having to continue paying the Claimant's high hourly rate of pay), this was not pursued by the Claimant at the hearing.

### Findings of fact

7. The relevant facts are, I find, as follows. Where it has been necessary for me to resolve any conflict of evidence, I indicate how I have done so at the relevant point. References to "[xx]" are to page numbers in the Bundle of Documents. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. I have not referred to every document I have read and/or was taken to in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.
8. At the time of the incidents leading to his summary dismissal, the Claimant was employed as the Site Supervisor at the Thales UK Crawley site. The duties and responsibilities of the Claimant (as "Guarding Manager") and his team were set out in the Assignment Instructions at [38-68], and included responsibility for supervision of all Security Officers on site to ensure compliance with the Assignment Instructions, contractual obligations and customer security requirements. The Claimant was aware of and understood the importance of these Instructions.
9. The Claimant's line manager was Mr Rauza, who was an Operations Manager for the Respondent. In terms of the Assignment Instructions, Mr Rauza fulfilled the role of "MITIE Contract Manager". Mr Rauza was not typically based at the Crawley site.
10. The Assignment Instructions at [57] refer to two senior individuals other than Mr Rauza with whom the Claimant was obliged to liaise on a daily basis: the "Thales Facilities Manager" (this was Mr Ciaran Fitzgerald, who was an employee of a separate company in the MITIE Group but was, in effect, the client contact for the Respondent) and the "Thales Security Manager" (this was Mr Paul Hines). Both Mr Fitzgerald and Mr Hines were based at the

Crawley site.

11. On 28 June 2018, Mr Rauza instructed the Claimant by email to ensure that no security officer leaves site without authorisation either from Mr Rauza or from Mitec (MITIE's central security control room). The Claimant acknowledged this instruction by return email [72-73].
12. On 31 July 2018, Mr Fitzgerald forwarded to the Claimant an email from Mr Hines reporting a security risk posed by a former employee of Thales who had failed to appear at court and was the subject of a warrant for his arrest. Mr Fitzgerald's email instructed the Claimant to brief his full team of security officers to call the police immediately should the individual be spotted, and to position a guard by the multi-storey car park at all times when the gates are open at London Road and Fleming Way [81-82].
13. At some point between 8 and 9am on 7 August 2018, two members of the Claimant's team of security officers (Mr Wheeler and Mr Shah) allowed a crane driver onto the site without signing him in, checking whether he had had a site induction (which he had not) or issuing a pass. The officers had recognised the crane driver, and Mr Shah had called his on-site host (Mr Jordan Smith of Thales) who had asked Mr Shah to allow the crane through. The Claimant was not present at the time of this incident, and only became aware of it later in the day (see below).
14. At around 11am on 7 August 2018, Mr Shah suffered a head injury falling of a chair in the security gatehouse. The Claimant and Mr Wheeler were present. Mr Shah reported that he felt sick, and the Claimant was concerned that he might be suffering from, at least, concussion. The Claimant considered that calling an ambulance would not be the quickest way for Mr Shah to be seen based upon prior experience, and instead instructed Mr Wheeler to drive Mr Shah to a walk-in centre in the centre of Crawley, around 15 minutes away. The Claimant did not seek the authorisation of Mr Rauza or Mitec to allow two officers to leave site (contrary to the instruction in Mr Rauza's email of 28 June 2018). Instead, he left Mr Fitzgerald a voicemail message regarding the incident. Around 15 minutes later, the Claimant spoke with Mr Fitzgerald, who told the Claimant that he would contact Mr Rauza. Mr Wheeler returned to the site around an hour after leaving, and then went straight on his lunch break.
15. At around 1.30pm on 7 August 2018, the crane driver (having left the site for lunch) returned to the site unaccompanied and crawled to the side of the London Road vehicle gate to gain access to the site. The gate was unmanned. Shortly afterwards a member of Thales staff reported this security breach to the Claimant. The Claimant radioed Mr Wheeler, who was having a cigarette at the end of his lunch break, who then returned to the gatehouse and on viewing the CCTV identified to the Claimant that the individual in question was the crane driver who had been granted access to the site that morning. The Claimant reported the breach to Mr Fitzgerald. Mr Fitzgerald went on to speak to the crane driver and his host regarding sign-in and escort procedures. The host, Mr Smith, subsequently went to the gatehouse to apologise to the Claimant for what had happened.

16. At around 5pm, Mr Rauza attempted to call the Claimant but was unable to get through on the Claimant's work mobile telephone. Mr Rauza also called the gatehouse and was told by Mr Wheeler that the Claimant was in the toilet. Mr Wheeler did not pass on to the Claimant a message that Mr Rauza had called. The Claimant did not speak to Mr Rauza before his shift ended. In view of the lack of contact, Mr Rauza suspected that the Claimant had left site early (his shift was due to end at 6pm).
17. On the morning of 8 August 2018, the Claimant was interviewed by Mr Piotr Draber, a Senior Operations Manager for MITIE, regarding the incidents of the previous day. Mr Rauza was present as note-taker but did not actively participate in the meeting. The notes of the meeting are at [74-78]. Mr Wheeler was also interviewed – the notes of that meeting are at [82C-82E]. Both the Claimant and Mr Wheeler were then referred for disciplinary action in respect of their actions on 7 August 2018, though at this stage the Claimant was not aware of this.
18. At 17:31 on 8 August 2018, Mr Fitzgerald emailed the Claimant to reiterate his instruction of 31 July 2018 that a guard be positioned by the multi-storey car park at all times when the gates are open at London Road and Fleming Way. The Claimant responded at 06:39 the following morning indicating he would "*ensure this gets done*" [80].
19. At around 08:00 on 10 August 2018, a delivery of cherry-pickers arrived on site for MITIE Cleaning, with Mr Fitzgerald's name on the paperwork. The Claimant contacted Mr Fitzgerald regarding this delivery. In the course of the telephone conversation, the Claimant used the words "I don't care". These words were not directed at Mr Fitzgerald, but Mr Fitzgerald understood them to have been.
20. At 12:58 on 10 August 2018, Mr Fitzgerald was called by a member of Thales staff to inform him that no guard was present at the London Road barrier. The member of staff called Mr Fitzgerald again at 13:00 to report that the barrier was broken and that she had had to redirect site traffic until two guards arrived at the scene. The guards had been deployed by the Claimant when he noticed the backing-up of traffic on CCTV from the gatehouse. The barrier was unmanned because, although the Claimant had assigned guards to cover the barrier, one guard had left his post early, before his relief guard had arrived. Both guards subsequently apologised for their actions.
21. Mr Fitzgerald escalated the two 10 August 2018 incidents by email that afternoon [83].
22. That same day, Mr Rauza spoke to the Claimant to inform him that he was being suspended pending a disciplinary investigation into the incidents on 7 and 10 August 2018. The suspension was confirmed in writing by a letter dated 14 August 2018 [84-85]. The letter set out in full the allegations against the Claimant. The Claimant was then invited to an investigatory meeting by a letter dated 15 August 2018, which again set out in full the allegations against the Claimant, and explained that the Claimant was entitled to be accompanied at that meeting [86-87].

23. The investigation meeting took place on 20 August 2018, conducted by Mr Rauza as disciplinary manager. The Claimant was not accompanied. The notes of the meeting are at [89-112]. The specific allegations were each put to the Claimant, and the Claimant set out his position in relation to each:
1. Regarding the allegation “*that a contractor was allowed onto site on the 7th of August at around 9am without contractor verification, not signed in, no pass issued, no confirmation of site induction and not collected by the host, which is a breach of the site procedure*”, the Claimant accepted that the incident had happened, but denied responsibility on the basis that it was Mr Wheeler and Mr Shah who allowed the contractor onto site, and he was not aware of this until later in the day.
  2. Regarding the allegation that the Claimant “*failed to follow the clients’ instruction to post an officer at London Road gate, which allowed the contractor to sneak under the barrier on 7th of August at around 13:30 without being detected by security, and that [the Claimant] did not consider this to be a security breach*”, the Claimant’s position was that he had reached an agreement with Thales (specifically with Mr Hines and his colleague Mr Brian Richards) that the London Road gate be covered by CCTV only between 12:00 and 15:00 in order to permit guards their required breaks. He did not regard the incident as a security breach as the crane driver was known to site.
  3. Regarding the allegation that the Claimant “*allowed an officer to leave site and another officer to take him to the walk-in centre without contacting either [his] line manager or MITEC despite being previously advised that [he] must do so*” and that “*such actions demonstrate an unreasonable refusal to follow management instructions*”, the Claimant explained that he acted on impulse in deciding that it would be quicker to send Mr Shah with Mr Wheeler to the walk-in centre than to call an ambulance, that Mr Fitzgerald had said he had done the right thing, and that Mr Fitzgerald had told the Claimant he would make any necessary calls.
  4. Regarding the allegation that the Claimant’s “*company mobile phone was switched off while on duty*”, the Claimant denied this was the case and also denied receiving any message to call Mr Rauza.
  5. Regarding the allegation that “*the Claimant failed to distribute officer cover sufficiently on the 10th of August at 12:58, despite the client specifically requesting London Road gate to be covered at all time, via the email on the 9th of August*”, the Claimant denied this was the case, and that the failure of cover was down to one guard leaving post before his relief arrived.
24. Mr Rauza followed up with Mr Fitzgerald by email on 20 August 2018 regarding the alleged agreement to leave the London Road gate uncovered between 12:00 and 15:00. Mr Fitzgerald responded on 23 August 2018 stating there was no such agreement [113].
25. Mr Rauza determined that there was a disciplinary case to answer and therefore prepared and forwarded an investigation pack to his manager, Mr

Draber. Contrary to the submissions of the Claimant, this was not inconsistent with the Respondent's disciplinary policy [68JJ] – Mr Rauza was plainly entitled to make the decision to refer the Claimant to a disciplining manager – it was for the latter to form an opinion as to what action (if any) should be taken.

26. Mr Draber then sent a letter inviting the Claimant to a disciplinary meeting – the letter was dated 30 August 2018 but was sent to the Claimant only on the morning of 31 August 2018 (a Friday) with the disciplinary meeting scheduled for the following Monday [115B].
27. At the Claimant's request, to allow him time to find a suitable representative, the meeting was rescheduled to Thursday 6 September 2018 [115A]. The Claimant was sent the investigation pack, which included: the investigating meeting notes dated 20 August 2018; the suspension letter dated 14 August 2018; Mr Fitzgerald's emails of 9 and 23 August 2018; the Claimant's email of 8 August 2018; Mr Rauza's email of 28 June 2018; and the notes of the Claimant's meeting with Mr Draber on 8 August 2018. The invitation letter explained that dismissal was a possible outcome, and that the Claimant was entitled to be accompanied.
28. The disciplinary meeting was subsequently again postponed, to 10 September 2018, on the request of the Claimant.
29. In the meantime, Mr Rauza had received on 30 August 2018 an email from Mr Brian Richards, which confirmed that "*a few weeks ago*" he had received a call from the Claimant regarding cover on the London Road gate during lunch breaks, and that he and Mr Hines had agreed with the Claimant that so long as the gatehouse monitored the gate by CCTV this would be OK [113A]. Mr Rauza did not add this email to the investigation pack and it was not provided to the Claimant as part of his disciplinary.
30. The disciplinary meeting took place on 10 September 2019. The meeting was conducted by Mr Martin as disciplinary manager. The Claimant was accompanied by his Union rep. The notes of the meeting are at [116-130] (hand-written) and [131-139] (typed). The Claimant maintained the position he had advanced in the investigation meeting in relation to the allegations against him. Presented with Mr Fitzgerald's denial of there being any agreement in relation to guard cover at the London Road gate, the Claimant invited Mr Martin to speak to Mr Hines and/or Mr Brian Richards. I find that Mr Martin did not do so, because he considered that any agreement that bypassed Mr Fitzgerald as the direct 'client' would not be legitimate. The Claimant also asked Mr Martin to seek statements from the other guards involved in the various incidents. Mr Martin's evidence as to whether or not he did conduct further investigations was unsatisfactory and I am unable to conclude that he did in fact interview anyone. However, in view of the lack of any genuine factual dispute in relation to the incidents, I find it was not necessary for Mr Martin to interview the other guards.
31. By a letter dated 20 September 2018, Mr Martin wrote to the Claimant informing him of the outcome of the disciplinary, which was that the Claimant be summarily dismissed [140-142]. In relevant part, Mr Martin

found that:

- The Claimant had *“directly ignored the client’s [i.e. Mr Fitzgerald’s] instructions to have an officer stationed at the London Road gate at all times which led/contributed to 2 breaches of access”*, and that any agreement between the Claimant and Mr Hines / Mr Brian Richards would be overridden by Mr Fitzgerald’s instruction.
  - That the Claimant’s failure to ensure the London Road gate was manned meant that the contractor ducking under the gate on 7 August was not immediately intercepted. Had the individual not been a contractor but an intruder the risk posed to the site and staff on site would have been extremely high.
  - The Claimant *“failed to follow strict management instruction [from Mr Rauza] to ensure that no officer leaves site without authorisation from [Mr Rauza] or the Duty Manager via MITEC”*. The Claimant *“did not report that two officers had left site as per [Mr Rauza’s] instructions”*, and Mr Rauza was not made aware until 5.30pm that day by the client. In addition, the site was *“left vulnerable”* by being 2 officers down, and the Claimant had *“allowed the injured guard to take responsibility for informing the manager of his departure when it is [the Claimant’s] responsibility to do so”*.
  - Overall, the Claimant had *“failed to carry out [his] duties as the site manager”*, *“actively ignored direct instructions from [his] line manager as well as the client which has resulted in the site being put at risk”*, and that his actions had *“led to a serious breach in trust and confidence in [his] ability to carry out [his] primary role”*.
32. The letter stated that the Claimant’s last day of employment would be 20 September 2018. The letter attached a copy of the minutes of the disciplinary meeting, and informed the Claimant of his right to appeal.
33. By a letter dated 24 September 2018 [143-145], the Claimant appealed the dismissal decision. The key points made in the Claimant’s appeal letter were, in summary:
- He had no dealings with the contractor on the morning of 7 August, and him being allowed access to the site was the responsibility of Mr Wheeler and Mr Shah. Statements should have been obtained from those individuals.
  - There was an agreement with Mr Brian Richards who spoke to Mr Hines in the presence of Mr Fitzgerald regarding having no officer posted to the London Road gate between 1200 and 1500. Statements should have been taken from Mr Brian Richards and from Miss Paige Bateup who could also corroborate.
  - He asked Mr Wheeler to take Mr Shah to the walk-in centre immediately as head injuries can prove problematic. He contacted Mr Fitzgerald, who stayed with the Claimant in the office until Mr Wheeler returned. He had completed all the relevant MITIE paperwork and had spoken to Mr Shah



who said that he was OK and would contact MITEC and Mr Rauza. In fact the Claimant contacted MITEC the following day.

- Mr Wheeler had failed to pass on a message for the Claimant to call Mr Rauza. The Claimant's mobile phone was on at all times and did not receive any call from Mr Rauza on 7 August.
- The failures on 10 August were not the Claimant's responsibility, as he had posted officers to man the London Road gate but an officer had left his post early and the other arrived late.
- There had been a failure to complete full investigation and gather all requested evidence.

34. An appeal hearing was scheduled for 4 October 2018 but, due to health issues, the Claimant asked for the appeal to be heard in his absence [149]. In his letter of 18 October 2018, the Claimant added two further points, being in summary:

- No regard had been had for the Claimant's exemplary employment record of almost 10 years.
- No lesser sanction was considered, and the Claimant believed that the decision to dismiss was because his hourly rates were far higher than the company wished to maintain.

35. The appeal officer, Mr Barnard, gathered further evidence for the purpose of the appeal. He reached out to Mr Hines regarding the alleged agreement, who in turn reached out to Mr Brian Richards and Miss Bateup, both of whom provided statements confirming the Claimant's account.

36. Mr Barnard did not uphold the Claimant's appeal. In the appeal outcome letter [162-164] he essentially confirmed the findings of Mr Martin. In respect of the agreement, on which Mr Barnard had further evidence, he concluded that the agreement was irrelevant because it was Mr Fitzgerald, as the direct client, whose instructions should be followed. Mr Barnard added findings that the Claimant put Mr Shah at risk by putting him in the care of another officer who is not a qualified First Aider, that the Claimant should have contacted Mr Rauza on 7 August 2018 in view of the gravity of the incidents irrespective of whether any messages were left, and that in respect of the 10 August changeover incident the Claimant should have been managing the team more proactively to ensure the gate was not left unmanned. Mr Barnard concluded that the Claimant had "*wilfully ignored direct management instructions and as such have placed the site and your work colleagues at risk*".

37. The Claimant presented his claim to the Tribunal on 6 January 2019.

#### Relevant law

##### *Unfair dismissal*

38. Section 94(1) ERA provides that an employee has the right not to be unfairly

dismissed by their employer. It is not in dispute that the Claimant was a qualifying employee and was dismissed by the Respondent.

39. Section 98 ERA deals with the fairness of dismissals. There are two stages within this section.

39.1 First, the employer must show (*i.e.* the burden of proof is on the employer to show) that it had a potentially fair reason for the dismissal, *i.e.* one of the reasons listed in section 98(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*” (section 98(1)(b)). Conduct is one of the potentially fair reasons.

39.2 Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the employer acted fair or unfairly in dismissing for that reason. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall depend 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 shall be determined in accordance with equity and the substantial merits of the case. The burden of proof at this stage is neutral.

40. It was common ground that, in cases relating to conduct (as this case is), the Tribunal should apply the test set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379. In summary, the dismissal will be unfair unless, at the time of dismissal, the employer:

40.1 genuinely believed that the employee was guilty of misconduct;

40.2 had reasonable grounds for that belief; and

40.3 had carried out an investigation into the matter that was reasonable in the circumstances of the case.

The burden of proof in determining these issues is neutral.

41. The issues identified in paragraph 5 above were framed so as to apply the principles set out in *Burchell*.

42. It is not for the Tribunal to substitute its own view of what it would have done in the position of the employer, but to determine whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the substantive decision and the procedure followed (*J Sainsbury plc v Hitt* [2003] IRLR 23; *Whitbread plc v Hall* [2001] ICR 699).

43. An investigation must be even-handed to be reasonable, and particularly rigorous when the charges are particularly serious (*A v B* [2003] IRLR 405). The employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the *Burchell* test will depend on the circumstances as

a whole – the investigation should be looked at as a whole when assessing the question of reasonableness (*Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399).

44. The size and administrative resources of the employer's undertaking are relevant, as is the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code"). The ACAS Code recognises that an employee might be dismissed even for a first offence where it constitutes gross misconduct. The employee's length of service is a factor to be considered (*Strouthos v London Underground Ltd* [2004] IRLR 636) but is not determinative. The employer is entitled to take into account the attitude of the employee to his conduct (*Paul v East Surrey District Health Authority* [1995] IRLR 305).
45. The approach to be taken to procedural fairness is a wide one, viewing it if appropriate as part of the overall picture, not as a separate aspect of fairness. Any procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness (*Taylor v OCS Group Ltd* [2006] IRLR 613).

#### *Wrongful dismissal*

46. An employee is not entitled to notice of termination if they have fundamentally breached the employment contract, e.g. if the contract is terminated because the employee is guilty of gross misconduct. It is not enough for the employer to show (as for unfair dismissal) that it reasonably believed that the employee committed gross misconduct, but that the misconduct was actually committed (*British Heart Foundation v Roy* UAEAT/0049/15).

#### Conclusions

##### Unfair dismissal

##### *Issue 1.1: Did the Respondent conduct a reasonable investigation?*

47. The Claimant's case on this issue was summarised at paragraphs 29-32 of his written closing submissions.

"29. The overall unreasonableness of the investigation can be summarised by outlining the following errors in the manner in which Mr. Rauza conducted the investigative process:-

- Failing to interview witnesses who the Claimant told him would assist by providing statements that would support his account of what happened – i.e. Paul Hines, Brian Richards, Paige Bateup, Jordan Smith
- Failing to interview individuals who quite obviously would have been able to provide accounts of what happened, e.g. Philip Manlab, Adam Dolivera, Harim Shah
- Failing to interview Mr. Fitzgerald regarding other aspects including his involvement in the contractor incident, the incident regarding Harim Shah and his

presence at the London Road gate on 10th August, particularly after the Claimant had given his account in interview

- Disregarding the evidence provided by Chris Wheeler relating to the crane driver not being inducted, which confirmed that the Claimant was not involved
- Unjustifiably disregarding the email from Brian Richards

30. Added to the above and despite his efforts to claim otherwise in his evidence, Mr. Rauza then proceeded to make the decision to discipline the Claimant (email at p.115D) which was a breach of the company policy (p.68JJ bottom para) designed it can reasonably be assumed, to include a stage where someone independent assesses the information in the investigation before referring the matter on or not.

31. These were all fundamental errors on the part of Mr. Rauza, failings which it is submitted no reasonable employer would make and they contributed to him conducting what was a wholly one sided and biased investigation on which Mr. Martin had to rely.

32. Attempts by both Mr. Martin and Mr. Barnard to obtain witness evidence did not rectify the errors by Mr. Rauza, particularly because Mr Martin did not make any notes of conversations with witnesses, if in fact he did so and Mr Barnard's records were inexplicably lost in the system apparently following a migration of data. This resulted in a complete lack of transparency of the process which was of no assistance to the Claimant."

48. The Respondent dealt with this issue in detail at paragraphs 42-50 of its written closing submissions.

49. I have already explained why the point made at paragraph 30 of the Claimant's closing submissions is not well-founded (see paragraph 25 above). Regarding the other points:

- It is undoubtedly true that Mr Rauza did not interview every individual listed by the Claimant. However, one has to examine the nature of the allegations against the Claimant when considering whether what was done was reasonable. Aside from the alleged agreement regarding manning of the London Road gate, there was little by way of factual dispute to justify expansive investigation. It was not alleged that the Claimant was directly responsible for the contractor being admitted to the site on the morning of 7 August 2018 (and in any event the Claimant was given the opportunity to, and repeatedly did, explain that he was not); the issue was one of failure of supervision. Similarly, there was no dispute that the Claimant did send Mr Wheeler to the walk-in centre with Mr Shah without getting prior approval from Mr Rauza, and the Claimant repeatedly gave his account of the events.
- Regarding the agreement, I consider it was objectively reasonable for Mr Rauza to enquire with Mr Fitzgerald in the first instance. Mr Fitzgerald was the direct client and could be expected to be party to (or at the very least aware of) any agreements of the nature suggested by the Claimant. Where Mr Rauza can be legitimately criticised is for not drawing the email of Mr Brian Richards to the attention of Mr Martin. However, this problem was sufficiently addressed in the appeal stage by

the evidence gathered by Mr Barnard, which served to confirm the Claimant's account, but did not change the outcome.

50. Looking at the investigation overall, I find that the Respondent did conduct an objectively reasonable investigation.

*Issue 1.2: Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?*

*Issue 1.3: Did the Respondent believe that he was guilty of the conduct detailed above?*

51. I will address these issues together.

52. Although the list of allegations was wider, the decision to dismiss (as explained in the dismissal letter) was based only on the points summarised at paragraph 31 above. In particular, Mr Martin made no finding that the Claimant was responsible for the contractor being admitted to the site in breach of protocols on the morning of 7 August 2018 (sub-issue 1.2.1), nor did he make any finding regarding the Claimant's mobile phone being switched off (sub-issue 1.2.4), nor a finding that the Claimant failed to distribute officer cover on 10 August (sub-issue 1.2.5), nor a finding that the Respondent had lost faith in the Claimant's individual integrity or that the Claimant had brought the Respondent into serious disrepute (sub-issue 1.2.7).

53. Insofar as Mr Martin sought to expand the basis for the dismissal in his evidence (as he did) I do not accept that the Respondent did genuinely believe the Claimant to be guilty of such broader alleged conduct at the time of dismissal. Had Mr Martin / the Respondent believed there were broader grounds, they would have been expressed in the disciplinary outcome letter. I will therefore focus on the findings actually made in the dismissal letter.

54. Regarding sub-issue 1.2.2, I find that the Respondent did believe that the Claimant was guilty of this conduct and had objectively reasonable grounds for doing so. It is clear that there was an instruction from the "client" (i.e. Mr Fitzgerald) that the London Road gate should be manned at all times, and that this instruction was not being met by the Claimant. The Claimant's answer to the point is that he had a separate agreement with the ultimate client, Thales, to permit the gate to be left unmanned (but monitored by CCTV) between 1200 and 1500 each day. I find that there was such an "agreement". However, the fundamental difficulty for the Claimant is that neither his line manager (Mr Rauza) nor the direct client (Mr Fitzgerald) were party to that agreement. Taking account of the clarity of Mr Fitzgerald's instruction on 31 July 2018 and the overall context of the situation (in particular the security risks that leaving the London Road gate unmanned for 3 hours through the middle of the day), I find that it was objectively reasonable for the Respondent to regard any 'back-channel' agreement between the Claimant and Mr Brian Richards as irrelevant. The finding that the Claimant had disregarded a direct instruction of the client was reasonably justified.

55. Regarding sub-issue 1.2.3, I find that the Respondent did believe that the

Claimant was guilty of this conduct and had objectively reasonable grounds for doing so. There was no dispute as to the facts – the Claimant did allow Mr Wheeler and Mr Shah to leave the site without prior approval from Mr Rauza or the duty manager via MITEC. The Claimant argued it was justified in the circumstances and I can see that point of view – the Claimant was presented with a medical emergency and made an on-the-spot decision how to proceed. However, it was reasonable for the Respondent to expect that the Claimant should have contacted Mr Rauza of the situation in a timely fashion, in particular given the site would be left short-handed. The Claimant failed to do so. It is not a sufficient answer for the Claimant to rely on Mr Fitzgerald to contact Mr Rauza – it was objectively reasonable for the Respondent to have expected the Claimant to have taken personal responsibility.

56. Sub-issue 1.2.6 is a summary statement that, based on my findings in the immediately preceding paragraphs, I find was genuinely made by the Respondent based on reasonable grounds.

*Issue 1.4: Was dismissal within the range of reasonable responses open to the Respondent?*

57. In considering this issue, I do so on the basis of the scope of the findings set out in the dismissal letter and addressed in the preceding paragraphs.
58. I find that dismissal was within the range of reasonable responses open to the Respondent. The Claimant had been found to have disregarded a direct instruction of the client, leading to security risks being posed to the highly sensitive site for which the Respondent was responsible for securing. This finding, combined with the further finding regarding the Claimant's failure to report to his line manager, could reasonably be regarded as sufficient to justify dismissal.
59. I accept that both Mr Martin and Mr Barnard considered the Claimant's long service, as they are required to do, but did not regard that as sufficient in the circumstances to avoid dismissal. I also accept that they took account of the Claimant's dismissive attitude toward the gravity of his conduct, as they were entitled to do. The outcome of dismissal, whilst harsh, was an objectively reasonable one in all the circumstances taking account of the gravity of the misconduct.

*Issue 1.5: Did the Respondent and the Claimant comply with the ACAS Code of Practice and its own disciplinary procedures?*

60. In relation to this issue, the Claimant's criticisms focussed on the investigation by Mr Rauza, identifying three issues:
- (i) Mr Rauza's failure to interview obvious witnesses who could provide relevant facts;
  - (ii) Mr Rauza's failure to provide the email of Mr Brian Richards to the attention of Mr Martin; and
  - (iii) Mr Rauza breaching the Respondent's own policy by making himself

the decision for the matter to proceed to the disciplinary hearing.

61. I have already addressed each of these points in the context of *Issue 1.1* above. I conclude there was no breach of the ACAS Code, nor of the Respondent's disciplinary procedures.

*Overall conclusion on unfair dismissal*

62. In view of the above findings, I conclude that the claim for unfair dismissal is not well-founded and shall be dismissed.

*Wrongful dismissal*

*Issue 2.1: Did the conduct of the Claimant breach their contract of employment?*

*Issue 2.2: If so, was that breach serious enough to be a repudiatory breach?*

*Issue 2.3: Did the Respondent waive the breach?*

63. I will deal with these issues together.
64. In distinction to the claim of unfair dismissal, where the focus is on the reasonableness of the Respondent's decisions and it is immaterial what decision I would have myself made if put in the shoes of the Respondent, for the claim of wrongful dismissal I must decide for myself whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate his employment without notice.
65. My findings of fact are at paragraphs 7-37 above. I find that the Claimant's conduct was not sufficiently serious to amount to gross misconduct. I do not accept the Respondent's submission that the evidence demonstrates the Claimant's culpability for gross misconduct amounting to a repudiatory breach of the implied term as to trust and confidence.
66. In making this finding, I have regard to the Respondent's own disciplinary policy and, in particular, the non-exhaustive list of examples of what will amount to gross misconduct in the Respondent's eyes: [68CC]. In my judgement the Claimant's conduct did not, for example, amount to "serious insubordination" or "a serious breach of trust and confidence", or anything akin to those examples. The most apt description of the Claimant's conduct, in my judgement, is "unreasonable refusals to follow an instruction issued by a manager". This falls within the list of examples of "misconduct", but not "gross misconduct".
67. I therefore find that the Respondent was entitled to dismiss the Claimant for misconduct, but that the conduct was not so serious that it warranted immediate dismissal without notice. The Claimant was dismissed in breach of contract in respect of notice.

*Remedy*

68. Issues of remedy were not addressed at the hearing due to lack of time. If the parties are unable to agree the appropriate remedy taking account of

my findings above, a further hearing shall be listed to determine the issue.

69. The parties shall write to the Tribunal within 28 days of receipt of this judgment to confirm whether a hearing is required and, if so, their time estimate and available dates.

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Employment Judge Abbott

Date: 1 September 2021

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