



EMPLOYMENT TRIBUNALS

Claimant: Mr A Baungally
Respondent: OCS Group UK Ltd
Heard at: East London Hearing Centre
On: 24 November 2021
Before: Employment Judge Cheunviratsakul

Representation

Claimant: Mr M J Radha (Lay Representative)
Respondent: Miss K Barry (Counsel)

JUDGMENT having been sent to the parties on 7 January 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant, Mr Baungally, was employed by the Respondent, OCS Group UK Ltd, as a court and tribunal security officer. His employment began on 1 April 2020 following a TUPE transfer from Mitie Security. There is no dispute as to continuity of service. The Claimant says he was unfairly dismissed within the meaning of section 98 of the Employment Rights Act 1996.

2. The Respondent says that Mr Baungally was dismissed fairly for conduct and that they were entitled to terminate his employment without notice because of gross misconduct.

3. Mr Baungally was represented by Mr Radha. Mr Baungally gave sworn evidence. The Respondent was represented by Miss Barry. She called sworn evidence from Mr Andy Carpenter who conducted the Claimant's disciplinary hearing and Mr Stuart Dawson who conducted the Claimant's appeal hearing.

4. I considered documents from a trial bundle of 393 pages and the witness statements from the witnesses called today.

Preliminary observations on the evidence

5. The standard of proof is on the balance of probabilities. This means that if the

Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal will be satisfied that the event did occur.

6. I found Mr Carpenter and Mr Dawson to be credible and reliable witnesses. Both were measured and reasonable in their evidence which was consistent with the documentary evidence. Both were clear to state when they did not have the knowledge to answer questions.

7. In contrast, I did not consider Mr Baungally to be particularly credible or reliable when giving evidence. In the hearing, Mr Baungally claimed to have raised several matters during the investigation and the disciplinary meetings which did not feature in the minutes. At times, Mr Baungally stated in oral evidence that his answers in those meetings were the direct opposite of what was recorded in the minutes: He said that he did not say that he had failed to check the sign-in sheet (page 174, bundle) at the Magistrate's entrance door, which has Anita Knowles' initials on it and, sign in and sign out times. In contrast, he said in the hearing, that he had checked the sheet, that Anita Knowles' name was not there and that the space on the document was blank; the inference being that the document had been falsified. Mr Baungally also denied saying that he normally did two tannoy announcements before locking up as per the minutes of the disciplinary hearing. Furthermore, in the hearing, for the first time, Mr Baungally made assertions that he thought he was not allowed to go into the room in question notwithstanding the fact that the minutes recorded him as saying that he had assumed the room was empty. Mr Baungally did not raise these discrepancies or at any time in his witness statement question the accuracy of the minutes. When questioned as to why he had not mentioned these things in his witness statement, Mr Baungally stated that it was because he was not qualified. Even taking Mr Baungally's lack of experience into account, I find it implausible that there could be so many inaccuracies in the minutes and that they would not be raised in Mr Baungally's witness statement or at some point by him in the investigation or disciplinary process particularly when Mr Baungally had the benefit of representation in the disciplinary meetings. That there are so many unchallenged discrepancies, I find cast doubt on the credibility of Mr Baungally's evidence.

Issues

8. The issues were discussed at the start of the day and explained to the parties as follows:

- 1.1 What was the reason or principal reason for dismissal? Did the respondent genuinely believe the claimant had committed misconduct.
- 1.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular;
 - 1.2.1 Were there reasonable grounds for that belief;
 - 1.2.2 At the time the belief was formed had the respondent carried out a reasonable investigation;
 - 1.2.3 Did the respondent otherwise act in a procedurally fair manner;
 - 1.2.4 Was dismissal within the range of reasonable responses.

- 1.3 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed
- 1.4 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal,
- 1.5 Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

9. I heard submissions at the end of the hearing from Mr Radha. He submitted that the investigation had not been conducted properly, that Mr Baungally had not been allowed a representative at the investigation meeting, that the CCTV footage was not provided to Mr Baungally when he asked for it and that, given Mr Baungally's unblemished record and long service of almost 20 years, that the decision to dismiss in the circumstances was unreasonable. Mr Radha briefly alluded to a lack of training which, from the evidence, appeared to be based on staff not receiving recent training on locking up procedures. During the evidence, Mr Baungally also alluded to welfare issues amongst staff regarding a colleague's recent death from Covid.

10. Miss Barry made submissions on behalf of the Respondent. It was agreed between the parties that the reason Mr Baungally was dismissed was conduct which is a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. Miss Barry says that the Claimant made admissions as to his conduct and that given those admissions there was no doubt that the Respondent genuinely believed that Mr Baungally had committed misconduct. She submitted that a reasonable investigation followed a fair procedure. She submitted that the Claimant had failed in several respects to carry out his duties properly and that notwithstanding his length of service and his disciplinary record the potential consequences were so serious that dismissal was within the band of reasonable responses. She submitted that there was no evidence of inconsistent treatment between the way in which Mr Baungally was dealt with and other members of staff in terms of similar incidents. She submitted that allegations of understaffing were irrelevant because, given the size of Barkingside Magistrate's Court, there was only ever one person charged with locking up. She further stated that any personal issues the Claimant was experiencing at the time due to the bereavement of a colleague were irrelevant and that at no point did the Claimant raise a link between his personal issues and the conduct complained of.

Finding of facts

11. It is not in dispute that the Claimant was employed by the Respondent for almost twenty years as a court security guard and that prior to the incident on 16 September his record was unblemished. It is further not in dispute that courts and tribunal buildings are high risk buildings in terms of security and therefore the correct function of security guards is paramount.

12. On 16 September 2020, Mr Baungally was the last remaining court security guard on the premises at Barkingside Magistrates Court. He was due to finish his shift at 7pm. It is not in dispute that site practice allowed Mr Baungally to leave before the end of his shift once patrols and lock up had been concluded.

13. Mr Baungally's two colleagues, Julius and George, left the site at approximately 17:49, their shift was due to end at 18:00 hours. A cleaner was still on site. At approximately 17:55, Mr Baungally spoke to the cleaner. At approximately 18:00, Mr Baungally went to the Magistrate's door to check it was locked and failed to lock it properly.

14. During his patrol at the end of the day, Mr Baungally assumed an office was empty when in fact it was not, Ms Anita Knowles was inside.

15. In the bundle at page 107, there is documentary evidence from Mr Baungally's colleague, Julius, who was interviewed as part of the investigation process. He stated that it is important to check every room and that 'that is the first thing to do and that everyone knows that'. In his evidence, Mr Baungally agreed that every room must be checked. He accepted the need to check every room and accepted he knew that at the relevant time. For this reason, I do not find the allegation that he thought he was not allowed to go into the office to be a plausible one.

16. Just after 6pm, Mr Baungally made one tannoy announcement; normally two tannoy announcements are made. Mr Baungally stated this to be the case in the disciplinary hearing. Two tannoy announcements as a practice was also confirmed by his colleague, Julius, in interview.

17. There is some dispute as to the amount of time Mr Baungally stated in his one tannoy announcement as regards leaving the building. I find the length of time which Mr Baungally stated in that one tannoy announcement to be immaterial in deciding the matter before me. Mr Baungally accepted that he left 4 to 5 minutes after he made the one announcement.

18. Ms Knowles was still in the building at the time. On realising she was locked in, she managed to leave via the Magistrate's entrance door with her fob. Mr Baungally states that he thought he had locked the door. I find that he did not check the door properly after purporting to lock it. Had Mr Baungally completed his duties with regard to locking the Magistrate's entrance door properly, Ms Knowles would not have been able to leave as she did. There is no evidence other than the Mr Baungally's assertions in meetings as to any problem with the door. On the contrary, the Respondent's evidence at page 106 of the bundle in the meeting minutes with Julius, state that the door was 'working fine'.

19. Mr Baungally should have been aware that Ms Knowles was still in the building when he left for the day. He had seen her car in the car park. Ms Knowles' initials were on the sign-in sheet. Mr Baungally failed to check that sign-in sheet. Had he done so, he would have been able to see that Ms Knowles was still in the building at the time he left. For the reasons given at paragraph 7 above, I do not find it plausible that Mr Baungally checked the sign in sheet, that it was blank and that the sheet has been falsified post-incident. Mr Baungally stated during the investigation meeting that he had

not checked the sheet. The sheet at page 174 has 'in and out' times recorded for Ms Knowles for the morning and the afternoon. The afternoon sign-out time corroborates the time Ms Knowles says she signed out after being locked in. Furthermore Mr Baungally, at no point, until the final hearing, questioned the accuracy of the investigation meeting minutes.

20. Following the incident, Ms Knowles made a complaint to the Respondent after which James Ford, Area Manager, North-East London Courts, conducted two initial investigation meetings with Mr Baungally. These took place on 23 September 2020 and 6 October 2020. In the 23 September meeting, the Claimant said that it was a mistake and apologised. Mr Baungally repeated that it was a 'human mistake' in the 6 October meeting. The Claimant was not represented at these meetings and I find that he was not entitled to be in any event. The Respondent's policy is that no representation is to be permitted at the investigation stage. It was clear from the Respondent's invitations to the 23 September and 6 October meetings that those meetings were investigation meetings only.

21. On 25 November 2020, Mr Carpenter had a disciplinary hearing with the Claimant and his representative. In this meeting the Claimant confirmed he had made mistakes and accepted via his representative that he had not locked the door properly.

22. On 20 January 2021, Mr Baungally's appeal was heard by Mr Dawson. Again, Mr Baungally's representative was present. In that meeting the Claimant stated that 'anyone can make a mistake because Ms Knowles was in an office that had not been used for around a year'. By implication, Mr Baungally accepted he had not checked the office.

23. Mr Baungally was given a full opportunity on all these occasions to put forward his version of events. At no stage was an issue raised by Mr Baungally as regards the accuracy of the minutes of previous meetings nor was an issue raised by Mr Baungally in respect of the provision of CCTV footage and any impact that may have had on the disciplinary investigation process. At no time was any issue raised by Mr Baungally as regards a lack of representation at the investigation stage. At no time was any issue raised by Mr Baungally as regards a failure to interview the cleaner and George, Mr Baungally's colleague. As to the latter, given the Claimant's admissions in the investigation meetings, I find that it was reasonable in the circumstances for the Respondent not to interview the cleaner and George. As to the CCTV footage and the Claimant's assertions that the failure to provide the footage affected the fairness of the investigation and disciplinary process, I find that the failure to provide the footage was not unfair and did not affect the Respondent's ability to conduct a reasonable investigation in a procedurally fair way: the Claimant accepts that he was able to view the CCTV footage on the day after the incident. He made representations in the first investigation meeting as regards the contents. There is a transcript of the CCTV footage of page 173 of the bundle as to which the Claimant has made no challenge. The Claimant made no formal request in accordance with HMCTS data access procedure for a copy of the footage when the investigation/disciplinary meetings were taking place. In any event, Mr Baungally accepted at an early stage that he should have checked the office room in which Ms Knowles was working before he left for the day. Provision of the CCTV footage would not therefore have shed any different light on the nature of the office checks conducted by Mr Baungally.

24. Similarly, I find that the provision of the CCTV footage would not have made any difference to the arguments put forward by Mr Baungally as to the locking of the Magistrates' entrance door during the investigation/disciplinary process. He stated that he thought he locked the door, but as it was not locked there must have been a problem with it. I have made findings in relation to the door above in paragraph 18 and accepted the evidence provided by the Respondent as to whether the door was working properly and whether Mr Baungally simply failed to check that the door was locked. I find that further viewing of the CCTV footage, after Mr Baungally had already had an opportunity to view it, would not have made a difference in relation to the Respondent's ability to conduct a reasonable investigation in a procedurally fair way.

25. I find that there were no other similar security breach incidents in which others staff members had been treated more favourably than Mr Baungally. There was no evidence to substantiate Mr Baungally's allegations of other security staff locking up incidents, how they were treated or that they were treated in preferential ways to Mr Baungally following such incident. Mr Baungally mentioned a series of names in paragraph 20 of his witness statement, but other than 'the fire service was called out to rescue people' could provide no more detail. Mr Baungally did not call evidence from any of the people he named, nor could he point to any other documentary evidence to substantiate his allegations. In contrast, despite it being suggested to him that such incidents had taken place during 2015, when he was in post, Mr Carpenter could recall no incidents such as those alleged by the Claimant. The only evidence of a locking up incident which was before me today was in wholly different circumstances whereby a person on the site hid behind a secret panel, as was outlined by Mr Carpenter in his evidence. Those circumstances, I find, cannot be compared to those of Mr Baungally. In addition, for the reasons set out at paragraph 7 above, I prefer the evidence of Mr Carpenter and find that there have been no other similar incidents where members of staff have been treated preferentially in similar circumstances to those of Mr Baungally.

26. The Claimant has an unblemished record and long-service of approximately 20 years. He has several good character references which were put before the Respondent at the time and are in the bundle.

27. I find that the personal issues and bereavement mentioned by Mr Baungally in his disciplinary hearing, explaining why he was anxious and in a rush on the day in question, to be irrelevant in deciding the issues before me today: Mr Baungally had made no mention of such matters previously. At no point previously had Mr Baungally claimed that such personal matters were affecting his ability to carry out his activities competently. In contrast, during the investigation meeting on 6 October 2020, Mr Baungally sought to suggest that Ms Knowles was hiding in an office without the lights on, and that his union representative had suggested she may have something to hide, such as going to the pub. In any event, I find that the Respondent had measures and procedures in place to look after the welfare of staff as outlined in evidence by Mr Carpenter which Mr Baungally did not avail himself of.

28. For similar reasons, I do not find that any arguments as regards staffing or lack of training advanced by Mr Baungally to be relevant in my determination of the issues. It was accepted that the final locking up process and checks at the end of the day were conducted by just one security guard. Mr Carpenter's evidence, which I accept, was that training was provided as required and that, in any event, a security guard of 19- 20 years

should be fully aware of what the locking up process of a courts and tribunal building involved.

Relevant Law - Unfair Dismissal

29. In this case the fact the claimant was dismissed is not in dispute.

30. Section 98 of the Employment Act 1996 deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Conduct is a potentially fair reason within this section. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

31. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was 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.

32. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **British Home Store v Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. In short, the employer must show that misconduct was the reason for the dismissal and must establish a genuine belief based on reasonable grounds after a reasonable investigation that the employee was guilty of misconduct.

33. The Court of Appeal in **British Leyland (UK) Ltd v Swift [1981] IRLR 91** set out the approach: "If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair. It must be remembered that in these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably [would] take a different view.

34. It is immaterial how the Tribunal would have handled the events or what decision it would have made. The Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation. The Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

35. As to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact.

36. Section 122(2) of the Employment Rights Act 1996 provides that where the tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce

that amount accordingly. Section 123(6) of the Employment Rights Act further provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Conclusions

37. It is not in dispute that the reason Mr Baungally was dismissed was for conduct. That is a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. Given the Claimant's admissions as to failing to check the rooms, I conclude that there were reasonable grounds for that belief.

38. Given my findings as regards the investigation meeting, the disciplinary hearing, the appeal hearing and the opportunity the Claimant had to put forward his case and with a representative on the latter two occasions, I find that the Respondent carried out a reasonable investigation and acted in a procedurally fair manner.

39. I must then consider whether dismissal was within the band of reasonable responses and whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss in accordance with section 98(4) of the Employment Rights Act 1996. I have considered all the circumstances in this case not limited to but including the Claimant's record, his service, his character references and also the importance of his work and the importance of security in court buildings. In the circumstances, notwithstanding the Claimant's service record and his other mitigating circumstances, I conclude that the Claimant's function was to provide security for a high-risk court building and that he failed to do so by serious omissions namely (i) locking another member of staff in the building after failing to check the building thoroughly and (ii) failing to lock an external door properly. Given the nature of the Claimant's failings and the potentially serious consequences that could follow a security breach in a courts and tribunals building I conclude that summary dismissal was within the band of reasonable responses.

40. The Claimant's claim for unfair dismissal is not well-founded and his claim is dismissed.

Employment Judge Cheunviratsakul
Dated: 2 March 2022



EMPLOYMENT TRIBUNALS

Claimant: Mr A Baungally
Respondent: OCS Group UK Ltd
Heard at: East London Hearing Centre
On: 24 November 2021
Before: Employment Judge Cheunviratsakul

Representation

Claimant: Mr M J Radha (Lay Representative)
Respondent: Miss K Barry (Counsel)

JUDGMENT having been sent to the parties on 7 January 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant, Mr Baungally, was employed by the Respondent, OCS Group UK Ltd, as a court and tribunal security officer. His employment began on 1 April 2020 following a TUPE transfer from Mitie Security. There is no dispute as to continuity of service. The Claimant says he was unfairly dismissed within the meaning of section 98 of the Employment Rights Act 1996.

2. The Respondent says that Mr Baungally was dismissed fairly for conduct and that they were entitled to terminate his employment without notice because of gross misconduct.

3. Mr Baungally was represented by Mr Radha. Mr Baungally gave sworn evidence. The Respondent was represented by Miss Barry. She called sworn evidence from Mr Andy Carpenter who conducted the Claimant's disciplinary hearing and Mr Stuart Dawson who conducted the Claimant's appeal hearing.

4. I considered documents from a trial bundle of 393 pages and the witness statements from the witnesses called today.

Preliminary observations on the evidence

5. The standard of proof is on the balance of probabilities. This means that if the

Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal will be satisfied that the event did occur.

6. I found Mr Carpenter and Mr Dawson to be credible and reliable witnesses. Both were measured and reasonable in their evidence which was consistent with the documentary evidence. Both were clear to state when they did not have the knowledge to answer questions.

7. In contrast, I did not consider Mr Baungally to be particularly credible or reliable when giving evidence. In the hearing, Mr Baungally claimed to have raised several matters during the investigation and the disciplinary meetings which did not feature in the minutes. At times, Mr Baungally stated in oral evidence that his answers in those meetings were the direct opposite of what was recorded in the minutes: He said that he did not say that he had failed to check the sign-in sheet (page 174, bundle) at the Magistrate's entrance door, which has Anita Knowles' initials on it and, sign in and sign out times. In contrast, he said in the hearing, that he had checked the sheet, that Anita Knowles' name was not there and that the space on the document was blank; the inference being that the document had been falsified. Mr Baungally also denied saying that he normally did two tannoy announcements before locking up as per the minutes of the disciplinary hearing. Furthermore, in the hearing, for the first time, Mr Baungally made assertions that he thought he was not allowed to go into the room in question notwithstanding the fact that the minutes recorded him as saying that he had assumed the room was empty. Mr Baungally did not raise these discrepancies or at any time in his witness statement question the accuracy of the minutes. When questioned as to why he had not mentioned these things in his witness statement, Mr Baungally stated that it was because he was not qualified. Even taking Mr Baungally's lack of experience into account, I find it implausible that there could be so many inaccuracies in the minutes and that they would not be raised in Mr Baungally's witness statement or at some point by him in the investigation or disciplinary process particularly when Mr Baungally had the benefit of representation in the disciplinary meetings. That there are so many unchallenged discrepancies, I find cast doubt on the credibility of Mr Baungally's evidence.

Issues

8. The issues were discussed at the start of the day and explained to the parties as follows:

- 1.1 What was the reason or principal reason for dismissal? Did the respondent genuinely believe the claimant had committed misconduct.
- 1.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular;
 - 1.2.1 Were there reasonable grounds for that belief;
 - 1.2.2 At the time the belief was formed had the respondent carried out a reasonable investigation;
 - 1.2.3 Did the respondent otherwise act in a procedurally fair manner;
 - 1.2.4 Was dismissal within the range of reasonable responses.

- 1.3 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed
- 1.4 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal,
- 1.5 Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

9. I heard submissions at the end of the hearing from Mr Radha. He submitted that the investigation had not been conducted properly, that Mr Baungally had not been allowed a representative at the investigation meeting, that the CCTV footage was not provided to Mr Baungally when he asked for it and that, given Mr Baungally's unblemished record and long service of almost 20 years, that the decision to dismiss in the circumstances was unreasonable. Mr Radha briefly alluded to a lack of training which, from the evidence, appeared to be based on staff not receiving recent training on locking up procedures. During the evidence, Mr Baungally also alluded to welfare issues amongst staff regarding a colleague's recent death from Covid.

10. Miss Barry made submissions on behalf of the Respondent. It was agreed between the parties that the reason Mr Baungally was dismissed was conduct which is a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. Miss Barry says that the Claimant made admissions as to his conduct and that given those admissions there was no doubt that the Respondent genuinely believed that Mr Baungally had committed misconduct. She submitted that a reasonable investigation followed a fair procedure. She submitted that the Claimant had failed in several respects to carry out his duties properly and that notwithstanding his length of service and his disciplinary record the potential consequences were so serious that dismissal was within the band of reasonable responses. She submitted that there was no evidence of inconsistent treatment between the way in which Mr Baungally was dealt with and other members of staff in terms of similar incidents. She submitted that allegations of understaffing were irrelevant because, given the size of Barkingside Magistrate's Court, there was only ever one person charged with locking up. She further stated that any personal issues the Claimant was experiencing at the time due to the bereavement of a colleague were irrelevant and that at no point did the Claimant raise a link between his personal issues and the conduct complained of.

Finding of facts

11. It is not in dispute that the Claimant was employed by the Respondent for almost twenty years as a court security guard and that prior to the incident on 16 September his record was unblemished. It is further not in dispute that courts and tribunal buildings are high risk buildings in terms of security and therefore the correct function of security guards is paramount.

12. On 16 September 2020, Mr Baungally was the last remaining court security guard on the premises at Barkingside Magistrates Court. He was due to finish his shift at 7pm. It is not in dispute that site practice allowed Mr Baungally to leave before the end of his shift once patrols and lock up had been concluded.

13. Mr Baungally's two colleagues, Julius and George, left the site at approximately 17:49, their shift was due to end at 18:00 hours. A cleaner was still on site. At approximately 17:55, Mr Baungally spoke to the cleaner. At approximately 18:00, Mr Baungally went to the Magistrate's door to check it was locked and failed to lock it properly.

14. During his patrol at the end of the day, Mr Baungally assumed an office was empty when in fact it was not, Ms Anita Knowles was inside.

15. In the bundle at page 107, there is documentary evidence from Mr Baungally's colleague, Julius, who was interviewed as part of the investigation process. He stated that it is important to check every room and that 'that is the first thing to do and that everyone knows that'. In his evidence, Mr Baungally agreed that every room must be checked. He accepted the need to check every room and accepted he knew that at the relevant time. For this reason, I do not find the allegation that he thought he was not allowed to go into the office to be a plausible one.

16. Just after 6pm, Mr Baungally made one tannoy announcement; normally two tannoy announcements are made. Mr Baungally stated this to be the case in the disciplinary hearing. Two tannoy announcements as a practice was also confirmed by his colleague, Julius, in interview.

17. There is some dispute as to the amount of time Mr Baungally stated in his one tannoy announcement as regards leaving the building. I find the length of time which Mr Baungally stated in that one tannoy announcement to be immaterial in deciding the matter before me. Mr Baungally accepted that he left 4 to 5 minutes after he made the one announcement.

18. Ms Knowles was still in the building at the time. On realising she was locked in, she managed to leave via the Magistrate's entrance door with her fob. Mr Baungally states that he thought he had locked the door. I find that he did not check the door properly after purporting to lock it. Had Mr Baungally completed his duties with regard to locking the Magistrate's entrance door properly, Ms Knowles would not have been able to leave as she did. There is no evidence other than the Mr Baungally's assertions in meetings as to any problem with the door. On the contrary, the Respondent's evidence at page 106 of the bundle in the meeting minutes with Julius, state that the door was 'working fine'.

19. Mr Baungally should have been aware that Ms Knowles was still in the building when he left for the day. He had seen her car in the car park. Ms Knowles' initials were on the sign-in sheet. Mr Baungally failed to check that sign-in sheet. Had he done so, he would have been able to see that Ms Knowles was still in the building at the time he left. For the reasons given at paragraph 7 above, I do not find it plausible that Mr Baungally checked the sign in sheet, that it was blank and that the sheet has been falsified post-incident. Mr Baungally stated during the investigation meeting that he had

not checked the sheet. The sheet at page 174 has 'in and out' times recorded for Ms Knowles for the morning and the afternoon. The afternoon sign-out time corroborates the time Ms Knowles says she signed out after being locked in. Furthermore Mr Baungally, at no point, until the final hearing, questioned the accuracy of the investigation meeting minutes.

20. Following the incident, Ms Knowles made a complaint to the Respondent after which James Ford, Area Manager, North-East London Courts, conducted two initial investigation meetings with Mr Baungally. These took place on 23 September 2020 and 6 October 2020. In the 23 September meeting, the Claimant said that it was a mistake and apologised. Mr Baungally repeated that it was a 'human mistake' in the 6 October meeting. The Claimant was not represented at these meetings and I find that he was not entitled to be in any event. The Respondent's policy is that no representation is to be permitted at the investigation stage. It was clear from the Respondent's invitations to the 23 September and 6 October meetings that those meetings were investigation meetings only.

21. On 25 November 2020, Mr Carpenter had a disciplinary hearing with the Claimant and his representative. In this meeting the Claimant confirmed he had made mistakes and accepted via his representative that he had not locked the door properly.

22. On 20 January 2021, Mr Baungally's appeal was heard by Mr Dawson. Again, Mr Baungally's representative was present. In that meeting the Claimant stated that 'anyone can make a mistake because Ms Knowles was in an office that had not been used for around a year'. By implication, Mr Baungally accepted he had not checked the office.

23. Mr Baungally was given a full opportunity on all these occasions to put forward his version of events. At no stage was an issue raised by Mr Baungally as regards the accuracy of the minutes of previous meetings nor was an issue raised by Mr Baungally in respect of the provision of CCTV footage and any impact that may have had on the disciplinary investigation process. At no time was any issue raised by Mr Baungally as regards a lack of representation at the investigation stage. At no time was any issue raised by Mr Baungally as regards a failure to interview the cleaner and George, Mr Baungally's colleague. As to the latter, given the Claimant's admissions in the investigation meetings, I find that it was reasonable in the circumstances for the Respondent not to interview the cleaner and George. As to the CCTV footage and the Claimant's assertions that the failure to provide the footage affected the fairness of the investigation and disciplinary process, I find that the failure to provide the footage was not unfair and did not affect the Respondent's ability to conduct a reasonable investigation in a procedurally fair way: the Claimant accepts that he was able to view the CCTV footage on the day after the incident. He made representations in the first investigation meeting as regards the contents. There is a transcript of the CCTV footage of page 173 of the bundle as to which the Claimant has made no challenge. The Claimant made no formal request in accordance with HMCTS data access procedure for a copy of the footage when the investigation/disciplinary meetings were taking place. In any event, Mr Baungally accepted at an early stage that he should have checked the office room in which Ms Knowles was working before he left for the day. Provision of the CCTV footage would not therefore have shed any different light on the nature of the office checks conducted by Mr Baungally.

24. Similarly, I find that the provision of the CCTV footage would not have made any difference to the arguments put forward by Mr Baungally as to the locking of the Magistrates' entrance door during the investigation/disciplinary process. He stated that he thought he locked the door, but as it was not locked there must have been a problem with it. I have made findings in relation to the door above in paragraph 18 and accepted the evidence provided by the Respondent as to whether the door was working properly and whether Mr Baungally simply failed to check that the door was locked. I find that further viewing of the CCTV footage, after Mr Baungally had already had an opportunity to view it, would not have made a difference in relation to the Respondent's ability to conduct a reasonable investigation in a procedurally fair way.

25. I find that there were no other similar security breach incidents in which others staff members had been treated more favourably than Mr Baungally. There was no evidence to substantiate Mr Baungally's allegations of other security staff locking up incidents, how they were treated or that they were treated in preferential ways to Mr Baungally following such incident. Mr Baungally mentioned a series of names in paragraph 20 of his witness statement, but other than 'the fire service was called out to rescue people' could provide no more detail. Mr Baungally did not call evidence from any of the people he named, nor could he point to any other documentary evidence to substantiate his allegations. In contrast, despite it being suggested to him that such incidents had taken place during 2015, when he was in post, Mr Carpenter could recall no incidents such as those alleged by the Claimant. The only evidence of a locking up incident which was before me today was in wholly different circumstances whereby a person on the site hid behind a secret panel, as was outlined by Mr Carpenter in his evidence. Those circumstances, I find, cannot be compared to those of Mr Baungally. In addition, for the reasons set out at paragraph 7 above, I prefer the evidence of Mr Carpenter and find that there have been no other similar incidents where members of staff have been treated preferentially in similar circumstances to those of Mr Baungally.

26. The Claimant has an unblemished record and long-service of approximately 20 years. He has several good character references which were put before the Respondent at the time and are in the bundle.

27. I find that the personal issues and bereavement mentioned by Mr Baungally in his disciplinary hearing, explaining why he was anxious and in a rush on the day in question, to be irrelevant in deciding the issues before me today: Mr Baungally had made no mention of such matters previously. At no point previously had Mr Baungally claimed that such personal matters were affecting his ability to carry out his activities competently. In contrast, during the investigation meeting on 6 October 2020, Mr Baungally sought to suggest that Ms Knowles was hiding in an office without the lights on, and that his union representative had suggested she may have something to hide, such as going to the pub. In any event, I find that the Respondent had measures and procedures in place to look after the welfare of staff as outlined in evidence by Mr Carpenter which Mr Baungally did not avail himself of.

28. For similar reasons, I do not find that any arguments as regards staffing or lack of training advanced by Mr Baungally to be relevant in my determination of the issues. It was accepted that the final locking up process and checks at the end of the day were conducted by just one security guard. Mr Carpenter's evidence, which I accept, was that training was provided as required and that, in any event, a security guard of 19- 20 years

should be fully aware of what the locking up process of a courts and tribunal building involved.

Relevant Law - Unfair Dismissal

29. In this case the fact the claimant was dismissed is not in dispute.

30. Section 98 of the Employment Act 1996 deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Conduct is a potentially fair reason within this section. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

31. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was 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.

32. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **British Home Store v Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. In short, the employer must show that misconduct was the reason for the dismissal and must establish a genuine belief based on reasonable grounds after a reasonable investigation that the employee was guilty of misconduct.

33. The Court of Appeal in **British Leyland (UK) Ltd v Swift [1981] IRLR 91** set out the approach: "If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair. It must be remembered that in these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably [would] take a different view.

34. It is immaterial how the Tribunal would have handled the events or what decision it would have made. The Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation. The Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

35. As to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact.

36. Section 122(2) of the Employment Rights Act 1996 provides that where the tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce

that amount accordingly. Section 123(6) of the Employment Rights Act further provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Conclusions

37. It is not in dispute that the reason Mr Baungally was dismissed was for conduct. That is a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. Given the Claimant's admissions as to failing to check the rooms, I conclude that there were reasonable grounds for that belief.

38. Given my findings as regards the investigation meeting, the disciplinary hearing, the appeal hearing and the opportunity the Claimant had to put forward his case and with a representative on the latter two occasions, I find that the Respondent carried out a reasonable investigation and acted in a procedurally fair manner.

39. I must then consider whether dismissal was within the band of reasonable responses and whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss in accordance with section 98(4) of the Employment Rights Act 1996. I have considered all the circumstances in this case not limited to but including the Claimant's record, his service, his character references and also the importance of his work and the importance of security in court buildings. In the circumstances, notwithstanding the Claimant's service record and his other mitigating circumstances, I conclude that the Claimant's function was to provide security for a high-risk court building and that he failed to do so by serious omissions namely (i) locking another member of staff in the building after failing to check the building thoroughly and (ii) failing to lock an external door properly. Given the nature of the Claimant's failings and the potentially serious consequences that could follow a security breach in a courts and tribunals building I conclude that summary dismissal was within the band of reasonable responses.

40. The Claimant's claim for unfair dismissal is not well-founded and his claim is dismissed.

Employment Judge Cheunviratsakul
Dated: 2 March 2022