



EMPLOYMENT TRIBUNALS

Claimant: Narayan Acharya
Respondent: Waltham Forests Services Ltd
Heard at: East London Hearing Centre
On: 24 November 2022 (by CVP) and 25 November 2022 (in person)
Before: Employment Judge F Allen

Representation

Claimant: In person
Respondent: Mr David Gray-Jones (Counsel)

RESERVED JUDGMENT

- 1. The Claimant was unfairly dismissed by the Respondent.**
- 2. The Tribunal does not make a Polkey reduction as in its judgment, there is no chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed. The dismissal was substantially unfair.**
- 3. The Claimant did not contribute to his dismissal by culpable and blameworthy conduct and therefore there is no reduction to his basic and compensatory award.**
- 4. The Claimant was wrongfully dismissed. His claim for breach of contract succeeds.**
- 5. The Claimant is entitled to a remedy for his successful claim. This will be decided at the remedy hearing which is listed on 3 April 2023 at 10am for 2 hours.**

REASONS

[page references are to the agreed bundle]

Introduction

1. The Claimant was employed by the Respondent from 18 February 2008 until 4 May 2021 as a Senior Control Centre Officer in the Emergency Command Centre (Operations Centre) at Laurel House based in Waltham Forest Town Hall complex. The Claimant had transferred under the Transfer of Undertaking and Protection of Employment (TUPE) Regulations to the Respondent on 3 October 2018 and his period of continuous employment ran from 18 February 2008.
2. The Respondent is a company which is wholly owned by the London Borough of Waltham Forest. The company undertakes a range of services for residents and businesses including all aspects of CCTV monitoring and security on behalf of the Council and commercial clients in East London.
3. The Claimant was dismissed on 4 May 2021 without notice or payment in lieu of notice. Early conciliation began on 14 June 2021 and a certificate was issued on 1 July 2021. The Claimant issued his claim on 12 August 2021.
4. The Respondent initially raised an out of time issue in the Grounds of Resistance but informed the Tribunal on 24 February 2022 that their application to have the claim struck out was misconceived as the Claimant had filed his claim in time. For the avoidance of doubt, I find that the claim is in time.
5. The Claimant makes two complaints, firstly that his dismissal was unfair within section 98 of the Employment Rights Act 1996 and secondly that he was dismissed without notice and is owed notice pay. In the claim form (ET1) the Claimant sought reinstatement but confirmed at the hearing that he was no longer seeking to be reinstated to his old job but compensation only.
6. The Respondent contests the claim. The Respondent says that the Claimant was fairly dismissed for gross misconduct, as he did not follow the correct procedure when he observed an individual entering the Town Hall complex in the early hours of the morning of 21 March 2021. The Respondent says that a fair investigation was carried out and that the disciplinary hearing was conducted by Shahzad Hussain who was unconnected to the case. A reasonable decision to dismiss was reached having taken account of all relevant factors. Having been dismissed for gross misconduct the Respondent says that, in line with the contract of employment, the Claimant is not entitled to notice pay.

The Hearing

7. I checked with the parties that I had all the correct documents. The documents that I had before me are the following:

- Agreed hearing bundle of 411 pages;
 - Witness statements from Louise Duffield (Director of Customer Service and Business Support at London Borough of Waltham Forest and Chair of Board); Shahzad Hussain (Respondent's Head of Commercial Operations); Mohammed Ali (Operations Centre Officer) and Mr Acharya (Claimant);
 - Respondent's skeleton argument dated 24 November 2022;
 - Respondent's chronology; and
 - Cast list.
8. Mr David Nash (Deputy Operations Centre Manager) had also provided a statement but did not give evidence at the hearing and I was invited by Counsel for the Respondent to give his signed statement such weight as I considered appropriate.
9. There was also a 10-minute video clip entitled Town Hall External Magistrate Fountain Overview which I was asked to view, and which was between 4 to 6.44 minutes.
10. There were some IT issues during the hearing when at times the video images were blurred but these resolved themselves and there was no issue with the sound. Mr Shahzad Hussain had some separate IT issues when the hearing began but having left and then re-joined the hearing, he had no further issues.
11. I heard sworn evidence from the following:
- Louise Duffield (Director of Customer Service and Business Support at London Borough of Waltham Forest and Chair of Board)
 - Shahzad Hussain (Respondent's Head of Commercial Operations)
 - Mohammed Ali (Operations Centre Officer)
 - Mr Acharya (Claimant).

Preliminary Issue

12. The Claimant raised two preliminary issues. The first issue raised by the Claimant is that he wanted an email dated 11 February 2021, sent to him by Mr Nash which referred to a junior operative going on Bold system training, to be included in the bundle of documents. The Claimant had attached this email to his witness statement and as the Respondent had no objection, the email was admitted into evidence.
13. The second issue raised by the Claimant related to the disclosure of the records of other employees who have been off sick with depression. As part of the document exchange for this hearing, the Respondent refused to provide this information, as it considered that it was not relevant to the

issues that the Tribunal had to determine and additionally, that providing this information would raise data protection issues. The Claimant had also made a FOI request which had also been refused for the same reason.

14. The Claimant renewed the request at the beginning of the hearing. He clarified that he was not asking for the names of those off sick for depression but just confirmation of the fact that there were employees who are off sick, who gave the reason for their absence as depression.
15. I refused to grant the Claimant's application as I did not consider that it was relevant to the issues which I had to determine which are: whether the Respondent genuinely believed that the Claimant had committed misconduct and if so whether the Respondent acted reasonably in treating this as a sufficient reason to dismiss him. The Claimant was not suggesting that he was depressed at the time of the incident such that it impacted on how he dealt with it and/or that this was a factor that the Respondent should have taken into account as mitigation. There are many reasons why a person may be off sick with depression that are not related to their employment.

The Legal issues and framework

16. It was agreed by both parties that the issues for me to determine are set out in the Case Management Orders sent to the parties on 2 March 2022 [43-49]. Although Polkey and contributory conduct issues concern remedy and would only arise if the Claimant's complaint of unfair dismissal succeeded it was agreed on day 1 (24 November 2022) that I would deal with these issues at this stage. I was informed at the start of day 2 (25 November 2022) that there had been some agreement in respect of remedy including the basic award and notice pay. The main areas of dispute being loss of earnings and future loss.
17. The parties agreed that the Claimant was dismissed on 4 May 2021 and the issues for me to decide are as follows.

Unfair dismissal

18. What was the principal reason for the Claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996. The Respondent's case is that the Claimant was dismissed for misconduct.
19. I need to be satisfied that the Respondent genuinely believed that the Claimant had committed misconduct.
20. 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? I will need to be satisfied that:
 - i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed, the Respondent had carried out a reasonable investigation;

- iii. the Respondent otherwise acted in a procedurally fair manner;
 - iv. dismissal was within the range of reasonable responses.
21. I apply the principles set out in *British Home Stores v Burchell* [1978] IRLR 379. The reason for dismissal is, “the set of facts known to the employer or, it may be, of beliefs held by him which cause him to dismiss the employee.” *Abernethy v Mott, Hay and Anderson* [1974] ICR 323.
 22. The range of reasonable responses test applies to the investigation as well as the decision to dismiss: *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23.
 23. I remind myself that I am not substituting my own decision for that of the Respondent. The question for me is not how I would have carried out the investigation or whether I would have dismissed the employee but whether the investigation carried out by the employer and decision to dismiss was reasonable in the circumstances. I must also take into account the size and administrative resources of the Respondent.
 24. It is for the employer to show a potentially fair reason for dismissal, but the second and third stages of the Burchell test are neutral as to the burden of proof: *Boys and Girls Welfare Society v Mc Donald* [1996] IRLR 129.
 25. When assessing whether the misconduct justified dismissal, I must assess whether the conduct in its totality amounted to a sufficient reason for dismissal, rather than focussing on whether individual acts of misconduct amounted, in isolation, to gross misconduct. Where the reasons for dismissal relied on is misconduct all constituent parts of that conduct are relevant for the purposes of the test under s.98(4) not simply the principle allegations of misconduct: *GM Packaging (UK) Ltd v Haslem* UKEAT/0259/13.
 26. In assessing fairness under s.98(4) the Tribunal has to consider whether the Respondent complied with the provisions of any relevant internal policy of the Respondent as well as the provisions of the ACAS Code on Discipline and Grievances.
 27. If the dismissal was procedurally unfair, I have to consider 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, in accordance with the principles in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8.
 28. 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 as set out in section 122(2) of the Employment Rights Act 1996 (ERA 1996)? and if so to what extent.
 29. 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 the compensatory award under section 123(6) of the ERA 1996?.

Breach of contract/wrongful dismissal

30. The parties agreed that the Claimant's notice period was 12 weeks, and that the Claimant was not paid for the notice period.
31. The issue for me to determine is whether the Claimant was guilty of gross misconduct. The burden of proof is on the Respondent and standard of proof is the balance of probabilities.
32. Dismissal without notice will only be lawful if the conduct is "conduct which so undermines the relationship of trust and confidence that the employer should no longer be required to retain the employee in the employment." *Neary v Dean of Westminster* [1999] IRLR 288.
33. In *Dietmann v Brent London Borough Council* [1987] ICR 737 the High Court held that a working definition of "gross negligence" in the context of employment law would be a "really serious failure to achieve the standards of skill and care objectively to be expected from a social worker of the grade and experience of the [Claimant]."

Findings of Fact

34. I have carefully considered the contents of all the statements, evidence that I was referred to and the submissions of both parties. In my reasons below I have not referred to each point raised or to every document referred to, but I have dealt with the points and evidence that are relevant to the issues that I must decide. Where I have had to resolve a conflict in the evidence, I indicate how I have done so at the material point.
35. The Claimant, Narayan Acharya, was employed by the Respondent for 13 years from 18 February 2008 until his employment was terminated without notice on 4 May 2021. At the time of the dismissal the Claimant was a Senior Control Centre Officer. The Claimant had had no previous disciplinary issues during his employment.
36. The Respondent is a company which is wholly owned by the London Borough of Waltham Forest. The company undertakes a range of services for residents and businesses including all aspect of CCTV monitoring and security on behalf of the Council and commercial clients in East London. The company has more than one site in the UK and a Human Resources Department.

Events on 21 March 2021

37. It is not in dispute that on 21 March 2021 the Claimant was working a shift starting at 1.15 am and finishing at 7am.
38. The Town Hall complex is accessible 24/7 by the general public and on 21 March 2021 at around 2am the Claimant was carrying out a camera check and noticed a male member of the public on the Town Hall complex. The man sat down under a tree, took off his rucksack and drank from a

container which was in a black carrier bag. The Claimant says that he believed that the container contained juice or water. Although the label on the bottle cannot be clearly seen, given the shape of the bottle, type of bag it was contained in and time of night I find, on the balance of probabilities, that it is likely that this bottle contained alcohol and not juice or water.

39. The Claimant monitored this man for approximately 3 mins. The Respondent accepts that this man displayed no overt anti-social behaviour. Having decided that the man's mannerism showed no threat to any member of the public, he did not appear unwell, drunk or suspicious the Claimant took no further action.
40. At around 05.45am a security guard reported to the CCTV control room that a "male has been found in the grass area and is not responding."
41. At the time that this call was made to the CCTV control room the Claimant was not in the control room but on a comfort break. When the Claimant returned his colleagues were already engaged with the incident. On return the Claimant asked what was going on and was informed about the call from security. The Claimant asked for the emergency services to be called and was informed that this had been done. The Claimant then sent the camera feed to the Metropolitan police.
42. The Claimant checked the playback footage of the camera which was monitoring the area where the man was found and realised that it was the same man that he had seen enter the Town Hall complex at around 2am.
43. After the London Ambulance Service arrived, security passed a message to the CCTV control room that the man was dead. I find, understandably, that the Claimant was shocked given that he had monitored the same man five hours before but, despite being shocked and shaken, the Claimant continued his duties and called his two most senior managers Nicholas Licardo, Operations Centre Manager, and Aswin Kerai, Head of Commercial Development to inform them of this incident. The Claimant downloaded the footage from 2am when he had first seen and monitored the man and briefed Oluniran (Niran) Olufajo and Muhammad (Jay) Khan who were starting the day shift, before he left the Operations Centre.
44. I do not accept that the Claimant left work early. There is simply no evidence that he did and Stephen Martins in his interview [180] taken as part of the investigation carried out by David Nash very clearly states that at a few minutes past 7 the Claimant was still in the Operations Centre.
45. As the senior officer on the shift, when the Claimant returned from his comfort break, he ascertained what had been done and what needed to be done. The interview of Stephen Martins [180] is again clear and when asked who took the lead in response to the incident replies "I was the one on the radio directing the officer then I followed Narayan's instructions."

Suspension and investigation

46. The Claimant was suspended by letter dated 23 March 2021 which sets out the allegation as a failure to follow correct procedures and failure to pay due

care and attention to the role as Senior CCTV Operation Officer. Subsequently a fatality occurred.

47. There was an investigation by Mr David Nash, Deputy Operations Centre Manager for the Waltham Forest Operations Centre, who viewed the CCTV footage and obtained witness statements from Stephen Martins (Operations Centre Officer); Charles McCarthey (Operations Centre Officer); Nicholas Licardo (Operations Centre Manager); Oluniran Olufajo (Control Centre Officer); Ashwin Kerai (Head of Commercial Development at London Borough of Waltham Forest), Mohammed Ali (Operations Centre Officer and the Claimant. There was an investigatory meeting with the Claimant on 24 March 2021.
48. The allegation set out in the investigation report [201-202] is that the Claimant “potentially did not respond appropriately regarding the individual being spotted on campus out of hours and he failed to report the matter to security or duly follow the matter up.”
49. The investigation report [201-202], concluded that the Claimant had been negligent in his duties as a man drinking on site was sufficient to warrant this individual being spoken to and asked to leave the site or alternatively being monitored. The investigation report concludes that the Claimant showed a lack of supervisory skills during the incident which his role requires.

Disciplinary Hearing

50. By letter of 7 April 2021 [176-177] the Claimant was invited to a disciplinary hearing on 15 April 2021 where the following allegation was to be considered:

“...potential failure to follow the correct procedure regarding the individual being spotted on campus out of hours and your failure to report the matter to Security and duly follow up.”
51. The Disciplinary hearing was conducted by Mr Shahzad Hussain, the Respondent’s Head of Commercial Operations, who has experience of chairing other disciplinary matters. At the hearing, David Nash presented the findings of his investigation, the Claimant had an opportunity to ask questions and to present his defence. Notes of this hearing were taken, and the Claimant was assisted at the hearing by another employee of the Respondent Muhammad (Jay) Khan. The notes of the hearing [208-213] were not provided to the Claimant to check or sign as a true and accurate record.
52. Mr Shahzad Hussain took the decision to dismiss the Claimant for gross misconduct by letter dated 4 May 2021 [217-219].
53. The dismissal letter accepts that there are no restrictions on visitors using the grounds as long as they are not engaged in anti-social or criminal acts and that the individual in this case was not displaying overt anti-social behaviour but concludes that “it is clear under most circumstances similar instances would and should raise sufficient suspicion to merit escalation to

security for further investigation.” The report then refers to Mo Ali’s statement [185-186] and concludes that on the balance of the evidence provided “I agree the failure to escalate was a serious breach in the Claimant’s duty as senior CCTV operative”.

54. The dismissal letter continues that Shahzad Hussain further believes there was sufficient cause to continue to monitor the individual on CCTV or return after a short interval to ascertain whether the individual was still on site. Shahzad Hussain then suggests that if the matter had been escalated earlier or monitored more diligently it may have resulted in a different outcome for the individual who died.
55. The dismissal letter concludes by acknowledging that the Claimant did take steps to brief his management team but the Claimant’s handling and judgment of the incident from monitoring, failure to escalate and taking ownership of the situation, as the Senior CCTV Operations Officer on shift, demonstrate a distinct lack of judgment and leadership.

Appeal against dismissal hearing

56. On 8 May 2021 the Claimant appealed raising a number of points including that the Disciplinary Chair had failed to consider the statements of Muhammad (Jay) Khan, Wesley Lima -Fadul, Stephen Martins and his exemplary work record.
57. By letter dated 10 May 2021 the Claimant was invited to an appeal hearing which took place on 18 May 2021. The decision to dismiss was upheld by the appeal chair Louise Duffield in a letter sent to the Claimant on 25 May 2021. The appeal chair found that it was extremely likely that the man was drinking alcohol and that having noticed the individual the Claimant should have deployed the tools available to him including monitoring the individual and deploying patrols to investigate further. The report then goes on to say that as an experienced and senior CCTV Operative it is reasonable to expect that he would have checked back in on the individual in question for a period and that if this had been done this could have resulted in a different outcome.

Conclusions

Reason for dismissal

58. I find that the actual or principal reason for the dismissal was the conduct of the Claimant on the morning of 21 March 2021 in failing to contact the security guard when he saw an individual enter the Town Hall complex and drink, what on the balance of probabilities, was alcohol. Conduct is a potentially fair reason for dismissal under s.98 of the Employment Rights Act 1996 but the issue for me to determine is whether the Respondent genuinely believed the Claimant had committed misconduct.
59. I find that the Respondent did not genuinely believe that the Claimant had committed misconduct. The main issue in this case and said reason for a finding of gross misconduct and summary dismissal is that the Respondent

says that when a person is on the Town Hall complex in the early hours and seen drinking alcohol this should be immediately escalated, and the Town Hall complex security guard informed.

60. It is agreed by both parties that there is no written standard procedure for such circumstances.
61. The Claimant's position is that he followed the correct procedure and CCTV operatives only report to the security guard if there is anti-social behaviour. At the disciplinary hearing at 1.7, page 211 the Claimant said that CCTV operatives report to security guard *"if someone was ASB and drinking and walking funny, rowdy then we would report to TSS, but it wasn't with this person"*.
62. The Respondent says that there is an unwritten procedure based on custom and practice to inform security in such cases which is a known practice that the Claimant is aware of and that in similar situations where an individual is on site in the early hours and appears to be drinking, security is informed. In its dismissal letter, the Respondent based this belief on Mohammed Ali's answer to the question "Have you ever been in the Operations Centre when they CCTV operators have seen people hanging around" which was *"In similar cases usually when they spot someone like drug or alcohol use happens on site they would usually radio the TSS Officer on site and send them out."*
63. None of the other employees interviewed as part of the investigation and whose interviews were before Shahzad Hussain were asked this question or make any reference to a known procedure when a person enters the Town Hall complex during the night and appears to be drinking. It was not disputed by the Respondent that Mr Ali works mostly on the call centre side of the Operations Centre and not as a CCTV operator and I find that no reasonable employer would conclude that there is a known unwritten practice amongst CCTV Operators based on one answer in an interview with an employee who works the majority of the time not as a CCTV Operator but in the call centre.
64. Additionally, I further find that no reasonable employer would rely on this answer which uses the words "usually" as stating that there is a definitive procedure that is followed.
65. Shahzad Hussain said in evidence before me that if there are incidents of anti-social behaviour, then the matter should be reported to the security guard but if there is no anti-social behaviour then there is no need to report but that his belief is that if someone is drinking alcohol in a public space in the early hours it is reasonable to assume anti-social behaviour.
66. I find that there is no reasonable basis for this belief. There was other evidence, that Shahzad Hussain was either aware of but did not consider or did not inform himself sufficiently of before the Disciplinary hearing. This evidence is the Respondent's own document of CCTV tasks. Ms Duffield in evidence before me was referred to page 307. The document at page 307 forms part of a document called Ops CCTV tasks and outlines what the Ops team need to look out for. The specific paragraph referred to Ms Duffield is

entitled *Parks* and Ms Duffield confirmed in evidence that this paragraph applies to the Town Hall complex. What this paragraph says is that the camera is required to catch individuals causing a disturbance or fly tipping, anti-social behaviour, rough sleeping or urinating and the ops team need to patrol all the parks looking for Alcohol drinkers committing any ASB and urinating in the bushes, rough sleepers and fly tippers.

67. I find that the wording of this paragraph is clear. It states that the Ops team are not looking out for people who are just drinking alcohol but people drinking alcohol and who are committing any ASB. Other paragraphs relating to other areas and not said to apply to the Town Hall complex specifically say that the Ops team in those areas do have to look out for street drinkers and/or suspicious behaving individuals and also monitor those that enter premises without authorised access. I find that if such tasks related to "*Parks*" then they would be set out in the relevant paragraph, but they are not and there is no basis to imply that they apply to the Town Hall complex.
68. The dismissal letter dated 4 May 2021[217-219] accepted that the man did not appear to be displaying overt anti-social behaviour and that there was no restrictions on visitors using the grounds unless they are engaged in anti-social behaviour. Given this finding by Shahzad Hussain and the Respondent's own evidence of CCTV tasks I find that no reasonable employer would have concluded, on the balance of probabilities, that in circumstances where a person is solely drinking on the Town Hall complex, even if alcohol, that it is to be escalated to the security guard unless there is additionally anti-social behaviour which in this case, it is accepted there was not.

Should the Claimant have continued to monitor the individual

69. I do not accept that Mr Shazad genuinely believed that there is a practice of going back to check on someone. There was simply no evidence of this ever happening on which to base a reasonable belief.
70. Since the incident, a written policy entitled Response to Antisocial or Suspicious Behaviour within the Town Hall Complex has now been introduced dated September 2021. Having regard to the facts of this particular case the relevant parts of this policy say that special attention is to be taken of person entering the Town Hall complex at unsociable hours (said to be dusk to dawn) and where a person is seen drinking the Operations Centre is to observe and monitor and report this to the Town Hall security officer so that they can attend and investigate further.
71. This policy, written to cover the exact situation in this case, makes no reference to CCTV operators who having observed a person entering the Town Hall complex, returning to observe and monitor a person in situations where it is unclear whether this policy applies and/or they have not reported to security.
72. Given that this written policy has been written to provide a standard operating procedure that CCTV Operatives should follow, I find that if the Respondent genuinely believed that the Claimant should have returned later

on to monitor then this policy, written after the events of 21 March 2021 would say so.

Failure to display the required supervisory skills when responding to the incident.

73. Mr Gray-Jones, in submissions, said that the Claimant's alleged failure to lead was viewed with concern and an aggravating factor but that the key breach being argued was the failure to alert the security guard.
74. The Respondent has completely failed to specify, what exactly the Claimant was supposed to do that he did not do and I find that, given the evidence before Shahzad Hussain and his acceptance that the Claimant did take steps to brief his management team, no reasonable employer would conclude that the Claimant, had failed to carry out his role as the Senior Operating Officer on shift.

Was the Procedure unfair

75. I further find that the procedure was unfair. It is apparent from the notes of the Disciplinary hearing that Mr Shahzad Hussain approached the hearing with a closed mind having decided before the end of the hearing that "It is pretty clear but you have failed to monitor" and "So I am trying to understand what stopped you from being competent in your response..."[1.7 on page 210].
76. The decision letter also failed to record in writing that the statements of Mr Wesley Lima-Tariq and Muhammad (Jay) Khan were considered. Although Shahzad Hussain's evidence at the appeal hearing was that he did consider these statements, I find that there was a failure to consider relevant evidence including the CCTV task document, statements of Mr Wesley Lima-Tariq and Muhammad (Jay) Khan and the Claimant's work record and length of service and that this failure was not remedied at the appeal hearing as there is nothing to suggest that Louise Duffield considered this evidence as part of the appeal.
77. The statements of Wesley Lima-Tariq and Muhammad (Jay) Khan were statements relevant to the issue of whether there is an unwritten process followed by CCTV Operatives when a person enters the Town Hall complex. Shahzad Hussain says that he considered them but there is simply nothing to suggest this on the face of the decision letter or any reasoning as to why the evidence of Mr Mo Ali was preferred over that of Wesley Lima-Tariq and Muhammad (Jay) Khan. Mr Muhammad (Jay) Khan being a Senior Operations Centre Officer.

The sanction

78. The Claimant has an exemplary work record with no previous disciplinary procedures or warnings and Shahzad Hussain accepted in his statement that he failed to record in writing that he took these factors into account but says that he did consider these factors when reaching his decision. Shahzad Hussain said in evidence that he considered a final warning on record for 12 months or dismissal and decided dismissal was the most appropriate. I find that Shahzad Hussain failed to consider relevant

evidence namely the document at page 69 of the agreed bundle which is part of the Respondent's disciplinary procedure and is a table that lists the type of breaches of conduct that may justify the implementation of the disciplinary procedure. I accept that it is a non-exhaustive list of examples of behaviour and general conduct which may amount to Gross Misconduct but find that the alleged conduct of the Claimant does not come anywhere near the examples set out in this document as amounting to gross misconduct. The conduct that the Respondent alleged is a failure to comply with Company policies and procedures which is an example which is specifically set out under the heading Misconduct and not Gross Misconduct.

79. The Respondent's disciplinary procedure at page 67 says under General Principles that *"No employee will be dismissed for a first breach of discipline except in the case of gross misconduct"*.
80. I find that no reasonable employer in the Respondent's position would have disregarded its own disciplinary policy when considering whether the conduct amounted to misconduct or gross misconduct and what sanction to impose and in circumstances where it is accepted there is no written Standard Operating Procedure and the Claimant's impeccable work record with the Respondent over the past 13 years.
81. To conclude I further find that the dismissal of the Claimant was not within the band of reasonable responses. I have considered the limited evidence I have as to the size and resources of the Respondent but find that there is no excuse for the unfairness in the Respondent's actions.
82. Given the above I find that the Claimant was unfairly dismissed.

Wrongful dismissal

83. Given my findings above it follows that I further find that the Claimant was not guilty of gross misconduct.
84. The parties agreed that the notice period is 12 weeks, and that the Claimant was not paid for this notice period.

Conclusions – Polkey and contributory fault

85. Given my finding that the Respondent did not genuinely believe that the conduct of the Claimant amounted to misconduct it follows that I do not find that there should be any reduction in the award (basic and/or compensatory) made to the Claimant.

Remedy

86. The issues to be considered at the remedy hearing on 3 April 2023 are set out in the case management order dated 2 March 2022 at paragraphs 2.6-2.8.

87. I was informed by Counsel for the Respondent that some remedy has been agreed and I encourage both parties, in light of my conclusions above, to reach an agreement as to remedy.

**Employment Judge F Allen
Date 29 December 2022**