



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Shamsheer Shah

**Respondent:** Alpha Response 2004 Ltd t/a Red Support Services

**Heard at:** Watford **On:** 5 & 6 June 2023

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

**Appearances:**

**For the Claimant:** Mr McKetty (Legal Consultant)

**For the Respondent:** Mr Uduje (Counsel)

## RESERVED JUDGMENT

The Claimant's claims of unfair dismissal and wrongful dismissal fail and are dismissed

## REASONS

### Background

1. The claimant commenced his employment as a Security Officer on 1 August 2016, with Vision Security Ltd. His employment was transferred to the respondent on 3 February 2020 following a TUPE transfer. The claimant was summarily dismissed by the respondent on 10 May 2022.
2. The claimant contacted ACAS on 5 August 2022, and an early conciliation certificate was issued on 24 August 2022.
3. The claimant presented a claim form (ET1) on 21 September 2022, claiming unfair and wrongful dismissal. The respondent submitted a response (ET3) on 25 October 2022 contesting the claims asserting the claimant was fairly dismissed for gross misconduct.
4. At this hearing the claimant was represented by Mr McKetty, Legal Consultant, and the respondent by Mr Uduje of counsel.

### Preliminary Issues

5. At the beginning of the hearing, I had to address issues of non-compliance with the case management orders and to agree a list of issues. The tribunal was not provided with the respondent witness statements or a final bundle.

The Case Management Order issued on 18 December 2022, required the respondent representative to upload these documents to the tribunal Document Upload Centre. There was no record on the tribunal system that this had been done. Mr McKetty complained that his bundle was incomplete as it had only 180 pages of the 248 page bundle; and that the respondent had not exchanged witness statements as ordered. Mr McKetty expressed his dissatisfaction and pursued a strike out application on the basis of this non-compliance and unreasonable conduct on part of the respondent representatives. The application was resisted by the respondent. Mr Uduje explained the respondent witness statements were emailed to the claimant on 31 March 2023, which the claimant strongly maintained he had not received; and the final bundle was also emailed to the claimant with a link for him to upload, which the claimant had not actioned the link as required to do.

6. I refused the application as it was not proportionate or in the interests of justice to strike out the claim. I was satisfied the case management orders had been complied with albeit with a short slippage of time, however, the claimant had been served with the bundle and witness statements in good time before this hearing. It was, however, unsatisfactory the respondent representatives did not upload the statements and bundle as ordered to this tribunal. This therefore caused a delay. Mr Uduje gave his assurance that hard copies of the bundle and statements would be delivered to the tribunal and a copy for Mr McKetty by 1.30pm. Given that I required time to read the statements and bundle, it was agreed the hearing be adjourned to commence at 2.30pm.

#### **List of issues**

7. Neither party had given consideration to preparing an agreed list of issues. I then discussed and agreed with the parties, the issues to be determined, which are set out below.

#### **Unfair dismissal**

8. What was the reason or principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1)&(2) of the Employment Rights Act 1996 (“ERA”)

The respondent asserts the reason was conduct, which is a potentially fair reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

- 8.1 If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
  - 8.2 there were reasonable grounds for that belief;
  - 8.3 at the time the belief was formed the respondent had carried out a reasonable investigation;
  - 8.4 the respondent otherwise acted in a procedurally fair manner;
  - 8.5 dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

9. If the claimant was unfairly dismissed and the remedy is compensation, the Tribunal will decide;
- 9.1 What financial losses has the dismissal caused the claimant?
  - 9.2 Has the claimant taken reasonable steps to mitigate his losses?
  - 9.3 If not, for what period of loss should the claimant be compensated?
  - 9.4 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 fairly dismissed or have been dismissed in time anyway (**Polkey**)

Contributory fault

- 9.5 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by any blameworthy or culpable conduct?
- 9.6 If so, would it be just and equitable to reduce the claimant's basic and compensatory award. If so, by what proportion pursuant to s122(2) & s123(6) ERA.?
- 9.7 Did either party fail to comply with a relevant Acas Code, and if so, should any compensation awarded be increased or decreased (by up to 25%).

Wrongful dismissal/Notice pay

- 10. Did the claimant fundamentally breach the contract of employment by an act of gross misconduct?
- 10 1 If the claimant was wrongfully dismissed, how much is he entitled to by way of damages for breach of contract?

Hearing

- 11. Around 2pm, the tribunal and Mr McKetty received a hardcopy of the bundle and statements. I was able to have a preliminary read of the statements and some key documents in preparation for the hearing.
- 12. At the start of the hearing Mr McKetty, confirmed the claimant was ready to proceed. During the hearing, I heard evidence from the claimant, and the respondent witnesses, Mr Nigel Jones (Area Manager), Mr Kola Shodalubi (Regional Operations Manager), and Miss Vickie Rann (Managing Director). All witnesses were cross examined. I also asked questions of the witnesses for the purposes of clarification.
- 13. On the second day, there were some additional documents added to the bundle. These were relevant documents, some which I requested be disclosed. These additional documents increased the bundle to 260 pages.
- 14. At the conclusion of the parties' evidence, Mr McKetty made oral submissions and Mr Uduje provided written submissions which he expanded on orally.

Due to lack of time to deliver an oral judgment, I reserved my decision.

**Findings of fact**

15. Having considered all of the evidence, on the balance of probabilities I have made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.
16. The respondent provides cleaning and security services to commercial and retail outlets. It has an approximate annual turnover of £1.8 million. The Directors and shareholders are Miss Vickie Rann and Miss Andree Wilson. The respondent operates nationally from Wales up to Manchester. At the time of the claimant's employment, the business employed some 760 employees. The respondent has one qualified HR employee, who is supported by an external Employment Advisory provider, which provides advice and support on employee relation issues.
17. The claimant commenced his employment as a Security Officer on 3 February 2016, with Vision Security Ltd. On or about January 2020 the claimant's employment was the subject of a TUPE transfer to the respondent. The claimant informed the tribunal that he had over 20 years' experience working as a Security Officer. He is licensed by the Security Industry Authority.(p59)
18. The claimant worked at the Galaxy Centre at Luton. His contractual working hours were 55 hours per week. The hours of work depended on the shift he was allocated. His gross monthly salary was £2,300, and net was £1,800 net. The bundle did not contain a copy of the claimant's contract of employment. However, the respondent did not dispute this information.
19. The bundle contained some documentation relating to the claimant's employment with the respondent. These are documents from the claimant's starter pack. In particular, one document signed by the claimant dated 15 January 2020, confirms his acknowledgment of the Employee Handbook, which expressly states, "*I have read the Employee Handbook and understand and accept that its contents form part of my Terms and Conditions of Employment. I will ensure that I remain aware of its contents..*". (p52)
20. The bundle contained a copy of the Employee Handbook. The version is dated 30 June 2022. (p101-149) This contained the Disciplinary Procedure. It expressly stated that "*this procedure is intended as a statement of Company policy and management guidelines and does not form part of an employee's contractual Terms and Conditions of employment.*"(p142).
21. In summary the procedure stated that no disciplinary action will be taken without a full investigation (this investigation meeting can be carried out without a formal invite as it is a "fact finding meeting"; employees may be suspended on full pay while investigations are carried out; the employee will be given reasonable notice of disciplinary hearings; entitled the employee to be accompanied at the hearing; allowed access to relevant evidence which will be made available in advance; and the employee will be warned of the

possible penalties which may be imposed. (p142)

22. In terms of gross misconduct, it stated that the Company reserves the right to dismiss without notice, (summary dismissal) if it is established that there has been an act of gross misconduct. Absence from work was cited as an act of gross misconduct.(p144)
23. The appeal procedure provided for notification of an appeal within 5 working days of the employee receiving the decision; the written notification should set out the grounds of appeal with any supporting evidence; and that the appeal shall be heard at an appeal meeting as soon as reasonably practicable by a Senior Manager, with the decision made in the appeal to be a final decision. (p144)
24. The tribunal was not provided with any documentary evidence to confirm the claimant's notice period. The claimant understood it to be one month, which in evidence he confirmed was based on his assumption. The respondent's position is that it was one week for every complete year, to a maximum of 12 weeks.
25. The claimant's workplace was at the Galaxy Centre in Luton. His Line Manager was Mr Onyeka H Ifesi (known as "Henry") The claimant worked with two other security officers namely Mr Anwar Shah (AS) and Mr Motaz Mahar.(MM) All three covered the security of the Centre, due to its size and safety reasons. The tribunal was told that the respondent was required by its client contractor to ensure that a minimum of two security officers were present on duty at all times.
26. The security officers working shifts were arranged in advance. It is common for the rotas to change, following swaps agreed by the officers themselves. The Centre required security from 05.00hrs to 01.00hrs daily.
27. It is a requirement the security officers complete the Daily Occurrence Report Book (DOR) each day to report all duties/incidents which occur throughout their shift. The security officers are also required to complete the sign in/out log sheet each time on duty to record their working hours. At the end of the log sheet, it states in bold black letters the following :-  
**"ALL EMPLOYEES MUST SIGN IN ARRIVAL AND ON DEPARTURE. THIS DOCUMENT IS USED FOR ACCOUNTING PURPOSES AND IT IS THEREFORE A DISCIPLINARY OFFENCE TO GIVE INACCURATE AND, MISLEADING OR FALSE DETAILS..... SUCH AN OFFENCE WILL BE VIEWED AS GROSS MISCONDUCT AND WILL USUALLY LEAD TO SUMMARY DISMISAL ...."** (p151)

#### Complaint- 27 April 2022

28. Following complaints received from AS & MM, about the claimant leaving the Centre (referred to as the "site") during working hours, and because the claimant ignored Henry's previous warnings not to leave the site during working hours without his approval, on 27 April 2022, Henry, sent an email to his Line Manager, Mr Nigel Jones, in which he stated, "May I formally report the persistent and deliberate absence from duties of the claimant ...". (p249-250). In summary, Henry reported that:

- (a) The claimant had secured employment as a Security Guard at Hong Buffet, a Chinese restaurant in the Arndale Centre, Luton which was 200 meters from the Galaxy Centre, and that his working hours at the Buffet were from 17.00hrs to 22.00hrs every Sunday. This working time clashes with his duties with the respondent hours of 17.00 hrs to 01.00hrs. Henry claimed the claimant had admitted to him, leaving his work station early to work at Hong Buffet.
- (b) On 17 April 2022 the claimant left the Galaxy Centre, whilst on duty, at 17.05hrs, and returned at 22.02 hrs.
- (c) On 24 April 2022, the claimant left at 16.57hrs and returned at 19.30hrs; then left at 19.57hrs and returned at 22.00hrs. These timings were recorded on the CCTV footage held at the Centre.
- (d) He had previously warned the claimant about this and that he would report him if this continued.
- (e) Also that the claimant employs intimidation to keep the other officers quiet; had heated quarrels with them, and that the claimant was putting the Centre at risk on a Sunday being a very busy day.

Investigation – 5 May 2022

- 29. On receipt of this email from Henry, Mr Nigel Jones decided to investigate the complaint. In cross examination, Mr Jones confirmed that prior to his meeting with the claimant, he viewed the CCTV footage and the Sign In/Out Log sheets for the 17th & 24 April 2022. (p152-154) He confirmed he did not speak to the security officers AS and MM, either before or after his meeting with the claimant, and neither did he check the Daily Occurrence Report (DOR) book. He accepted the contents of the complaint email from Henry.
- 30. On 5 May 2022, at 10.04am, Mr Jones met with the claimant to conduct an investigation meeting. The claimant was not given advance notice of this, as this was a fact finding meeting, and no notice is required to be given in accordance with its procedures. Mr Jones was accompanied by Henry. The meeting was recorded by Mr Jones, and at the end of the meeting a typed transcript was given to the claimant to read and sign, which he did to confirm that they were a true reflection of the investigation. (p70-73)
- 31. The transcribed notes confirm Mr Jones opened the meeting by informing the claimant the purpose of the meeting, namely “leaving site unauthorised during working hours”. In cross examination, the claimant accepted he understood fully the reason for this investigation.
- 32. Mr Jones questioned the claimant about his absences on 17<sup>th</sup>; 24<sup>th</sup> April and 1<sup>st</sup> May 2022 as reported by Henry. The claimant’s recorded replies are “*I don’t know*”, “*I went to see friends*”, and “*I can’t remember*”, The claimant said he felt victimised and complained that others were coming in late too. He complained “others were doing it including Henry”, “others do it too”. The claimant admitted Henry had previously warned him about leaving the site whilst on duty.

33. The claimant did not either deny or dispute leaving site during his working hours. At the end of the meeting the claimant was suspended from duty.
34. At this meeting Mr Jones did not question the claimant if he had another job at Hong Buffet as claimed by Henry. The respondent produced no evidence in support of this claim. In evidence the claimant denied having a job at the Hong Buffet.

Disciplinary Hearing – 10 May 2022

35. By letter dated 5 May 2022, the claimant was invited to a disciplinary meeting scheduled for 10 May at 10.00am with Mr Kola Shodalubi. The letter is stated to be from Miss Rann. (p74-75) In evidence, Miss Rann explained she was not the author of this letter. It was prepared and sent out by the respondent's HR employee. She did not approve or see the letter before it was sent to the claimant.
36. The letter is headed "Gross misconduct – Invitation to Disciplinary". The letter confirms the claimant's suspension, and the allegation being, "*Leaving site during working hours on 3 occasions*". The letter confirms the claimant's right to be accompanied and provide any written statement or information to be considered. It also states, "*Due consideration will be given to any factors or explanations which you raise when considering whether, if any, disciplinary sanctions are to be imposed*". A copy of the investigation notes were attached.
37. The claimant attended the scheduled hearing on his own. Mr Shodalubi took written contemporaneous notes. At the end of the meeting the claimant marked these with his initials to confirm his agreement to their content. (p76-77)
38. The hearing notes confirm Mr Shodalubi asked the claimant about leaving site on Sunday 1<sup>st</sup> May 2022 to go to the Hong Buffet. The claimant admitted he left site and told his colleague. He stated the reason for leaving, "*to meet a friend around town*". The claimant is asked, if he left during working hours, to which he replied, "*I don't know. I thought I was only covering the 10am-5pm. I said I will come back if you need me.*"
39. Mr Shodalubi in the claimant's presence called Frankie to check the entry on the shift booking system (Gallinet) for that day. It was confirmed the system recorded the claimant booking on shift 17.06 hrs and there was no record of him signing out at the end of the shift. The claimant confirmed that any time he left the site he informed his colleagues. When asked the question, if he should be leaving site during working hours, the claimant replies, "*I'm not sure everyone does it.*" The claimant did request to see the DOR book, which Mr Shodalubi refused without explanation.
40. The claimant in his replies to further questions about his leaving site during his shift, replied, "*I may have returned to the site a couple of times but not sure when*", and "*I said I will pop back to see if everything is okay but I can't do the 5 hours*".

41. When asked, why did he come back to do another 5 hour shift, if he could not do the further shift, after he finished his shift t 17.00hrs. The claimant replied, *“not sure, its two shifts. My colleagues knows about me leaving the site and I gave them money. The two guys on shifts gets money from me”*. The claimant further states, that *“Henry puts me down for the full shift and I pay Mo and Anwar money for the late shift”*; on two different occasions these Sunday shifts went to Shaz account while I did some of the shift”
42. Mr Shodalubi confirmed that his review of the CCTV footage for the shift on Sunday 1 May 2022, showed the claimant leaving site at 5pm, then he returned later a couple of times to stay on site for 12 minutes, and left again. (p255-256) This showed he was on shift that day. The claimant replied *“I don't know if I was doing them a favour; doing that was suggested by my team and Henry know about this.”* The claimant further stated *“I did cover some of the Sunday shifts in April and Shaz got paid for two directly. I swap my shift with Motaz, so I worked Monday/Wednesday and he works Saturday/Sunday.* The claimant then claimed, *“I was leaving site with consent and Henry knows about that.”* In evidence, the claimant did not dispute the CCTV footage stills which showed his movements as reported by Mr Shodalubi. (p255-256)
43. Mr Shodalubi confirmed he adjourned the meeting for a short period to consider his decision. He returned to notify the claimant that he decided to summarily dismiss him. He told him, *“Following investigation, CCTV footage and meeting today confirmed to me that you have been leaving site prior to your finish time on several occasions especially on Sunday shifts. You have been warned verbally by your line Manager but you have refused to adhere to instructions. These are classified as gross misconduct according to Employee Handbook for leaving site and putting site at risk. Based on the gravity of the misconduct and regular practice at work, I would have to end your employment with Red Support Services today 10 May 2022.* “ The claimant was informed of his right of appeal to be sent to Miss Rann within 7 days.
44. The claimant replied, *“I do not agree with the assessment you made. I feel the judgment was pre-determined before the meeting and biased to protect the Manager on site and the other staff.”*
45. The claimant's summary dismissal was confirmed in writing by letter dated 12 May 2022. (p79) This letter was sent in the name of Miss V Rann. In evidence Miss Rann clarified that she was not the author of this letter and had not seen the letter before it was sent. The letter was sent by their appointed HR employee.
46. In evidence, the claimant accepted that the CCTV footage stills for the dates of 17<sup>th</sup> & 24<sup>th</sup> April 2022 and 1st May 2022, showed his image for the times he returned to the site. (p254-256)

#### Appeal

47. The claimant appealed his dismissal, within the 7 day timeline by letter dated 16 May 2022 addressed to Miss Rann. (p80-81) The basis of the



claimant's appeal was that;

- (a) he had advised his Line Manger Henry that he was unable to accommodate the 8 hour shift on Saturday and Sunday;
- (b) that his shifts had changed due to Covid 19 pandemic from days' to night shifts;
- (c) he had arranged a straight swap for night shifts for Monday and Wednesday instead of Saturday and Sunday;
- (d) he had explained this change to his Line Manager and he had constructive knowledge of what was happening with regard to the change of shift patterns;
- (e) the investigation and enquiry was not sufficient as if statements had been provided from other workers for the disciplinary, the this matter would have been clarified;
- (f) He has no disciplinary sanctions on his record, and that dismissal was not proportionate and therefore unfair after 20 years of service.

48. Miss Rann was the appointed person to deal with the appeal.

49. By email sent on 16 May 2022, the claimant requested copies of the DOR book for the shifts entries in question, so to submit his appeal. The requested copies were sent by email on 18 May 2022. (p84) In evidence Miss Rann said she verbally extended the time for the claimant to send his amended appeal by 7 days.

50. On 30 May 2022, Miss Rann wrote to the claimant closing his appeal. The letter stated, *"On the 18<sup>th</sup> May 2022 we extended your Appeal by 7 days to review the signing in and out book, as requested by you. This was emailed by myself directly to you on the 18<sup>th</sup> May 2022 at 15.43pm. As we have not heard anything within the given time frame, your opportunity to appeal has now been closed. Should you wish to discuss this further, or do not fully understand this letter please do not hesitate to contact myself ...."*

51. On 1 June 2022, the claimant contacted Miss Rann by telephone about his appeal. In evidence, Miss Rann explained they had an in-depth conversation about the dismissal and his appeal. Following this conversation the claimant submitted a detailed email with his points of appeal. (p98-90) In summary, the claimant stated, on 1 May 2022, he was not rostered to do the 10.00-23.00hrs shift, but as a favour he agreed to cover the 10.00–17.00hrs shift. He claimed that he was not rostered on the Saturday & Sunday shifts for which he was questioned and dismissed, as he had swapped shifts with Mr Mahir, who was covering those shifts. The claimant further repeated his claim that he was not given a fair hearing by Mr Shodalubi who had pre-determined the outcome, and that he had been singled out and victimised.

52. Miss Rann did not hold a face to face appeal meeting with the clamant. In cross examination she accepted this and denied that not holding an appeal meeting was in breach of the respondent's disciplinary procedure. She maintained she had dealt with the appeal professionally and covered the points of appeal in their two in-depth telephone calls. She did not take notes of these telephone discussions as on one occasion she was travelling, and the other occasion she was on holiday.

53. Miss Rann confirmed she reviewed the entries in the DOR book, signing in/out log sheets; the contemporaneous notes of the investigation and disciplinary meetings and viewed the CCTV footage which showed the claimant's movements on the said dates and times as recorded. In addition, she had sight of statements from AS, MM & Henry, which were obtained after the claimant's dismissal and did not form part of the investigation and disciplinary meetings. These were not disclosed to the claimant but formed part of the respondent's disclosure in these proceedings.
54. Miss Rann rejected the claimant's appeal. In her letter dismissing the appeal, she made the finding that the claimant's normal shift on a Saturday & Sunday was 17.00hrs-01.00hrs. However, he swapped this with another colleague to work from 10.00hrs-23.00hrs. On Sunday 1st May, the claimant was rostered to work from 10.00hrs to 23.00hrs, and the recorded CCTV footage showed, his leaving site as soon as he arrived, and returning at 11.27hrs; leaving at 16.57hrs returning at 19.16hrs, then leaving at 19.28hrs; returning at 22.07hrs and then leaving at 22.26hrs 34 minutes before his finish time at 23.00hrs. Further, Miss Rann concluded that the claimant had been previously warned by Henry not to leave the site during working hours, and that he admitted to this warning to Mr Jones at the investigation meeting. (p88-89)

### **Relevant Law**

55. **Section 98(1) and (2) of ERA** provide that:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show;  
(a) the reason (or, if more than one, the principal reason) for the dismissal;  
and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -(b) relates to the conduct of the employee."

- Section 98(4) of ERA** provides that:

"(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and  
(b) shall be determined in accordance with equity and the substantial merits of the case."

56. In conduct cases the tribunal must have regard to the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379** EAT, namely:  
(i) did the employer believe that the employee was guilty of misconduct;  
(ii) did the employer have reasonable grounds for that belief;  
(iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances.

57. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.
58. It was held in the case of **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.
- 59 **In Shrestha v Genesis Housing Association Ltd [2015] EWCA 94** it was made clear that the investigation should be looked at as a whole when assessing the question of reasonableness. I remind myself that it is not for the tribunal to substitute its own view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT**).
60. In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether, due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals should consider the procedural issues together with the reason for dismissal. The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.
61. The ACAS Code of Practice :Disciplinary and Grievance Procedures (2015) ('the Code') which tribunals are required to take into account when considering relevant cases states, at Paragraph 5 that 'It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of a investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing. 'It also says that in misconduct cases ,where practicable ,different people should carry out the investigation and disciplinary hearings. Paragraph 24 says that 'Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct .These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.' It also states at Paragraph 27 that in relation to appeals that any appeal 'should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.'

### Wrongful dismissal

62. **Section 3(2) ERA and Article 3 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623** gives the Tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.
63. Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract. The employer must show that the employee behaved in such a way as to fundamentally undermine the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract). The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence (a serious dereliction of duty) which undermined trust and confidence.
64. In accordance with **s86 ERA**, employees are entitled to one week's notice for each complete year of service unless dismissed for gross misconduct. If an employee of 18 proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

### Conclusions

65. I have applied the relevant law to the findings of fact to determine the issues, and have reached the following conclusions.

#### What was the principal reason for dismissal

66. The respondent has admitted dismissing the claimant on the grounds of conduct.
67. I conclude that the respondent has shown the principal reason for the claimant's dismissal, namely conduct which is a potentially fair reason falling within s98(2)(b) ERA. I find that Mr Shodalubi, on the basis of the investigations carried out; the documentary evidence and the CCTV footage available, was satisfied of the claimant's misconduct.

#### Reasonable grounds for belief

68. I conclude that the claimant at the investigation and disciplinary hearings admitted leaving site during working hours without approval, and he did not dispute the CCTV footage evidence. His reasons advanced at the disciplinary and subsequent appeal hearing varied from either he was not rostered to do the shift; he had swapped his shifts with Mr Mahar as he could not work after 17.00hrs; that he was doing a favour to cover the 10.00hrs to 17.00hrs; that Henry was aware of his leaving as he had given his consent; and that he was paying his colleagues monies for covering his late shift. Mr Jones and Mr Shodalubi, were entitled to reject these assertions on the basis of the entries in the DOR book which recorded the claimant's rostered shifts for the days in question; the signing in/out log sheets which confirmed his signing in (although they were not all complete, despite it was his responsibility to

complete) the undisputed CCTV footage; and his admission at the investigation meeting that he had previously been warned by Henry for leaving site during working hours without authorization.

Reasonable investigation and procedure

69. In assessing the fairness of the dismissal, I had regard to requirements in the Burchell test (Para 53 above). I considered the initial investigation. The onus is on the respondent to carry out as much investigation as is reasonable before deciding whether dismissal is a reasonable response in the circumstances. The investigation need not be to the standard of a police forensic investigation but must be a reasonable one. On the facts, I am satisfied Mr Jones had carried out a reasonable investigation for the purposes of interviewing the claimant. In cross examination, Mr Jones was criticised for not checking the rota sheets/records to ascertain the claimant's actual working hours for the days in question. That criticism was unfair because at the investigation meeting, the claimant did not question his working shifts. The issue of his working hours was first raised at the disciplinary. As Mr Jones said in cross examination, at that time he had no reason to believe that the information about the claimant working shifts for the days in question were not correct or would be challenged by the claimant.
70. I am also satisfied that Mr Shodalubi, before dismissing the claimant had made reasonable enquiries about the claimant's working shifts and reviewed the documentation and CCTV footage before making the decision to dismiss him. I accept the respondent could have considered interviewing and obtaining written statements from AS and MM before dismissing the claimant. However, I am not convinced it would have made any difference, given that the evidence before the respondent was sufficient at that time to consider dismissal.
71. I therefore conclude looking at the investigation as a whole it was within the range of reasonable responses.
72. In terms of the procedure followed, I am satisfied from the outset the claimant was made aware of the basis of the complaint raised by Henry; that he understood the reason for the investigation and disciplinary action; he was given full and fair opportunity to make his representations; he understood fully the seriousness of the matter and he was warned he may face dismissal; was given the right to be accompanied and afforded the right of appeal following his dismissal.
73. I do find that the respondent could have disclosed to the claimant the DOR book and copies of the entries in the log in/out sheets and the CCTV stills in advance of the disciplinary. However, I do not consider this to be material defect as it did not cause any unfairness to the claimant or deny him a fair hearing. Full discussions were held about this information at the disciplinary hearing. Also Miss Rann did disclose the DOR book to the claimant for the purposes of the appeal.
74. I do find the respondent's decision not to hold an appeal meeting to be a technical breach of its own procedures. However, Miss Rann did decide to conduct an appeal, having first decided to close the appeal. The claimant

did not himself request a face to face meeting which he could have insisted upon but did not do. I am satisfied from hearing Miss Rann's evidence she did give the claimant the opportunity to submit his amended grounds of appeal, which he did, and that she did carefully address the appeal by reviewing the facts and evidence, before she decided to uphold the dismissal.

75. I therefore conclude that the overall procedure adopted by the respondent was fair.

**Dismissal within the range of reasonable responses**

76. In accordance with the respondent's Disciplinary rules, unauthorised absence from work is a gross misconduct offence. In evidence, the claimant accepted that leaving work during working hours without approval is a disciplinary offence for which an employee could be dismissed. He accepted the seriousness and consequence of this offence.

77. On the facts, I find that dismissal fell within the range of options available to a reasonable employer, and that the dismissal fell within the band of reasonable responses in the circumstances. I come to this conclusion for the following reasons. The claimant was a senior security officer with some 20 years' experience in the role. He was fully aware of the gravity and consequences of the offence and the safety risk he caused by his conduct. He had been previously warned by Henry but ignored the warnings, in breach of the respondent's rules of conduct.

**Wrongful dismissal**

78. With regard to the wrongful dismissal claim, I have to determine whether or not, and to what extent, the claimant was in breach of contract by his conduct. I am satisfied the claimant was in breach of contract by leaving the site during his working hours without authorisation. The claimant admitted to this conduct as well as there is clear evidence adduced by the respondent to show the breach by the claimant. This proven conduct fundamentally undermined the employment contract. Accordingly, his claim fails.

79. In conclusion, the Claimant's claims fail and are therefore dismissed.

**Employment Judge Bansal**  
**Date: 14 August 2023**

Judgment sent to the parties on  
15 August 2023

.....  
.....  
For the Tribunal office