EMPLOYMENT TRIBUNALS

Claimant: Mr D Forster

Respondent: Mitie Limited

Heard at: London South Employment Tribunal, by video.
On: 6 & 7 January 2025

Before: Employment Judge E Macdonald

Representation
Claimant: Mr Forster (litigant in person)
Respondent: Ms Duncan-Brown of Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed.

2. The claim for holiday pay succeeds in part: the Claimant is entitled to bepaid in respect of 20 days (four weeks) accrued but untaken annual leave under Regulations 13 & 14 Working Time Regulations 1998, but not in respect of leave entitlement under Regulation 13A of the 1998 Regulations.

3. The claim for wrongful dismissal (notice pay) succeeds.

4. The claim for a redundancy payment does not succeed.

REASONS

Introduction

1. By a Form ET1 received on 29 February 2024 the Claimant brought a complaint of unfair dismissal; a claim for a redundancy payment; and claims for notice pay and holiday pay. His case, in essence, was that he had been

dismissed following a disciplinary process where the real reason for his dismissal was redundancy. His case was that the dismissal was effectively a cost-saving exercise. The Respondent resisted the complaints and said in terms that the Claimant had been fairly dismissed by reason of gross misconduct.

2. At the start of the hearing, it became apparent that an updated bundle had been provided to the Tribunal, but I had not been provided with it. There may have been issues with the Document Upload Centre. Similarly, there were several witness statements which had been prepared but which had not made their way to me in advance of the hearing. They were the statements of Mr Marcus Green, the investigating officer; Mr Adrian Jones, the dismissing officer; Ms Jane Summerfield, the appeal officer; and Mr Ciaran O'Donnell, who was the Claimant's line manager and who spoke to the redundancy process and the issue of holiday pay. We were able to resolve this issue and I took time to read the statements.

3. A further issue was that the Claimant, due to his living circumstances, was located in a hotel lobby. Having canvassed the parties' views and considered the overriding objective I was willing – although with considerable hesitation – to proceed. The Claimant was sufficiently uninterrupted to enable participation in the hearing and I could see that he was not being overlooked; he was using a headset.

4. As indicated above, I was provided with witness statements on behalf of, and heard oral evidence from, the investigating officer, Mr Marcus Green; the Claimant's line manager, Mr Ciaran O'Donnell; the dismissing officer, Mr Adrian Jones; and the appeal officer, Ms Jane Summerfield. I also had a witness statement prepared by the Claimant and heard oral evidence from the Claimant himself. There was a hearing bundle of 396 pages and a supplementary bundle of 24 pages.

5. Another issue arose mid-afternoon on Day 1: the Claimant did not have access to the updated bundle. We adjourned briefly to resolve this. There were further technical issues on the morning of May 2 and the process of evidence over-ran substantially. Closing submissions ended at around 3.15pm on Day 2, and I did not consider it fair to the parties to attempt to reach and deliver a decision in the remaining time.

6. I was grateful to Ms Duncan-Brown for her assistance; and to the Claimant for the clear way in which he advanced his case.

7. I made the following findings of fact on the balance of probabilities and having considered the evidence in the round.

Findings

Background

8. The Claimant transferred by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the Respondent on or around 1 September 2022. Prior to that date he had been employed by G4S. He had been employed on site at the Bentall Centre for some 22 years, and for the last 6 years he had worked as Security Manager. That included being involved in the Duty Manager rota. The Duty Manager is responsible for ensuring the health and safety of people on site, and also for taking charge of and managing any incidents which might occur.

9. Mitie hold a contract with Jones Land LaSalle (***"JLL"***) to provide security for a set of shopping centres within the London Region. One of those centres is the Bentall Centre.

10. During his employment, and specifically in the leave year prior to the TUPE transfer, the Claimant accrued holiday entitlement with G4S which he had not taken by the point of the TUPE transfer on or around 1 September 2022. The G4S holiday year ran from January – December whereas the holiday year operated by Mitie ran from April – March. The proposed date for the TUPE transfer changed on multiple occasions, but G4S would not permit members of staff to book holiday due to the impending transfer. Then, following the TUPE transfer in September 2022 a new Curzon cinema opened on site: this effectively prevented the Claimant from booking annual leave around that time, then the Claimant was prevented from taking annual leave around the Christmas period. The Claimant had a conversation with his line manager, Ian Hannon, who agreed that he would not be able to take his annual leave in the remainder of the leave year and told the Claimant (in terms) that being paid in lieu would be an option.

11. Further, in January – February 2023 the Claimant was absent from work for a period of 5 – 6 weeks as he was signed off sick due to a leg operation.

12. For completeness, I note that the contractual holiday provision in the Claimant's contract of employment refers only to statutory entitlement and explains that holiday entitlement is the legal minimum entitlement, but goes on to say that in addition to statutory entitlement there is additional servicerelated holiday for each completed year of service at the beginning of the holiday year up to a maximum of 5 additional days.

13. As of 6 March 2023, the Claimant had accrued an entitlement of 25 days. There was an email from Mr Hannon recording the reported difficulties which the Claimant had had in booking leave, confirming the amount outstanding, and saying:

> ". . . [c]ould we . . . perhaps carry over some of Dean's or even pay some of these days?"

14. In 2023 the Claimant's role was at risk of redundancy. A redundancy consultation process had begun but had not concluded by the time that the Claimant was dismissed. For the reasons set out below, I do not need to go into further detail on this point.

The events of 13 July 2023

15. On 13 July 2023 an incident occurred in the Bentall Centre when a lift malfunctioned. This was one of the "scenic" lifts, with glass sides. Regrettably, passengers were in the lift and were unable to leave. This was described as a "lift entrapment" situation. Those trapped included an infant.

16. At 12:14 an individual trapped in the lift pressed the alarm; there was no bell, and no answer. The intercom was not functional.

17. At 12.20 a security supervisor, Nasser Afify, noticed trapped persons banging on the lift door.

18. At 12.23 "Control" were informed of the entrapment. "Control" consisted of two Control Supervisors (Stephen Murphy and Jordan Kelly-Smith), and Controllers reporting to them. The Control Supervisors were line managed by Paul Howes, Compliance Manager.

19. At 12.29 a call-out was made, with reference number #2242640, through the JLL helpdesk with "Crest", the engineers. Mr Green in his evidence explained that he reviewed CCTV footage and saw the Claimant at the lift also at 12.29.

20. At around 12.45pm an individual by the name of Ben Phelan called John Barnard (Contract Manager at the Bentall Centre) to confirm that the engineer was en route.

21. The Claimant says that he received a phone call from the Mr Afify asking him to attend the lift because there were customers trapped in the lift and they were asking to speak to a manager. I find that this would have been at around or very shortly after 12.20.

22. He had not previously been aware that customers were trapped. He made his way to the lift. On arrival, he saw that the lift was stuck between floors.

23. He saw that Mr Afify was talking to the customers through open doors; Mr Afify said that he had to open the doors to communicate with the customers because the intercom was not working.

24. The Claimant then asked whether the customers were OK; they explained that they wanted to know how long it was going to take for them to be released. I find that this was around 12.29: that is consistent with Mr Green's review of the CCTV footage.

25. The Claimant therefore called Control on the radio to ask what ETA had been provided by Crest. Control was unable to provide an ETA; the Claimant explained that Mr Afify would stay with the customers while he, the Claimant, went to Control to get an ETA. He went to Control, called Crest, and asked for a call back. I find that this was shortly after 12:45, i.e. in the region of 12:50 – 12:55. I make that finding because it was not until 12:45 that it was confirmed that the engineers were en route. That is also consistent with the Claimant's account in oral evidence.

26. Thereafter, the Claimant received a call saying that a mother and her son had fallen on one of the escalators; the Claimant started moving to attend the mother and son, and while he was doing so at 13.09 Crest called the Claimant on his mobile phone and provided an ETA of 20-30 minutes. The Claimant relayed this message to Mr Afify and confirmed this with Control.

27. The Claimant subsequently received a call from Mr Afify asking for some bottles of water to be made available for when the customers were released from the lift (it was a hot day, and the elevator was clearly uncomfortably warm). The Claimant tried to get water from reception but reception was not able to help. Reception appeared unaware of the incident. The Claimant then left the centre to get water from Waitrose (across the road from the Bentall Centre) at his own expense.

28. The engineer arrived at 13:47.

29. Upon returning from Waitrose the Claimant saw that the lift engineer had arrived on site. He spoke to the engineer who explained that he would need to go to the lift motor room to try to reset the lift. The Claimant waited with the customers at the lift while the engineer went with Mr Afify to the lift motor room.

30. While the Claimant was waiting, he received a call explaining that the fire brigade had arrived on site (this had happened at around 13:48). They had been called by one of the trapped customers following a suggestion made by the Claimant.

31. In due course the Mr Afify relieved the Claimant, and the Claimant went with the fire brigade to try to locate the engineer. However, as the Claimant entered the lower ground floor customer area of the Mall he slipped on a spillage outside McDonald's. He called Control and asked for a cleaner. This was a heavy footfall area with a realistic chance of a further accident happening if the spill were not cleaned up.

32. The issue with the lift was resolved at 1.55pm and the customers were released. At this time the Claimant was still waiting by the spill.

33. As the Claimant waited for a cleaner to attend, Mr Afify reported over the radio that the customers had been released and would like to speak to the manager. The Claimant asked Mr Afify to apologise to the customers; to say that he would be with them as soon as possible; but that if they did not wish to wait, then Mr Afify could provide the Centre's email address. In due course the cleaners arrived, and the Claimant felt able to leave, but by this time the Centre Director ("Tina") had spoken with the customers, and the customers had left.

34. Unfortunately, the lift was not shut down, nor was it cordoned off (at any rate not above ground floor level). "Out of order" signs had not been put on the lift doors. In due course further people entered the lift and became stuck. The documentary evidence records that at 14:05 Control noticed that the lift in question was moving up and down; the Claimant had reported that there were people in the lift; the Claimant then located the engineer and asked him to stop the lift and let the second group of people out.

The client raises concerns.

35. The following day, 14 July 2023, representatives of Benthall (recorded as Tina Poly Mapp, centre director; and Marcus March, deputy centre director), met with Ciaran O'Donnell (account manager) and Marcus Green (area support manager); they expressed concerns, in particular relating to the following (I quote selectively from the notes of that meeting):

> Lack of escalation to Centre Management or Mitie
>
> "Duty Manager didn't take ownership of the incident or seem to know what to do"?
>
> Security team had to be told what to do by Centre Management and were not acting on what they should know or own initiative.
>
> - No common sense applied by Duty Manager or security team

- Centre Management have no confidence in Duty Manager orsecurity team to safely manage incidents

- No confidence in Security Manager (Dean) as Duty Manager – Tryand establish what additional training he has had or sign off to become Duty Manager

Concern that the incident did not show any consideration from the security team for **People** (lives at risk, particularly that of the infant and lack of any first aid. Lift not cordoned off in 'Observation Mode' could have resulted in injury or death as it was not level or safe). **Reputation –** Situation and the manner in which it was (wasn't) dealt with could impact massively on the reputation of the centre. **Building** – Lift was not cordoned off or left in a safe state while in observation mode. This also shows that security did not properly engage with or work in conjunction with the engineer.

Investigation

36. The issue was investigated by Mr Marcus Green. He reviewed the incident reports; checked various procedural documents, being the Assignment Instructions, standard operating procedures, emergency procedures, "Toolbox Talks", and risk assessments. He viewed CCTV of the incident; and conducted meetings with the Claimant and with Mr Afify. The investigation spanned 18 & 19 July 2023.

37. Mr Green produced an investigation report in which he found that the incident had not been managed effectively. He was concerned that the Claimant had prioritised the water spill over the welfare and/or aftercare of the customers. He considered that there had been a lack of urgency and escalation to Crest, the engineers. The Claimant had not produced an incident report, nor did he produce a report after having been asked to do so by Mr Green.

Disciplinary hearing and dismissal

38. Two disciplinary hearings were carried out by Mr Adrian Jones, the first on 12 September 2023 and the second on 27 September 2023. The reason for the second hearing was that the Claimant had raised issues relating to the Respondent's policies and procedures which Mr Jones wanted to consider and then discuss with the Claimant. Mr Jones in due course decided to dismiss the Claimant and the decision was communicated by letter dated 4 October 2023.

39. That letter contained the following text:

- Serious breach of health and safety rules / bringing the company into serious disrepute. Serious breach of trust and confidence.

- Specifically, it is alleged that on 19th July 2023 your Failure as a Duty Manager / Security on the 13th of July 2023 to effectively manage a lift entrapment, resulting in three adult females, one adult male, and

  a 6-month-old baby being entrapped for 1hr and 40 minutes in one of the glass centre lifts.

- Specifically, it is alleged that you have breached the following procedures:

- Escalation Procedure – failure to escalate the incident to the centre management team, or Crest (Lift Engineers) in a timely fashion.

- Health and Safety Procedure – failure to intervene when the lift outer doors were opened by your mall supervisor.

- Duty of care – failure to follow up when the passengers were released from the lift when they asked to speak to the Duty Manager.

- Reporting Procedure – failure to report the incident to either the client or Mitie.

Specifically, the reason for this decision is:

- Serious Breach of Health and Safety Rules, Failure to intervene when the lift outer doors were opened by your mall supervisor and failure to ensure that the power was turned off along with not using the HS barriers to secure the area which could have caused harm to other customers and the persons trapped inside the lift.

- Serious breach of trust and confidence, based on the lack of leadership that you have demonstrated throughout this incident.

- Bringing the company into serious disrepute with the client by the way this incident was managed by yourself.

40. The Claimant appealed against the decision by letter dated 6 October 2023. The appeal hearing was held on 3 November 2023 and the appeal officer

was Ms Jane Summerfield. The appeal was not upheld: the outcome was communicated by letter dated 16 November 2023.

Law

41. The Employment Rights Act 1996 provides insofar as is material as follows:

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part(in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General.

(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 othersubstantial 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—

(a) relates to the capability or qualifications of the employee for performingwork of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[. . .]

(c) is that the employee was redundant

[. . .]

(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 andadministrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial meritsof the case.

42. The inquiry under s 98(4) of the 1996 Act is governed by the test in **British Home Stores Ltd v Burchell (Note) [1980] ICR 303.** The Tribunal must be satisfied that the employer believed the employee was guilty of misconduct; that it had reasonable grounds to sustain that belief; and that prior to forming its belief it had carried out a reasonable investigation. The Tribunal must also consider whether dismissal (given the conduct found) was within the band of reasonable responses.

43. The Tribunal must not substitute its view for that of the employer but must apply a "band of reasonable responses" approach: **British Leyland UK v Swift [1981] IRLR 91,** i.e. must ask whether the employer's decision was one which a reasonable employer might have adopted.

44. The "band of reasonable responses" test applies at all stages of the inquiry: **Foley v Post Office [2000] IRLR 827.**

45. What constitutes gross misconduct is a mixed question of fact and law. Gross misconduct will involve either deliberate wrongdoing or gross negligence: **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09.** The question is whether the negligent dereliction of duty (if that is the finding) is so grave and weighty as to amount to a justification for summary dismissal.

46. The Tribunal must focus on what the employer made of the evidence, based on the information before it, not substituting its own view of the appropriate sanction but applying the standards of the hypothetical reasonable employer in considering the range of options that were reasonably open to it: **St Mungo's Community Housing Association v Finnerty [2022] EAT 117.**

47. There is an implied term in all employment contracts that neither party will, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence:

Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606.

48. I was also referred by the Respondent to **Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22**, a case in which the claimant had been employed by Sainsbury's for 26 years before being summarily dismissed for gross misconduct. The alleged misconduct was that a human resources partner had sent an inappropriate email by which he sought deliberately to manipulate "Talkback" scores; the claimant was aware of this but had not taken adequate steps to rectify the situation. The judge in that case had been entitled to find that, given the significance placed by the company on "Talkback", this was a serious dereliction of duty, and hence could amount to gross misconduct because it undermined trust and confidence.

49. If a party has behaved in a manner likely to damage the relationship of trust and confidence, that breach will be so fundamental that it inevitably goes to the root of the contract: **Johnson v Unisys Ltd [2001] UKHL 13, Morrow v Safeway Stores Plc [2002] IRLR 9.**

50. Statutory holiday entitlement is governed by Regulations 13 & 13A Working Time Regulations 1998. Payment upon termination is governed by Regulation 14.

51. Regulation 13(1) provides for four weeks' leave entitlement in any given leave year. One of the conditions under which that leave can be carried over is where a worker has been unable to take some or all of it as a result of taking a period of sick leave; or where the employer has failed to ensure that the employee has a reasonable opportunity to take it, or failed to inform them of the consequences of not taking it: Regulation 13(155 – 13(17) WTR 1998.

52. Regulation 13A provides for 1.6 weeks' leave entitlement ("additional leave") in any given leave year and may be carried forward in more limited circumstances, i.e. pursuant to a "relevant agreement" (as defined in Regulation 2 WTR 1998) or where as a result of taking a period of statutory leave in any leave year, a worker is unable to take some or all of the annual leave to which the worker is entitled: Regulation 13A(7) & Regulation 13A(7A)

53. Regulation 2 WTR 1998 provides that *"relevant agreement"* , in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer.

54. "Statutory leave" is defined as any leave under Part 8 Employment Rights Act 1996. Insofar as is relevant, it does not include sick leave.

Conclusion

55. The reason for the Claimant's dismissal was as set out in Mr Jones' witness statement, and included the following elements in particular:

(1) He had failed to intervene when the lift outer doors were opened by Mr Afify and had failed to ensure that the power was turned off.

(2) He was fully responsible for the actions of his supervisor. He (the Claimant) should have taken immediate action upon seeing the doors open: he should have directed that the doors be shut immediately and checked that the power was off. The combination of those failures posed a risk of serious injury or fatality to those in the lift.

(3) He had not used the health and safety barriers to secure the area after the incident, nor had he put "out of order" signs on the lift straight away. Because of this failure, other customers got into the lift and were trapped. As the Duty Manager, he was responsible for making sure that everyone at the Bentall Centre was safe.

(4) He had brought Mitie into disrepute with the client. This was the main factor in the dismissal.

(5) He had breached the escalation procedure by failing to escalate the incident to the centre management team or Crest in a timely fashion.

(6) He had failed in his duty of care by failing to follow up when the passengers were released from the lift and asked to speak to the Claimant, and

(7) He had breached the reporting procedure by failing to report the incident to either Mitie or Mitie's client.

56. This reason was a reason related to conduct and is therefore a potentially fair reason for dismissal. I therefore apply the **Burchell** test set out above.

Whether the dismissing officer had a genuine belief in the conduct complained of

57. I find that the dismissing officer, Mr Jones, held a genuine belief in the conduct complained of.

Whether the dismissing officer had reasonable grounds for that belief

58. I conclude that there were reasonable grounds on which Mr Jones arrived at this belief. Although the Claimant was not the person who opened the lift doors, it was clear from the investigation that the Claimant had attended on site; the respondent's procedures are clear that lift doors must not be opened unless the power is off; the Claimant had not checked this point. Neither barriers nor signage had been put in place, with the result that further customers entered the lift and became stuck. The client was clearly unhappy and there was a reasonable basis for Mr Jones to hold that the Claimant had brought Mitie into disrepute. In his investigation interview (Bundle p 178) the Claimant accepted that the client should have been made aware. There was no dispute that the Claimant had not in fact spoken

    to the customers (albeit the Claimant provided an explanation for this), and the Claimant accepted that an incident report had not been completed. There were also reasonable grounds to think that the combination of failures posed a risk of serious injury or fatality.

59. As to the failure to escalate to Crest in a timely fashion: Mr Jones had reasonable grounds to believe that the Claimant had attended at 12:29 (this was Mr Green's report having viewed the CCTV; that a callout had been made at 12:29 to the engineers; that at 12:45 it was confirmed that the engineers were en route; and that at 13:09 the engineers had provided an ETA of 20 – 30 minutes. The claimant had explained that between 12:29 and 13:09 he had attended Control in order to chase up Crest (to identify an ETA). I do not accept that Mr Jones had reasonable grounds to believe that the Claimant failed to escalate the matter to Crest in a timely fashion, even applying the "band of reasonable responses" test to this issue.

60. The Claimant complains that the standard operating procedure for lift entrapments was re-written after the incident and that this indicates that the procedure must have contained an error. That in my view is incorrect: Mr Green said, and I accept, that no changes were made as a direct result of the incident.

Whether that belief was arrived at following a reasonable investigation

61. I conclude that the investigation was clearly reasonable, and well within the band of reasonable responses.

62. The Claimant says that the investigation felt like an interrogation and that the questions were leading. I accept that the Claimant may have felt that he was being interrogated but there was nothing about the manner of the investigation, or the way in which questions were asked, which resulted in unfairness. The investigation was not unreasonable.

63. The Claimant says that he was not given a copy of the notes to proof-read or sign. There was some delay in providing the notes, but they were in due course provided. This was not unreasonable.

64. The Claimant complains about his suspension. I accept Mr Green's evidence that the suspension was necessary to protect the business. The suspension did not render the investigation unfair, nor did it render the investigation unreasonable.

65. The Claimant also says that he was not given a fair disciplinary hearing. I do not agree: the manner in which the disciplinary hearing was conducted fell within the band of reasonable responses.

Whether the dismissal was fair in all the circumstances

66. I deal first with the specific challenges which the Claimant raises to the fairness of the dismissal itself.

67. First, the Claimant alleges that there had been a lack of training and that nobody from the security team had been trained or was certified to deal with lift entrapments. I consider it likely that there was a need for re-training: that was one of the recommendations made by Mr Green in the investigation summary document. However, I also consider that, given the Claimant's role, he could and should have familiarised himself with the written procedures and policies.

68. Second, the Claimant says that the policies are contradictory, leaving room for error. There is some force to that observation: in particular, there is some variation regarding whether the fire brigade should be called, with one Mitie document in particular stating that the Fire Service

> ". . . now has a policy of not attending shut in lifts unless it is an emergency so a judgement call must be made before requesting their attendance" (Bundle p 91)

while what appears to be an earlier policy (Bundle p 243) specified that in the case of a lift entrapment,

> "[i]f after 1.5 hours and still no attendance from Create (*sic*) engineer, then control is to call the fire brigade for assistance . . .Control to ask lift contractor of *(sic*) an ETA, if over 1 hour the fire service is to be called via 999 . . ."

69. That is relevant insofar as the Claimant's failure to call the fire brigade was relied upon in the disciplinary hearing: it would not be within the band of reasonable responses to blame the Claimant for this failure, because the responsibility for calling the fire brigade – at least under the policy relied upon – rests with Control, rather than the Duty Manager. However, this did not play a significant role in the dismissal.

70. What is consistent across the policies is the requirement to confirm that the power to the lifts is off before the doors to the lifts are opened. The reason behind this is clear and, in my view, obvious: if the power is not off, then the lift might move, and that poses a real risk of very serious injury.

71. Third, the Claimant says that Mr Jones is a friend of the client who raised the complaint. I do not consider that this prevented Mr Jones from conducting a fair hearing.

72. Fourth, the Claimant raises a complaint relating to the delay in holding a disciplinary hearing. The disciplinary hearing was rescheduled several times due to the unavailability of the Claimant's representative; took place initially on 12 September 2023; and was then adjourned to 27 September 2023 in order to allow Mr Jones to investigate what the Claimant had said about policies and procedures, and then to discuss his review with the Claimant. I do not consider that this gave rise to any unfairness.

73. I have also borne in mind the fact that the Claimant had been employed for some 22 years and had worked as a Security Manager for 6 of those years. His personnel record was clean. He was not subject to any warnings. There was some mitigation available for his actions. He was not the individual who had in fact opened the lift doors. He was not the individual who was present when the lift was left by the engineers (hence, not immediately aware that the lift had not been cordoned off, or safety barriers erected, or "out of order" signs put up).

74. However, I accept that the Respondent had reasonable grounds for concluding, following a reasonable investigation, that the Claimant had failed to intervene when he found the lift doors had been opened, thereby permitting a dangerous situation to persist; failed adequately to manage the situation; failed to ensure that barriers or "out of order" signs were put up; had failed in his duty of care by failing to follow up with the passengers upon release; and had brought the Respondent into disrepute. I remind myself that it is not my task to substitute my own view for that of the employer but to apply the "band of reasonable responses" test. I conclude that, given the

conduct found, dismissal was within the band of reasonable responses. A reasonable employer could have treated the Claimant's actions and/or omissions as destroying or seriously damaging trust and confidence and could have chosen to dismiss the Claimant as a result.

75. The Claimant also says that the reason for dismissal was redundancy; this was in effect a cost-saving exercise. I have no hesitation in rejecting that allegation. I have no doubt that Mr Jones was an honest witness (as indeed were all witnesses who attended to give evidence). There had been an incident which had caused substantial concern, both in the Respondent company and for the Respondent's client, and it was that incident which led to the Claimant's dismissal. The redundancy consultation had started in August 2023 as a result of a restructure process which had been agreed between the Respondent and its client, JLL. The fact that the redundancy and disciplinary processes overlapped was coincidence, nothing more.

76. The complaint of unfair dismissal is accordingly not well-founded and will be dismissed.

Wrongful dismissal

77. I then consider whether the Claimant was in repudiatory breach of contract. In contrast to the test for unfair dismissal, the question is an objective one: was the employee in repudiatory breach of contract? Put differently: did the Claimant's actions (or omissions) in fact amount to gross misconduct?

78. I consider that the Claimant's actions and/or omissions in the circumstances were not, applying **Sandwell**, so grave and weighty as to amount to a justification for summary dismissal. In particular, the Claimant was not responsible for the full length of time that the customers were trapped in the lift. The responsibility for calling the fire brigade rested with Control, rather than with the Claimant. Errors made by his direct reports do not constitute repudiatory breach by the Claimant himself. He took reasonable steps to contact Crest and to obtain an ETA. Indeed, the Respondent in closing submissions argued that there was a delay of no more than 15 minutes between the Claimant calling Crest to ask for an ETA and Crest returning his call to provide an ETA.

79. He could quite reasonably have expected that Mr Afify and/or the lift engineer would have placed signs and/or barriers to prevent the lift being used and was not aware of the failing at the point at which the customers left the lift.

80. As the Respondent correctly argues, the situation was hazardous. The Claimant's handling of the situation can fairly be criticised: he should have checked that the power was off upon seeing that the lift doors were open;

he should have attended to the customers in the lift in preference to dealing with a water spill; he clearly failed formally to report the matter either to the client or to the Respondent. However, he could have been (for example) demoted and/or re-trained. His conduct was not, in my view, such as to amount to a repudiatory breach of contract.

81. Conduct may not amount to gross misconduct even if it poses a risk to health and safety: **Weston Recovery Services v Fisher [2010] 10 WLUK 127.**

82. I conclude that the Claimant was wrongfully dismissed. He is entitled to notice pay as a result. I have not heard submissions from the parties on remedy and I do not therefore consider it appropriate to set out findings on remedy, although the parties will be invited to indicate how they wish to proceed, and in particular whether they would be content for the matter to be determined on the papers.

Holiday pay

83. As of 6 March 2023, the Claimant had accrued but not taken 25 days of leave. Mitie operate a "use it or lose it" policy but this had not been communicated to the Claimant – indeed the opposite, he had been given to believe that he would be able to carry the leave forward or to be paid in lieu. I also consider that his sick leave prevented him from taking his annual leave (which he might otherwise have taken during the period of convalescence), thereby engaging Regulation 13(15) WTR 1998; I would in any event have found that the employer(s) had failed to give the Claimant a reasonable opportunity to take leave or encourage him to do so.

84. For all those reasons I find that Regulation 13 leave equivalent to 4 weeks was carried forward and should have been paid on termination, applying Regulation 14 WTR 1998. Regulation 13A (additional) leave does not carry forward because none of the conditions for that leave carrying forward are met.

85. As I have not heard submissions from the parties, I do not consider it appropriate to determine remedy at this point, although it may well be possible to decide remedy on the papers, and again the parties will be invited to indicate how they wish to proceed.

Redundancy payment

86. The Claimant was not dismissed by reason of redundancy. He is therefore not entitled to a redundancy payment.

Employment Judge **E Macdonald**

Date **23 January 2025**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 February 2025

FOR EMPLOYMENT TRIBUNALS

P Wing

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/