EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Nicholas Kitaruth **OCS Security Limited**

Heard at: London Central **On**: 18 – 19 February 2025
In chambers: 20 February 2025

Before: Employment Judge Lewis

Representation

For the Claimant: Mr K Pal, Counsel

For the Respondent: Mr O Tahzib, Counsel

RESERVED JUDGMENT

1. By consent, the name of the respondent was amended to OCS Security Limited.

2. The claimant was unfairly dismissed.

3. There will be a deduction of 50% from the compensatory award on grounds of Polkey.

4. The compensatory award will be increased by 20% for the respondent's unreasonable failure to comply with relevant provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

5. There will be a reduction of the basic award by 25% for conduct prior to dismissal and an additional reduction of the compensatory award by 25% for contributory fault.

6. There will be a hearing for remedy on **16 April 2025** over CVP. The parties should agree a bundle of documents for remedy and exchange any

witness statements by **2 April 2025.** The parties should exchange written submissions on **14 April 2025**.

REASONS

Claims and issues

1. The claimant has made an unfair dismissal claim.

2. The issues were agreed as follows:

Unfair dismissal

2.1. Has the respondent shown the reason for the dismissal?

2.2. Was the dismissal fair or unfair, applying the band of reasonable responses? As part of that:

2.2.1. Following the three stage test in British Home Stores v Burchell:

2.2.1.1. Did the respondent genuinely believe the claimant was guilty of misconduct?

2.2.1.2. Did it hold that belief on reasonable grounds?

2.2.1.3. Did it carry out a proper and adequate investigation?

2.2.2. Was dismissal a fair sanction?

2.3. Was there a breach of the ACAS Code on Disciplinary and Grievance Procedures?

2.4. If the dismissal was unfair on procedural grounds, what is the chance that the respondent would have (fairly) dismissed the claimant even if it had followed fair procedures and on what date? ('Polkey')

2.5. Should there be any deduction from the basic award for conduct prior to dismissal or from the compensatory award for contributory fault?

2.6. If the claimant wins, remedy. The claimant seeks reinstatement / re-engagement.

Procedure

3. The tribunal heard from the claimant and, for the respondent, from Craig Stride, Jason Sherer, Alex Jobbins, Phil Walker and Chris Flavell. There was an agreed trial bundle of 225 pages with three further pages provided

separately and then later in the hearing some emails between Mr Walker and HR on 19 and 22 September 2023. Mr Pal provided written closing submissions.

4. The claimant wished to present three further witness statements for witnesses who he would not actually be calling. These witness statements were first disclosed to the respondent (unsigned) two working days prior to the start of this hearing and a signed version the day after. Exchange of the other witness statements had taken place back in June 2024. The claimant put forward no particular reason for the lateness of the statements other than a vague statement about the difficulty of getting them.

5. The respondent objected to admitting the late statements on grounds that the claimant would by then have seen the respondent's statements. Moreover, the late disclosure with no forewarning or indication in the ET1 meant that the respondent did not have an opportunity to call witnesses to refute anything which was said. This was compounded by the fact that the witnesses would not be attending the tribunal hearing.

6. I was invited to make a decision without reading the witness statements. I decided not to allow them in. There was no good reason for their lateness and the respondent would potentially be prejudiced by being unable to answer or challenge them. The claimant may take some consolation from the fact that witness statements without a witness attending the hearing to have their evidence tested are not generally very persuasive.

Fact findings

7. The claimant had been employed by the respondent since 12 December 2017. At the time of the relevant events, he was Deputy Security Manager on the respondent's security contract at the QEII Conference Centre in London. The claimant's role was to manage security at the building for the client, ie QEII which owned the Conference Centre. His normal place of work was in the building.

8. There were 22 security officers managed by 4 supervisors, two day and two night. The claimant's role included performance managing and quality checking the work of the supervisors, conducting return to work interviews for them, overseeing the accuracy of incident reports etc The level of work at the Conference Centre fluctuated – it was far busier and more hands on at the time when events were put on. August was a much quieter time although there was still work to do.

9. The claimant's line manager from 2022 was the Security Account Manager, Craig Stride. Mr Stride in turn reported to the Account Director for Public Services in Security, Jason Sherer.

10. The claimant's contract states that his normal working hours were 42/week and his working hours would normally be Monday – Friday 8 am – 5

pm. In practice, Mr Stride allowed some flexibility with the claimant usually worked 9 am – 5 pm, but working longer hours or, in return for a day off in lieu, weekends if operationally necessary.

11. The respondent supported homeworking in appropriate circumstances and had a homeworking policy.

12. The claimant had an informal arrangement with Mr Stride whereby the claimant was allowed to work at home from time-to-time. This was usually one day/week and occasionally two days/week. Mr Stride had a similar arrangement for himself with Mr Sherer. The claimant had to get Mr Stride's agreement. These agreements were made orally and sealed with a handshake. The only written record was that the claimant would nearer the time send out a calendar invite to include the client marking that he was working from home on the days in question.

13. The dismissal arose as a result of the claimant working from his parent's home in Cornwall from 14 – 17 August 2024. The claimant says this had been agreed with Mr Stride. Mr Stride says it had been discussed but not agreed. The respondent further says that the claimant was not in fact carrying out any work at that time. The claimant says that he was, but there were reception difficulties.

14. Mr Stride told the tribunal that a colleague did not necessarily need to be working from their actual home address provided they were always contactable and could get to site if required. He says he would never have authorised four days working from home or from Cornwall.

Discussions about the August period

15. In early June 2023, Mr Stride told the claimant that he had an operation booked in August and would be taking 7 – 18 August 2023 off work. The claimant said that he was hoping to book a week off at that time. Mr Stride told the claimant that he had no holiday left because he had taken 5 weeks earlier in the year to go to Mauritius. The claimant asked whether he could be granted time off in lieu, since on many occasions he worked extra hours. However, that was not agreed.

16. Mr Stride says it was left that they would need to speak to Mr Sherer and the matter was never discussed again. The claimant cannot now remember if it was left that way. He says there were a number of conversations about working from home in August, although he can remember no details, and that they did finally shake on it that he would be working from home in August.

17. About two weeks before his operation, Mr Stride was told it would not be going ahead. He therefore cancelled his second week of holiday.

18. A few days before 14 August 2023, the claimant put in his outlook calendar that he would be working from home the following week.

19. Meanwhile, in early August 2023, a Sector Director, Martin Harre, met the claimant, Mr Stride and Mr Sherer. He said he felt that Mr Stride and the claimant were failing as a management team and that if matters did not improve, they would face disciplinary action. Mr Harre followed up with an email dated 7 August 2023, setting out various tasks for each of them. This email was not in the later investigation pack, but the fact that Mr Harre had set out various requirements was referred to.

The investigation

20. At 13.01 on 14 August 2023 Mr Stride messaged the claimant on WhatsApp saying, 'Where are you today? We need to meet Jason at London office Wednesday have sent invite'. The claimant messaged back, 'Won't be able to I told you working from home in Cornwall. You were having your week off then I was going to be in Cornwall.' Mr Stride replied 'Nick hold up. We had a discussion before Martin had to get involved and we didn't confirm anything. Being the level of tasks outstanding it wouldn't have been an option for a week and this would need to be planned. Iv had no update on any tasks no handover. Jason was not aware. These things need confirming. Working from home also means working from home. And you're not contactable. I'll always try and make it easy for us but it needs a discussion and has to work for everyone … Need you on site/London office on Wednesday,'

21. The claimant replied, 'Hi I'm sorry but this was a discussion before Martin got involved. Will do the update tomorrow. He then sent a voicemail which started, 'Hold up. We said we spoke about this and you said it would be fine.' The claimant went on to itemise various tasks he was doing and would do.

22. On 15 August 2023, Mr Stride emailed the claimant to say that as he was not in his place of work, he was considering this period as unauthorised absence from 14 – 17 August 2023. Payroll would be advised and HR contacted to carry out the next steps. The claimant replied by email, 'We have already discussed this, and you were more than happy for this period for me to be working from home. The client is more than happy with this as well….Let me know when you are free to talk.' Mr Stride replied, 'I don't need to discuss this further, nothing was confirmed, you've not responded to any emails, tasks not completed. If you were needed on site you couldn't make it as you're in Cornwall. With regards to the client you do not work for the client you work for AS'. This email chain was in the bundle of papers later seen by the Investigating Officer, Dismissing Officer and Appeals Officer.

23. On 15 August 2023, HR asked Alex Jobbins, an Operations Manager on a different contract, to carry out the investigation.

24. Mr Stride emailed Mr Fries in HR, copy to Mr Jobbins, attaching various emails. He said that as the claimant had said the client approved this, he had met the client to establish whether that was the case. He said, 'The client strongly denied this and stated "they do not manage Nick and he only sends a Teams invite to work from home". They stated they would never approve any

such request and were disappointed he implemented [sic] them in the communication on this issue'.

The investigation meeting

25. The investigation meeting took place on 22 August 2023 between Mr Jobbins and the claimant. The claimant was accompanied by a work colleague. A note taker was also present.

26. The notes of the investigation record that Mr Jobbins asked the claimant who authorised him to work from home. The claimant said he had a conversation with Mr Stride that he was to work from home in his parents' house in Cornwall. He said he sent out a calendar invite to the client and Mr Stride that he would be working from home. He did not note 'in Cornwall' on the calendar invite. He said they all accepted it; Mr Stride had shaken hands on it – Mr Stride did not have a problem with the claimant working from home as long as he was contactable. Mr Jobbins asked if Mr Stride put all that in writing. The claimant said no. The claimant said that Mr Sherer had said that as long as one of the claimant and Mr Stride were on site, he did not mind the other working hybrid.

27. Mr Jobbins asked roughly when the claimant had had the discussion with Mr Stride authorising him to work from home in August. The claimant said they had discussed it multiple times over the last few months. He could not remember the dates exactly.

28. Mr Jobbins asked whether the claimant had missed out on any meetings or tasks while he was working away from site, The claimant said there were no tasks to be completed during his time working from home and he had no physical meetings. He said he responded to calendar invites, phone calls, liaising with the officers and emails. He said the only thing he did not attend was a Teams meeting because Mr Stride had cancelled it.

29. Mr Jobbins said that the definition of working from home was from one's personal; residence and that was because if there was an incident on site, he should be able to attend site within a reasonable time, He asked if it had been agreed that he could work from a location which was not his personal residence and did not allow him to come to site within a reasonable time. The claimant said the agreement was that they were more than happy to let him work away from home because they had day and night supervisors as a back up plan for emergencies.

30. Mr Jobbins asked whether the claimant had been given any tasks that he must complete following his meeting with Mr Harre. The claimant said yes, all tasks had been completed. Mr Jobbins asked if the claimant had completed all tasks given to him by Mr Stride. The claimant said that was irrelevant. Mr Jobbins said it was relevant if they were required while he was working away. The claimant said there was nothing required during that period from Mr Stride.

31. Mr Jobbins put it to the claimant that it was effectively a holiday for the claimant. The claimant denied this. He said it was only a holiday at the weekend.

The Investigation Report and suspension

32. Mr Jobbins provided an Investigation Report dated 23 August 2023. The start of the executive summary says 'NK took unauthorised leave from the business stating he was working from home during the period of 14th – 18th August. During this period, he did not notify his management team of his absence other than sending a teams invite to the client and account manager stating, working from home'. In addition, he failed to complete his work duties with both the client and employer and therefore placing the company at risk'.

33. He recommended disciplinary action brought on the basis of misconduct ('unauthorised absence from work') and gross misconduct ('bringing the organisation into serious disrepute; and serious neglect of duties, or a serious deliberate breach of your contract or our procedure'.)

34. The report stated that the claimant had said he was not on holiday while based at his parents' house in Cornwall, but just remotely working. He could not confirm the hours that he worked. The report stated that Mr Jobbins had asked for evidence of the agreed 'working from home', meetings attended, calls made and email sent, but no evidence had been produced confirming any of that. The report stated that Mr Jobbins had received evidence from Mr Stride confirming there were numerous tasks not completed, OCS meetings and client meetings not attended during the period of absence. There were also statements from Mr Sherer and Mr Stride that the client was not happy with the claimant not being available on site during the week and that certain tasks were not completed. This appears to have been based on a number of emails which Mr Jobbins looked at since he did not formally interview Mr Stride or Mr Sherer.

35. The Investigation Report concluded that although the claimant had said it was a regular 'agreed' occurrence to work from home (although generally from his domiciled address), the claimant could not provide evidence confirming this. He said it was apparent from all the evidence that the claimant had shown a serious neglect of duties and a serious deliberate breach of policies and procedures. Also, in view of the client comments, he had potentially put the contract at risk and in disrepute.

36. By letter dated 23 August 2023, the claimant was suspended from duty by Mr Sherer as a result of concerns about the claimant's response to being investigated. The grounds listed were 'minor breaches of your contract of employment; minor breaches of our policies and procedures; unauthorised absence from work; refusal to follow instructions; repeated or serious failure to obey instructions, or any other serious act of insubordination; bringing the organisation into serious disrepute; serious neglect of duties, or a serious or deliberate breach of your contract or our procedures'. The letter added ' It is

alleged that you are not going to work as is expected and is [sic] being disruptive and this has been witnessed by the client.'

37. By letter dated 30 August 2023, the claimant wrote to the HR Support Desk stating that his absence had been authorised and asking for detail of what the other allegations were about. He denied the allegation of unauthorised absence from work. He said that it had been discussed with and authorised by Mr Stride on a number of occasions and that finally, before Mr Stride went onto annual leave on 20 July 2023, the claimant reconfirmed he would be working from home in Cornwall and they shook on it. The letter was copied to Mr Fries and Mr Sherer. The claimant received no reply.

The disciplinary hearing

38. The disciplinary policy says at paragraph 6.3, 'When we consider there are grounds for disciplinary action you will be invited to a disciplinary meeting. We will set out in a letter the allegations against you, the basis for those allegations, and the likely consequences if the allegations are found to be true….'

39. The claimant was invited to a disciplinary hearing by letter dated 1 September 2023. The letter stated that the purpose of the hearing was to discuss three allegations of misconduct ('minor breaches of your contract of employment; minor breaches of our policies and procedures; unauthorised absence from work; refusal to follow instructions') and three allegations of gross misconduct ('repeated or serious failure to obey instructions, or any other serious act of insubordination; bringing the organisation into serious disrepute; serious neglect of duties, or a serious or deliberate breach of your contract or our procedures'). This was a repeat of the allegations in the suspension letter, but with no greater clarity. The letter added 'It is alleged that you are not going to work as is expected and is [sic] being disruptive and this has been witnessed by the client'. That was a reference to the current situation since the investigatory meeting.

40. The letter attached notes of the investigation meeting with the claimant and the disciplinary, grievance and whistleblowing policies. A full list of potential outcomes was listed. The claimant was told of his right to be accompanied.

41. The disciplinary hearing took place on 19 September 2023 and was chaired by Phil Walker, Account Manager. The claimant was accompanied by his union representative and there was a notetaker.

42. At the start of the disciplinary hearing, Mr Walker checked that the claimant was happy to proceed. The claimant said that he was. Mr Walker said his focus would be on the unauthorised absence and the tasks given to the claimant while he was away or working from home on 14 – 17 August 2023. I have set out more detail of the documents Mr walker was discussing with the claimant in a separate section below.

43. The claimant said Mr Sherer had told him they could work from home as long as they worked some days from site. He said it had always been a verbal process and a calendar invite was used, which also informed the client. He said location had never been an issue. Mr Walker said he wanted evidence that the claimant had said he would be in Cornwall when working from home. The claimant said he might have a WhatsApp voice note, but there was no formality – Mr Stride had said they could work from home as long as communications were maintained. Mr Walker asked the claimant to send him any additional information in support by Friday. The claimant agreed.

44. Mr Walker then moved on to the tasks which had been given to the claimant within the time frame. He first discussed the incident report. The claimant said he had got the statements and sent them back to Mr Stride and Mr Stride had said he would complete the task as he was liaising with the client. Mr Walked checked whether the claimant was saying he had responded to Mr Stride's email. The claimant said yes. Mr Walker asked for the email. The claimant said he needed access to his emails. Mr Walker said he would arrange for access to be unlocked.

45. Mr Walker moved on to discuss a 15 August 2023 email about completion of performance improvement plans ('PIPs'). The claimant said he had told Mr Stride on several occasions that he had had no training to do that. Mr Walker asked if he had said so in an email. The claimant said yes and he would send the email across.

46. They then discussed the missed meetings while the claimant was in Cornwall. The claimant said a lot of the meetings were recurring meetings and they got cancelled quite often. He did not understand the allegation regarding the meeting on the 18th because he was then on site.

47. Mr Walker concluded by summarising – 'if you do have anything to back up the claims for working at home please have this back to me by Friday – if I can get you access to your emails, please ensure you send me the full email thread.' He asked the claimant also to send any emails showing he had notified Mr Stride that he had no training for the PIPs and the voice notes regarding working from home.

48. Later on 19 September 2023, Mr Fries, at Mr Walker's request, wrote to the claimant to provide him with authorisation to access his work emails so he could forward some emails he had mentioned to Mr Walker, ie (i) an email where the client specifically asked Mr Stride to deal directly with the lift incident report and an email stating Mr Stride would deal with it, and (ii) the claimant's email notifying Mr Stride that he had received no training to conduct PIPs and would find it beneficial to have training before conducting that specific task.

49. The claimant did not send in these emails or his WhatsApp messages with Mr Stride or any other further information. Nor did he say he was having any access difficulties.

50. Even though the claimant was stating the agreement had been oral, Mr Walker was concerned that the claimant could not provide written evidence to support his contention that Mr Stride had authorised the working from home in August. Mr Walker did not formally interview Mr Stride at any stage, either before or after his decision, to explore his version of events or regarding the PIP and incident report tasks.

51. At 3.43 pm on Friday 22 September 2023, Mr Walker emailed Mr Fries with his decision. He felt that the claimant had misled management and had chosen to use the time as unauthorised leave. He had not completed the tasks given to him or chased up during that period. He had put on his outlook calendar that he was working from home, which is not where he was located. He had not provided evidence that working from home was approved in this period. Mr Walker said that he believed, based on the emails from Mr Stride and the calendar, that no approved holiday had been granted by Mr Stride or Mr Sherer. He felt the actions amounted to gross misconduct and the claimant should be dismissed with immediate effect.

52. By letter dated 25 September 2023, Mr Walker informed the claimant that he was summarily dismissed. The letter set out the three allegations of gross misconduct, ie 'repeated or serious failure to obey instructions, or any other serious act of insubordination; bringing the organisation into serious disrepute; serious neglect of duties, or a serious or deliberate breach of your contract or our procedures'. It then said that Mr Walker had concluded that 'I believe you are guilty of the allegations against you, ie by failing to obey management instruction / neglecting your duties, you have caused serious reputation damage to our company with the client'. No further detail was provided regarding what the claimant was found to have done which warranted dismissal.

53. The letter noted that Mr Walker had allowed the claimant time after the hearing to provide additional evidence, but had not submitted any extra evidence.

54. The letter stated that the claimant had a right of appeal.

55. The letter was drafted by HR based on Mr Walker's instructions, and approved by Mr Walker.

56. Mr Walker explained in the tribunal that his reason for dismissal was that the claimant was absent without authorisation from 14 – 17 August 2023. What took this from misconduct to gross misconduct was that the claimant had not only gone on holiday without permission, but had misled his managers by saying he was working from home when he was not in fact doing any work. This included a number of failures to deal with reasonable requests from his manager.

<u>Appeal</u>

57. The claimant appealed by letter dated 28 September 2023 on grounds that:
    57.1. Failure to follow a fair and reasonable investigation as per company policy and reach a reasonable conclusion based on the evidence
    57.2. The penalty of dismissal was too harsh and outside the band of reasonable responses
    57.3. The allegations could not be considered gross misconduct
    57.4. The evidence provided did not support the allegations
    57.5. The alleged conduct breaches discussed at the disciplinary hearing did not conform with the reasons for dismissal given in the dismissal letter.

58. The appeal was heard by an Operations Director, Chris Flavell, on 28 March 2024. The claimant's union representative was present. There was a note taker.

59. The delay in holding the appeal was not down to Mr Flavell, who had only recently come into the company and been asked to conduct the appeal. There has been no explanation for the long delay prior to that. The claimant had chased up on numerous occasions.

60. Mr Flavell read the investigation report and attached documents, the disciplinary notes, the dismissal hearing and the letter of appeal. He did not interview any other witnesses.

61. The claimant did not provide any extra documentation in support of his appeal.

62. By letter dated 17 May 2024, Mr Flavell rejected the appeal. He did overturn the finding that the claimant's actions had brought the company into serious disrepute, but he upheld the other two grounds of gross misconduct.

63. Regarding the points of appeal, Mr Flavell said that he could not see any failings in the investigation. He felt that the allegations would usually be classed as gross misconduct. He felt the evidence did support the allegations, apart from that of bringing the company into disrepute. The evidence showed missed Teams and mobile calls in the relevant period; failure to respond to numerous chaser emails in the relevant period; and clients calls/meetings which the claimant failed to attend during the relevant period. Regarding the final ground of appeal, Mr Flavell accepted that the allegation of 'unauthorised absence' should have been listed separately as it was a significant factor and discussion point, but it was also managed under the 'serious failure to obey instructions' and 'serious neglect of duties' headings as the claimant's absence/non-attendance resulted in instructions not being followed, leading to duties being neglected in that period.

<u>The allegations of missed work</u>

64. For clarity, I'll set out a little more detail here of the specific work tasks which it was alleged the claimant was asked to do while in Cornwall, but did not do.

65. In the Investigation Pack was an email from Mr Stride to Mr Jobbins, saying that the claimant had not attended the following meetings: Monday 14th, 11.30 am claimant said he needed to reschedule because poor wifi; Mr Stride had moved it to 12.30 but the claimant failed to attend until 12.55 which had to be cancelled because Mr Stride then had to go to another meeting; 15 August: missed call with Mr Stride and Mr Sherer; 16 August: missed call with the client at 9.30 am and with Mr Stride and Mr Sherer at 11 am; 18 August missed call 10 am with client. Mr Stride also attached a variety of emails which the claimant had not responded to.

66. During his meeting with Mr Jobbins, the claimant said that he did not miss any meetings while he was in Cornwall, but some of the meetings were cancelled by Mr Stride. Mr Jobbins asked the claimant if he could provide evidence of his calendar and any cancellations and evidence of tasks which were in his journal.

67. On 15 August 2023, Mr Stride emailed the claimant saying a few tasks were still outstanding. These related to return to work meetings, a missing variation of contract for two staff members and only 5 appraisals conducted by supervisors this month. He said 'Please reply today'. The claimant did not reply and had not replied by Monday 21 August, when Mr Stride emailed him again saying 'Please can you update on the outstanding tasks, the lack of response and progress is very concerning'. On 23 August 2023, Mr Stride chased again, 'Why hasn't this been actioned and why haven't you responded?'. This email chain was in the pack with the Investigation Report.

68. On 12 July 2023, a cleaner emailed the client's head of building management about an incident a fortnight previously when she had been stuck in the lift for 2 hours. The client asked for a copy of the incident report. The client immediately emailed Mr Stride and others, asking for the report. On 20 July 2023, Mr Stride emailed the claimant asking him to speak to two employees to obtain secondary statements regarding the incident. The claimant emailed them that day, copying in Mr Stride, asking for a report asap. Mr Stride emailed the claimant on 14 August 2023 at 11.14 am asking 'Was this done, preferably by yourself, as Miro couldn't get it correct first time.' The claimant did not respond. At 4.04 pm Mr Stride emailed the claimant again, 'Can I get a response on this please. I need to close this out asap.' On 15 August 2023 at 10.32 am Mr Stride emailed 'As iv not had a response I will assume this was [not] actioned and will action myself. Please explain why this was not actioned by close of business today.' There does not appear to have been any response from the claimant.

69. When asked in the tribunal, the claimant said it was hard now to remember but possibly he was awaiting an update from the team.

Law

70. The claimant's written submissions contained submissions on the law which I accept. I do not repeat them all here.

71. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

72. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)

73. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

74. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct?
(2) did they hold that belief on reasonable grounds?
(3) did they carry out a proper and adequate investigation?

75. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

76. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason.

77. I have reminded myself that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision.

78. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) 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. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

79. It is not fair to dismiss an employee for conduct which he did not appreciate, and could not reasonably have been expected to appreciate, might attract the sanction of dismissal for a single occurrence. (Hewston v Ofsted [2023] IRLR 878, EAT.)

80. It is a fundamental part of fair disciplinary procedure that an employee knows the case against them. The Court of Appeal in Sattar v Citybank NA and another [2020] IRLR 104, CA said:

'It is obviously an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. That duty is not met if the employee has to speculate what may be in issue and what may not. The question is not what charges the employer may have been entitled to charge on the material provided to the employee; it is what charges have in fact been made. There may be potential charges which, for one reason or another, are not being pursued. What the ET must be satisfied about is not that the charges actually made in general terms could be read as entailing specific charges not specifically identified; it is whether it can properly be satisfied that an employee would understand from the way the case is put that these charges were actually being made; and any doubt about that question should be resolved in the employee's favour, given that the burden is on the employer to make the charges sufficiently clear.'

81. In reaching their decision, tribunals must take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

82. The ACAS Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

83. Where the dismissal is unfair on procedural grounds, the tribunal must consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that

the claimant would still have been dismissed had fair procedures been followed.

84. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so.

85. Under s123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. The employee's conduct must have been culpable or blameworthy. The first question is whether the employee's conduct caused or contributed to the dismissal. The second is whether it would be just and equitable to reduce the compensatory award and by how much.

86. When deciding the appropriate percentage to deduct for contributory fault, the tribunal should take into account any reduction it has already made under the Polkey principle.

87. The tribunal's approach to issues of contributory fault (and gross misconduct) is different from its approach when considering whether or not the dismissal was fair. In respect of contributory fault and gross misconduct, the tribunal may make its own findings on disputed facts on the evidence which it has heard (London Ambulance Service NHS Trust v Small [2009] IRLR 563, CA.)

Conclusions

88. The reason for dismissal was conduct. The respondent dismissed the claimant because it believed he had gone to Cornwall without authorisation from 14 – 17 August 2023 and that not only was this unauthorised working from home but that the claimant had misled his managers and was not in fact working in that period and had not completed tasks he had been given in that period.

BHS v Burchell

89. I will now apply the three stage test in BHS v Burchell.

90. First, I find that the respondent genuinely believed the claimant was guilty of this misconduct.

91. Second, did the respondent carry out a reasonable investigation? To a certain extent, yes. There were separate investigatory and disciplinary stages. The claimant was invited to investigation, disciplinary and appeal meetings. He was asked questions about the authorisation of his leave and about uncompleted tasks, and had the opportunity to put his case. A large number of relevant documents were put into the investigation pack and read and discussed by the managers at each stage. The claimant was given an

opportunity to produce any extra documents and access to his emails was enabled, but he did not produce anything further. He did not produce his WhatsApp messages with Mr Stride.

92. Where the respondent went wrong was that at no stage was Mr Stride formally interviewed, either by Mr Jobbins or Mr Walker or even Mr Flavell. Mr Stride was the only witness other than the claimant of any importance. The claimant explained the agreement had been verbal. It was unreasonable to expect him to provide written evidence of a verbal agreement. Although Mr Stride had set out his position in various emails to or about the claimant's absence, which were in the Investigation Pack, these were not explored. The claimant was saying that his managers had allowed a practice which was wholly verbal and informal, and that on this occasion, it had also been agreed. No reasonable employer would have failed to consider the possibility that there had been a genuine misunderstanding given such informal arrangements or that Mr Stride had forgotten how matters were left or even that Mr Stride had given permission and then changed his mind after Mr Harre's meeting about the running of the contract. It would not have been onerous to have interviewed Mr Stride and pressed him for more detail to get to the bottom of the different views. To a lesser extent, but still importantly, Mr Stride should have been asked to comment on the claimant's explanation for the state of play on the PIPs and incident report instead of throwing the onus onto the claimant to find where the position was recorded in emails. I am conscious that an investigation only needs to be within the band of reasonable responses and there are limits to how much an employer is required to look into. However, for the reasons I have explained, I find that no reasonable employer would have failed to interview Mr Stride formally before reaching a decision to dismiss the claimant. For this reason, the dismissal was unfair.

93. Third, did the respondent hold its belief in the claimant's misconduct on reasonable grounds? I have already mentioned the fundamental flaw, which is that Mr Stride was not formally interviewed and therefore what he would have said and the WhatsApp messages which he might have produced cannot go into the equation.

94. Aside from that, the respondent did have evidence of meetings not attended and emails not responded to during the 14 – 17 August 2023 period. The claimant had not produced any emails proving he did any work during that period or supporting the particular explanations he had given as regards the PIP and incident report tasks. Regarding whether working from home from Cornwall had been authorised, such arrangements were always verbal so the lack of anything in writing should not have been conclusive. An employer would have to weigh up one word against another and decide why it was accepting one account rather than another. This is hypothetical since Mr Stride was not interviewed.

<u>Procedures: overview</u>

95. The next question is whether there was a breach of the ACAS Code and whether fair procedures were followed generally.

96. Fair procedures were followed in the sense that there were separate investigation, disciplinary and appeal processes, each by a separate decision-maker. The claimant was invited to meetings at each stage and was allowed to be accompanied. Notes were taken of the meetings. The claimant was provided with the Investigation Report and pack of evidence prior to the disciplinary hearing.

Delay in the appeal

97. The claimant argues that the dismissal was unfair because of the very long delay in hearing the appeal. The claimant did chase this many times and there was no good reason provided for such a delay. Indeed, there is a notable distinction between the time taken to investigate and dismiss the claimant (6 weeks) and the time taken to hear his appeal and provide the appeal outcome (7 and a half months) - the letter of appeal was 28 September 2023; the appeal was heard on 28 March 2024 and the appeal outcome letter was 17 May 2024. That distinction might give the impression that the respondent was more concerned with rapidly dismissing the claimant than hearing the appeal with an open mind.

98. Having said that, there was no evidence that the appeal process was not carried out fairly or that Mr Flavell did not have an open mind. Mr Flavell was not himself responsible for the delay in holding the appeal. The claimant did not put forward to the tribunal any way in which the delay negatively affected the appeal decision or his ability to argue his case. The investigation meeting with the claimant had been held extremely quickly and the Investigation Report had been provided promptly before memories would fade. By the time of the appeal hearing, the claimant knew what the issues were and what he wanted to say about them.

99. The ACAS Code says at paragraph 26 that appeals should be heard without unreasonable delay. There was an unreasonable delay here, even if it did not make the dismissal unfair.

100. So while I would say that the long delay was extremely poor practice by the employer, I do not think it makes the dismissal unfair. However, since the dismissal was unfair for other reasons, it will be a factor when I consider an uplift in compensation.

Clarity of allegations

101. Paragraph 9 of the ACAS Code says that where there is a disciplinary case to answer, the employee should be notified in writing. The notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary hearing. It would normally be appropriate to provide copies of any written evidence with the notification.

102. The respondent's disciplinary policy says 'When we consider there are grounds for disciplinary action you will be invited to a disciplinary meeting. We will set out in a letter the allegations against you, the basis for those allegations, and the likely consequences if the allegations are found to be true….'

103. The letter inviting the claimant to the disciplinary hearing did not set out the allegations or basis for allegations. It simply set out the categories of misconduct or gross misconduct in the policy which applied. The letter did not in itself contain sufficient information to enable the claimant to prepare to answer his case at the disciplinary hearing. The same could be said of the suspension letter.

104. The letters were drafted by HR and do appear to be an over-elaborate attempt to put the basic allegations into as many headings as possible from the disciplinary policy. Indeed, the underlying factual allegations are not set out in the suspension letter or in the invitation to the disciplinary hearing or in the dismissal letter. The claimant's request for clarity of the suspension letter, which contained the same generic wording as the invitation to the disciplinary, went unanswered. The claimant's letter shows that he did understand that the key issue was whether he was authorised to work from Cornwall from 14 – 17 August 2023.

105. It should not be left to an employee to work out what the precise allegations are against him. Having said that, I have asked myself whether these were obvious anyway, and whether the claimant was in any way inhibited from presenting his defence.

106. The claimant always knew the main issue was that he was accused of unauthorised absence from work because Mr Stride signalled that from the outset in his email of 15 August 2023. During the investigation, the claimant was questioned extensively about whether he had authorisation and about whether he had completed all tasks given by Mr Stride and if he had missed any meetings.

107. The invitation to the disciplinary hearing contained the Investigation Report. That identified the key issues at the start of the executive summary: 'NK took unauthorised leave from the business stating he was working from home during the period of 14th – 18th August. During this period, he did not notify his management team of his absence other than sending a teams invite to the client and account manager stating, working from home'. In addition, he failed to complete his work duties with both the client and employer and therefore placing the company at risk'. These were the reasons why the claimant was ultimately dismissed.

108. At the start of the disciplinary hearing, Mr Walker checked that the claimant was happy to proceed. The claimant had a trade union representative with him. The claimant confirmed that he was. He did not say that he was unaware of the allegations. Mr Walker said his focus would be on

the unauthorised absence and tasks given to the claimant while on leave or working from home from 14 – 17 August 2023. Again, the claimant did not say that he was caught by surprise or could not answer.

109. For these reasons I consider that although the letter inviting the claimant to the disciplinary hearing was lacking in detail, the claimant did in fact understand the allegations and was able to provide answers. He was also given the opportunity to send in any evidence after the hearing. So the lack of clarity in the disciplinary invitation letter did not make the dismissal unfair.

Was dismissal a fair sanction?

110. The respondent's disciplinary policy lists examples of offences which will normally be considered as misconduct and separately lists examples of offences which will normally be considered gross misconduct. 'Unauthorised absence' is in the ordinary misconduct list. This is also how it was repeatedly classified in the suspension and disciplinary letters sent to the claimant.

111. The gross misconduct list includes 'repeated or serious failure to obey instructions, or any other serious act of insubordination', 'bringing the organisation into serious disrepute' and 'serious neglect of duties, or a serious or deliberate breach of your contract or our procedures'. Although the bringing into disrepute heading was overturned on appeal, the dismissing and appeal officers considered that unauthorised absence in Cornwall and neglecting duties while there fell within the other two categories of gross misconduct.

112. Without getting too bogged down in the wording in the disciplinary policy, I have looked at the factual realities. 'Unauthorised absence' can cover a range of circumstances and what an employee says about why he is or was absent may add an element of deception which makes it worse. Mr Pal argues that is double counting because by definition, if an employee is on unauthorised absence, he is not doing work. Mr Pal says it is unreasonable to count that as two separate offences. However, I think there is a difference between, for example, the claimant carrying out a full day's work from his home on each of the four days in August when that had not been authorised, and him saying that he was 'working from home' but in fact going to Cornwall and not carrying out work, but holding himself out as doing so.

113. Here, Mr Walker considered that it was not merely a matter of unauthorised leave. He believed the claimant had misled management into thinking that he was working from his own home, whereas in fact he was in Cornwall and was not doing allocated tasks and was effectively taking unapproved holiday. If that was the finding (and I have commented separately about the problem with the investigation), then a reasonable employer could decide to dismiss an employee for gross misconduct, even if he had no previous warnings on the matter.

114. I believe a reasonable employer could take the view that the claimant's conduct did also fall within the category of gross misconduct in the disciplinary policy and that, in any event, whether or not it did so, that the

claimant ought to have known that such conduct could be a dismissable offence.

ACAS adjustment

115. The respondent breached the ACAS Code in two respects: (1) by the notification of the disciplinary hearing itself not containing sufficient information about the alleged misconduct and (2) by the unreasonable delay in hearing the appeal.

116. Regarding (1), the respondent is a large employer with dedicated HR staff and should have been able to write a clearer invitation to the disciplinary hearing, especially as its own disciplinary policy had the same requirement. On the other hand, the disciplinary invitation did attach the Investigation Report and did offer a right of representation as well as listing the possible outcomes including dismissal. Regarding (2) the delay in hearing the appeal was simply inexcusable, even if the rest of the appeal process and decision-making was fair and even though it did not in itself affect the claimant's ability to put his appeal and have it fairly decided. It still caused the claimant stress and he had to write numerous reminders. Balancing these factors, I award an uplift to the compensatory award of 20%.

What difference would it have made had there been fair procedures (Polkey)

117. I have identified the unfair process as the failure formally to interview Mr Stride.

118. If the respondent had formally interviewed Mr Stride, it is likely that Mr Stride would have produced the WhatsApp messages which he later produced as part of disclosure for the tribunal proceedings, especially as the claimant had referred to a WhatsApp message in his own investigation meeting. Both Mr Stride and Mr Walker accepted in the tribunal that the WhatsApp exchanges suggested that the claimant genuinely believed he had been given permission. This would indicate there may have been a misunderstanding, This would have been a significant conclusion given that the aspect which pushed the matter from misconduct to gross misconduct in Mr Walker's mind was his belief that the claimant had misled management regarding his whereabouts. I do not believe that Mr Walker would definitely have made a different decision because at the time, he might still have been sceptical about whether the claimant's response was genuine. He might also have considered that the claimant was not working while in Cornwall and that he was misleading the respondent on that aspect too. Another consideration is that, had he formally interviewed Mr Stride, Mr Walker would have realised how informal the arrangements were and the responsibility of Mr Stride and perhaps Mr Sherer for allowing such a system, which always had the potential for misunderstanding. On balance, I believe there is only a 50% chance that if Mr Stride had been interviewed, the claimant would have been dismissed.

Contributory fault

119. For this part of the case, I can reach my own conclusions on the evidence I heard regarding the claimant's conduct.

120. I find that the claimant genuinely believed he had been given permission to work from his parents' house in Cornwall from 14 – 18 August 2023. I reach this conclusion mainly because of the way he expressed himself to Mr Stride in the WhatsApps on 14 August 2023 when the topic first came up. Mr Stride's response suggests that he was equally convinced of his own recollection and believed no such permission had been given. I suspect there had been several conversations and that there was a degree of ambiguity in how things had been left, which was compounded by the wider changing circumstances both regarding when Mr Stride would be away because of his operation / holiday, and as a result of the problematic meeting with Mr Harre. Mr Stride had allowed a completely informal system whereby agreements for home working were made verbally and were not noted down anywhere other than a post-agreement outlook notification sent out by the claimant shortly before. Such a system was ripe for misunderstandings. I do not accept Mr Stride's assertion to the tribunal that he would never have agreed 4 days working from home or that it be from such a distance. If that was the case, he would positively have told the claimant 'no' when the claimant first raised it in a discussion, whereas a WhatsApp note says 'We had a discussion before Martin … and we didn't confirm anything' (my emphasis). I also find it not implausible that Mr Stride had initially agreed, or seemed to agree, the arrangement, even though it was at such a distance, because August is usually a relatively quiet time.

121. In this context, I do not consider any misunderstanding by the claimant or his decision to go to Cornwall to be misconduct or culpable or blameworthy.

122. However, whilst in Cornwall, I have doubts that the claimant did any work. He did not attend any of the Teams meetings. The WhatsApp messages show he missed a 14 August meeting with Mr Stride and suggest that he missed it not purely because he had poor WiFi at his parents' home, but that he was driving. There were also a number of emails which I have set out above requiring an immediate answer, which the claimant did not even acknowledge. Moreover, the claimant did not provide the respondent at the time or the tribunal during this case with any emails written by him in the 4 day period. The claimant was unable to explain this. He said to the tribunal at first that he did not have access to his email account at the time. He could not explain in what way he meant that he continued not to have access after he was specifically granted it following the disciplinary hearing. Nor could he explain why no such emails had emerged on the respondent's disclosure, even though he has been professionally represented and in a disclosure exercise, had the respondent been pressed, searching for emails over such a short period would presumably have been easy.

123. I consider the claimant's failure to respond to the specific queries of his manager while in Cornwall and indeed his apparent failure to do any work at that time, while contending that he was on a 'working from home' arrangement (or even a 'working from home in Cornwall' arrangement) was

culpable conduct which contributed to the claimant's dismissal. Indeed it was a key reason for the dismissal.

124. When deciding how much to deduct from the compensatory award for contributory fault, I would normally have deducted 75%. However, I take into account that I have already deducted 50% on the Polkey principle. I therefore deduct 25% from the compensatory award for contributory fault and I will deduct 25% from the basic award for conduct prior to dismissal.

Remedy

125. A hearing for remedy will take place on **16 April 2025**. The parties should come prepared to deal both with the claimant's application for re-instatement / re-engagement and, if that is unsuccessful, with financial compensation.

_____
Employment Judge Lewis

Dated: 20 February 2025……..

Judgment and Reasons sent to the parties on:

27 February 2025
…….....

M PARRIS
…….....
For the Tribunal Office