Case Number: 2200526/2016

RESERVED DECISION

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Olomojobi	**v**	**Salisbury Security Services Limited**

Heard at: London Central
On: 1, 2, 5, and 6 September 2016

Before: Employment Judge Hodgson

Representation
For the Claimant: in person and Mr R Ogalvie for submissions
For the Respondents: Mr M Wilson, representative

JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 11 March 2016 the claimant brought a claim of unfair dismissal.

The Issues

2.1 At the commencement of the hearing, the issues were identified.

Unfair dismissal

2.2 Has the respondent shown a potentially fair reason for dismissal?

2.3 Did that reason relate to the claimant's conduct? The respondent will need to show that it had an actual belief in the claimant's misconduct.

2.4 Did the respondent act fairly in treating that reason as a sufficient reason to dismiss the claimant?

2.5 The tribunal will need to consider whether, at the time the respondent formed the belief that the claimant had committed the alleged conduct, that the respondent had grounds for that belief. It will also need to consider whether the respondent had carried out an adequate investigation at the time it formed its belief.

2.6 Was the dismissal otherwise procedurally unfair? If so, has the respondent shown that it would have dismissed in any event had it followed a fair procedure? If so, by when?

2.7 Did the claimant contribute to the dismissal and if so to what extent?

2.8 The relevant code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). The claimant specifically alleged breach of sections 19, 20, and 21 of the code.

Evidence

3.1 For the claimant we heard from: the claimant, C2; Ms Bless Pamela Akoli, C3; and Mr Ameen Khalil, C4;

3.2 For the respondent we heard from: Mr Muhammed Zeeshan, R2; Mr Ian Rigby, R3;Mr Stefan Kovac. R4; and Mr Nigel Arthur Davies, R5.

3.3 In addition we received statements (but the witness was not called) from Mr Femi Imabeh (C5) who was said to be out of the country, and Mr Martin Barrow (C6) who had not been answering the claimant's calls.

3.4 We received a bundle, R1 from the respondent and C1 from the claimant.

3.5 The claimant relied on written submissions, C5.

Applications

4.1 At the commencement of submissions on day two, the claimant requested that I allow Mr Robert Ogilvie to speak on the claimant's behalf. He had no specific qualification as a barrister or solicitor, but had some legal training.

4.2 I gave permission and I clarified that he had in fact been present during the course of the hearing, although he had taken no active part. Following further discussion I noted that the written submissions were in fact prepared by Mr Ogilvie.

The Facts

5.1 The claimant was initially employed in February 2007 at HMRC Euston Towers. As a result of a number of TUPE transfers, the detail of which I do not need to consider, the claimant was employed by the respondent with effect from 1 February 2015.

5.2 The claimant worked as a security officer. At all material times, the claimant worked on a fixed shift pattern covering night shifts and weekend days, on a rotational basis. I am only concerned with the operations of the nightshift. Nightshift ran from 19:00 to 07:00.

5.3 The building has several floors. I have received information concerning the basement, the ground floor, and the first floor.

5.4 It is part of the claimant's duty to remain on site and to undertake periodic patrols. He was expected to undertake approximately six patrols in evening.

5.5 The building has CCTV cameras. The respondent operates 10 cameras which are material to this case. In addition, a number of doors have electronic locks which are released using a swipe card. The electronic releases have sensors which are wired into a computer system which records when the doors are accessed and the code of the card accessing them. This is known as the "Janus" system.

5.6 It follows that as a security officer walks around the floors, the officer will be picked up on CCTV and will leave a trail of swipes captured by the Janus system.

5.7 The claimant had a history of being late. This was investigated by Mr Kovac and his poor timekeeping was discussed in September 2015. It is not material to my decision.

5.8 Around August 2015, it came to the respondent's attention that there were difficulties, particularly with the evening shift at Euston Tower. There followed an investigation. Information was gathered particularly from the following sources: the daily occurrence book, the patrol records, the Janus system, and CCTV.

5.9 There is external CCTV which is not under the control of the respondent. No information was gathered from that.

5.10 As a result of the initial enquiries, a number of interviews took place. The claimant was interviewed on 19 October 2015 by Mr Ian Rigby, a security account manager. Mr Stefan Kovac, a security contract manager, was in attendance, but did not take the lead in the interview.

5.11 On 14 October 2015, the claimant was invited to an investigation meeting. The letter outlined a number of allegations as follows:

- **failing to conduct duties effectively in accordance with site procedures**
- **failing to comply with current procedures for out of hours working and access control**
- **failing to exercise a duty of care towards a member of tenant's staff**
- **conduct likely to damage the reputation of the company**
- **falsification of official documents namely the daily occurrence book and security patrol reports.**

5.12 At the interview on 19 October 2015, the allegations were outlined. When the claimant was asked about leaving the site early he initially denied it. He also said, "You don't grass your mates up." Later he admitted to leaving the site early on a number of occasions to avoid paying the congestion charge. At no time did the claimant accept he left site any more than 15 minutes before the end of his shift.

5.13 The notes of the meeting were typed up.

5.14 On 21 October 2015, Mr Rigby interviewed Mr Mohammed Ameen Khalil, the claimant's security supervisor. He stated that he had given no one permission to leave site early. (He has later changed his evidence on this, but not prior to the claimant's dismissal. In any event, even before the tribunal, his evidence was that he gave permission to leave up to 15 minutes early on occasions.)

5.15 On 27 October 2015, Mr Rigby wrote to the claimant again inviting him to a further investigation meeting to take place on 2 November 2015. The same points of investigation were set out. No specific detail was provided.

5.16 At the interview, Mr Rigby refused the claimant's request to allow him to record the interview. During the interview, five specific dates were put to the claimant. They are as follows: 23 August 2015 (movement last detected at 02:58); 3 September 2015(movement last detected 06:15); 4 September 2015 (movement last detected 06:15); 16 September 2015 (movement last detected 06:15); and 19 September 2015 (movement last detected 04:22)

5.17 The essence of the allegations was that there was no recorded CCTV, or Janus, evidence that the claimant had remained in the building after those times. The claimant was asked for an explanation.

5.18 He suggested on 23 August 2015 he may have gone into the gym. Mr Rigby doubted this, as access to the gym would have been recorded on the Janus system and he did not accept the claimant would not be caught on CCTV. As regards 19 September 2015, Mr Rigby had attended site that day sometime after 06:00 and had been informed the claimant was on patrol. However, he observed that the claimant had not reappeared.

5.19 Mr Rigby formed the view that the claimant's explanations were unsatisfactory and his conduct could amount to gross misconduct. He suspended the claimant on full pay. The suspension was confirmed by letter of 3 November 2015. It confirmed the reasons for the suspension which were in summary: leaving the site whilst on duty; failing to book off when leaving the site and being wrongly paid for work; failing to meet the company standards; and potentially bringing the company into disrepute. In addition, it was also said there was a poor attendance record as he was continually arriving late for shift, although it is not clear why that was included.

5.20 The notes of the meeting of 2 November were typed up. Mr Rigby prepared a comprehensive investigation report.

5.21 On 3 November 2015, Mr Rigby interviewed Mr Femi Imabeh, security supervisor. He confirmed the claimant left site early on occasions to avoid the congestion charge, but denied the claimant had sought or gained his permission.

5.22 The report is clear, comprehensive, and well set out. It gave a general introduction and then detailed the complaints against the claimant, specifically setting out the five occasions for which he was required to give a response. It summarised the evidence of Mr Khalil, Mr Imabeh, and the claimant. It recorded specifically the admissions and contentions made by the claimant. It provided extensive documentary evidence in the form of the relevant Janus reports for each incident and referred to the relevant CCTV. It concluded that there was evidence the claimant was not in the buildings on the occasions identified.

5.23 By letter of 17 November 2015, the claimant was invited to a disciplinary meeting. The specific allegations as recorded in the letter remained general. However, he was forwarded a copy of the report, which contained the specific allegations. The meeting was rescheduled from 23 to 25 November 2015. Thereafter it was rescheduled for 1 December 2015. The disciplinary meeting was conducted by a HR manager who is not an employee, Ms Caroline York. Ms Hilary Scott, legal counsel, assisted. I have not heard evidence from either. I have seen a copy of the relevant transcript and this has not been disputed as inaccurate.

5.24 Ms Caroline York decided to dismiss the claimant and wrote to him on 4 December 2015. As regards the circumstances she relied on, the identification of the specific allegations is poor and haphazard. It is apparent that she discussed with the claimant leaving site early and she records that he admitted to leaving only 15 to 20 minutes early. The claimant explained that he may have been in the control room when not picked up on the Janus report or the CCTV, but it is clear that she rejected that explanation. She makes reference to the claimant obtaining money under false pretences and refers to these matters as gross misconduct.

5.25 In addition, she made reference to the claimant being late for work on 13 occasions from August 2015 to October 2015.

5.26 She concluded that summary dismissal was appropriate and stated, “The reason for your dismissal is gross misconduct as set out above.

5.27 The claimant appealed by letter of 11 December 2015. It was a lengthy appeal he specifically relied on the following:

> **a. No formal complaint or allegation was issued to me.**
> **b. I was unlawfully turned from a witness, invited to give information against my colleague, Ameen, to the accused.**
> **c. A sanction of suspension was orally meted out to me, without giving me the opportunity to be heard, therefore in breach of rights.**
> **d. The investigative enquiry was conducted by my accuser – Ian Rigby.**

e. The disciplinary meeting was conducted by a biased umpire.
f. I was denied the opportunity of being heard by the HR manager.
g. The HR manager arrived at the decision of 3 December 2015 without hearing me on all issues.

5.28 In addition he also relied on more general points: the disciplinary hearing was in breach of natural justice; the HR manager erred gravely in her findings and conclusions despite the inconclusive evidence and the logic of his responses; Ms York had failed to make conclusions on four allegations; Ms York had erred by unilaterally regarding four heads of allegations without making any findings and conclusions; the sanctions were unreasonable and irrational. His letter expanded on his reasons for all these matters.

5.29 The appeal was heard by Mr Nigel Davies. Mr Davies did not undertake any sort of review. His approach was to rehear the entirety of the disciplinary. In order to do this, he visited site and familiarised himself with the layout, the operation of the CCTV, and the Janus system. He reviewed all the evidence. He read Mr Rigby's investigation. He read the relevant statements. He reviewed the documentary evidence available. He then held a lengthy meeting with the claimant when he reviewed all of the specific allegations and he considered each of the claimant's appeal points.

5.30 He made a number of findings. He did not accept the claimant had not been issued with a formal complaint. He believed the investigation clearly identified the allegations against the claimant. He did not accept there was something wrong in turning the claimant from a witness to an accused. He did not accept the claimant had been given no right to be heard. He saw no reason why Mr Ian Rigby should not investigate. This was in accordance with the respondent's disciplinary process. He found no evidence that Ms York was biased. He did not agree the claimant was denied the opportunity of being heard by the HR manager: he had been given specific opportunity to give further comments. He rejected the claimant's contention that he had not been given opportunity to elaborate on his case in respect of leaving site early on 3, 4, and, 16 September. He accepted the claimant could take short smoking breaks and he accepted the claimant had difficulty with an ill-fitting uniform. He therefore accepted there was no failure to maintain corporate standards.

5.31 He concluded the claimant had left site on 23 August and 19 September without authority. He concluded the claimant had left by the south fire exit, as this was one way in which he could leave without either being recorded on CCTV or through the Janus system. (The claimant has accepted before me that it would be possible to leave from the south fire exit from the position where he was recorded on the Janus system without either activating the Janus system or being caught on CCTV.

5.32 Mr Davies found the claimant had failed to book off when leaving site resulting in being overpaid.

5.33 Mr Davies accepted the claimant's appeal on corporate standards, which revolved around wearing a uniform.

5.34 Mr Davies concluded that leaving early was conduct likely to damage the reputation of the company. There was no further evidence of negligence in performance of his duties.

5.35 He accepted the claimant had been persistently late but this would only warrant a first written warning not dismissal.

5.36 Mr Davies concluded that the three matters he had found, being leaving site early 23 August 2015 and 19 September 2015 without authority and thereafter failing to book off such that he was paid more than he was entitled to, amounted to gross misconduct. Those two matters also amounted to behaviour likely to damage the reputation of the company.

5.37 Although Mr Davies upheld part of the claimant's appeal as outlined above, he considered the failing so serious that dismissal was the appropriate course of action; he upheld the sanction, albeit he did so for more limited reasons than Ms York.

The law

6.1 Section 98 Employment Rights Act 1996 deals with potentially fair reasons and reasonableness.

Employment Rights Act 1996 - section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(*a*) the reason (or, if more than one, the principal reason) for the dismissal, and
(*b*) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(*a*) relates to the capability or qualifications of the employee for performing work 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, or
(*d*) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(*a*)--

(*a*) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(*b*) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--**
>
> > **(*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) 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 merits of the case.**

6.2 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell [1980] ICR 303**, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the **EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.6 In considering the question of contribution, the tribunal must make findings of fact as to the claimant's conduct. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the award by such proportion as it consider just and equitable having regard to that finding.

6.7 The claimant's submissions refer to a number of cases and I will deal with them, to the extent they have any relevance, in my conclusions.

Conclusions

7.1 This is an unusual case in that the respondent has failed to call any direct evidence of the person who initially decided to dismiss. It is the respondent's basic position that it is clear that there were grounds for dismissal and that any defect of procedure or process which tainted the dismissal was rectified and put right on appeal.

7.2 It should remind myself of the importance of the appeal.

7.3 The appeal process is an integral part of the whole process of dismissal. An appeal process is envisaged by the ACAS code (see paragraph 26 of the code) and the respondent's own disciplinary policy and procedure provides for a process of appeal. Their Lordships, in **West Midlands Co-Operative Society Limited v Tipton 1986 ICR 192** made it clear that a tribunal should not simply consider matters known at the time of dismissal. An employer could act reasonably on the facts known at the time of dismissal, but quite unreasonably in maintaining that decision in the light of new facts and arguments brought during the appeal procedure. It follows the employer's actions at all stages are relevant to the reasonableness of the dismissal process. The point is emphasised in the Court of Appeal decision in **Taylor v OCS Group Limited 2006 ICR 1602**. The task of the employment tribunal when considering whether the employer acted reasonably in dismissing is to assess the fairness of the disciplinary procedure as a whole.

7.4 The appeal procedure is important because it gives an employee the opportunity to demonstrate the reason for his or her dismissal was not sufficient. That is a matter the tribunal should have in mind when considering criticisms of the appeal procedure itself: was the claimant denied the opportunity of demonstrating that the real reason for his dismissal was insufficient.

7.5 Whilst the defect in the appeal process can lead to a finding of unfair dismissal, conversely it has long been recognised that an appeal process may address previous defects, whether they are substantive or procedural, and correct them. It is irrelevant whether the appeal process is a review or

a rehearing. The Court of Appeal in **Taylor** established that the words "rehearing" and "review" are mere labels, what is important is whether the appeal was sufficiently thorough to cure the earlier shortcomings. That is a matter of fact for the tribunal.

7.6 With that in mind, and given the lack of evidence from the dismissing manager, Ms York, I am going to consider first the appeal.

7.7 There is no doubt that Mr Davies's appeal was extremely thorough. To attach the label of rehearing would be appropriate in this case. Mr Davies went back to basics. He familiarised himself with the locus. He made sure he understood the procedures. He went back to the primary evidence and read the statements. He considered the full detail in the investigation report. He familiarised himself with the disciplinary process and outcome. He considered the primary material in the form of the Janus reports and the CCTV. Thereafter, he undertook a thorough interview with the claimant and considered each and every point raised by the claimant; he dealt with each, giving full reasons. It would be difficult to imagine a more thorough appeal process.

7.8 The result of that appeal process was that he found two of the specific allegations concerning the claimant – leaving his shift several hours early (23 August and 10 September) and then falsifying records – were true. He concluded they could constitute gross misconduct and they could seriously damage the respondent's reputation.

7.9 He also found for the claimant on a number of points of appeal. As regards his general lateness, he did not consider that should form a reason for dismissal. He did not find any other allegations of negligent performance of duties. He accepted the claimant's explanation as to why he had had difficulties with his uniform.

7.10 It follows that by focusing on the two most extreme examples of the claimant abandoning his duties, Mr Davies maintained his focus and considered specifically whether those matters could amount to gross misconduct.

7.11 He found that leaving the premises on 23 August 2015 and 19 September 2015 did amount to gross misconduct. At the time he formed his view, he clearly had the relevant belief. The belief established the reason which related to conduct.

7.12 At the time he formed that belief he had grounds. The evidence was overwhelming. The claimant had given contradictory and haphazard explanations. He suggested that perhaps he had gone back to the control room. He suggested he had been in the gym. He did admit to leaving early, but that left many hours not accounted for.

7.13 Mr Davies had established that it would have been possible for the claimant to leave from his last known Janus position without either accessing the Janus system further or being caught on CCTV. Against this, the claimant could give no rational explanation as to how he could

have got back to the control room without being seen. Nor could the claimant explain why there was no record of his leaving on the Janus system which should have recorded him leaving a shift on or around 7 o'clock. The claimant was required to leave from an authorised door. All the authorised doors were linked to the Janus system. There was no reasonable explanation for why there had been no registration of his leaving.

7.14 The claimant did suggest at one point that he had left much later than 07:00 (after 10:00), but that would not explain the total lack of evidence of the claimant on the Janus system or on CCTV for many hours.

7.15 The claimant's explanation that he may have been in the gym was even more bizarre. It seemed to be the claimant's suggestion that he could access the gym without using his swipe card, thus avoiding the Janus system. Mr Davies was asked to believe that the claimant may have been in the gym which he had accessed without authority and in a manner which, effectively, was breaking in. It was possible to slip a small plastic card into the lock and force it open. However, the claimant would have no authority to do so and being in the gym he would be off duty in unauthorised part of the premises, for many hours. It would still not explain why the claimant was not seen later on CCTV or why he did not activate the Janus system when leaving at the end of his shift.

7.16 This is not a case such as **Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457**, as relied on by the claimant, where the employer was presented with diametrically conflicting accounts of an alleged incident with little evidence to corroborate one way or the other. The claimant could not give any sensible account at all. The corroborating information and evidence was overwhelming. It is suggested the claimant should have been given the benefit of the doubt. There was no doubt in this case. The only rational explanation was that the claimant left the premises by the south fire exit, and avoided the Janus system and the CCTV by so doing.

7.17 There can be no doubt that Mr Davies had ample grounds for his belief.

7.18 There has been some criticism of the investigation. The claimant suggests that he did not know the case he was to answer. It would be fair to say that the specific allegations he faced did develop. They were not set out initially in the first investigation meeting. However, by the time of the second investigation interview, the five specific occasions when he was said to have left early were identified. He was asked specifically about them. Whilst those specific allegations were not included in the letter inviting him to a disciplinary, they were set out very clearly in the investigation report. There could be no doubt that the claimant knew exactly which specific five occasions he was to account for.

7.19 There can be no doubt that at the appeal stage, the specific allegations were considered in detail. The claimant had ample opportunity to answer

them first in the investigation, then it would also appear in the disciplinary, and certainly at the appeal stage.

7.20 There has been some criticism of the failure to interview all possible witnesses. I understand there was one individual on the night shift who was not interviewed. However, that individuals was never implicated by reference to any other material such as the CCTV or the Janus report. The obligation is to undertake a reasonable investigation of a reasonable employer. There is no obligation to interview every possible witness or to explore every possible avenue. There has been some suggestion that the external CCTV footage should have been obtained in order to see if the claimant left the building. That was unnecessary in my view. The internal evidence was clear and overwhelming. Interviewing a further witness was also unnecessary having regard to the strength of the evidence already obtained from other witnesses and the evidence in the form of the Janus report and the CCTV footage. The claimant has given no rationale explanation for why the additional witness could have helped his case or shed light on the surrounding circumstances.

7.21 I have no doubt that the investigation was sufficient to found the basis for the conclusions reached by Mr Davies. The investigation was within the range of reasonable investigations of a reasonable employer.

7.22 There have been various criticisms of the procedure. There is criticism of the dismissal. There is some evidence to suggest that there may be difficulty with part of the dismissal process. There is a lack of oral evidence. Having regard to all the documentary evidence available, I have no doubt the Ms York did take the view the claimant had deliberately left and falsely claimed wages on at least two occasions being 23 August and 19 September 2015. I also have no doubt that she found that his overall conduct was gross misconduct.

7.23 It is less clear to me what view she took as regards the other matters, particularly his persistent lateness, his failure to wear uniform, and general allegations of negligence.

7.24 As regards lateness, she certainly found that it was misconduct. Whether it was seen as gross misconduct, and whether this was a necessary finding in her overall decision that the claimant had committed gross misconduct is less clear. It may be reasonable to find that the lack of clarity itself casts sufficient doubt over the reasonableness for a potential finding of unfair dismissal.

7.25 The lack of clarity regarding the other matters, particularly the references to the failure to maintain corporate standards and the negligent performance of duty, simply adds to the uncertainty, and that uncertainty may warrant a finding of unfair dismissal. I have no doubt the Ms York did consider the investigation report, which was thorough, and she did form the view that the claimant's overall conduct was such as to warrant dismissal. However, there is a lack of clarity in the written documentation, and I have not had the benefit of hearing from her.

7.26 That said, to the extent Ms York's approach can be criticised, I have no doubt at all that those points were recognised by Mr Davies; he considered them carefully, and the weaknesses were addressed and rectified. He sifted through what was relevant and what was not relevant. He rejected those matters for which there was no proper evidence. He put the general lateness in an appropriate context and made it clear he would not dismiss for that reason. He focused on the matters which could truly be seen as gross misconduct, and he dismissed for those reasons alone. He dealt with all the claimant specific appeal points and he gave full and proper reasons for his findings.

7.27 There has been some suggestion that there was breach of the respondent's own written procedure and policy.[1] The claimant suggests that there can be no dismissal unless there has been a warning. That is a misreading of the policy. There is some suggestion that the type of behaviour for which he was sacked is not caught by the respondent's own definition of "gross misconduct." I do not accept that. Theft, fraud, dishonesty, and falsification are all given as examples of gross misconduct. The claimant signed out at 00:700, either getting somebody else to do it for him using his pin, or doing it through his mobile phone. There were grounds to conclude he deliberately falsified the time that he was leaving and falsely claimed money. There is no doubt that his conduct falls within the general concept of gross misconduct identified in the policy.

7.28 I do not accept his arguments that Mr Rigby was either inappropriate or biased or that Ms York was inappropriate or biased. I do not accept his argument that only an operations manager could dismiss. I have some sympathy with the suggestion that the policy envisages a manager dismissing and being supported by HR; however, I do not read the policy as imposing such an interpretation. In any event, it was rectified on appeal.

7.29 As regards the alleged breach of the ACAS code, I should deal with each of those. I accept under paragraph 19 that it is usual to give an employee a written warning. However, that ignores paragraph 23, which makes it clear that some acts are so serious they justify instant dismissal. The claimant was in a position of trust and responsibility. He abused the trust by deliberately absenting himself. There can be little doubt that he did not appear on the Janus system or the CCTV because he deliberately sought to avoid them. That was a dishonest act. Signing out a 07:00 was a dishonest act. Claiming wages when he was not there was a dishonest act. Thereafter, lying to the respondent was a further act of dishonesty. Continuing to claim that he had not left the premises, when the evidence was overwhelming, cast such doubt over the claimant's honesty that it was almost inevitable it would be seen as gross misconduct.

[1] In submissions, the claimant relies on *Crawford v Suffolk Meintal Health NHS Trust 2012 EWCA civ 138*. I accept that a claimant can rely on procedural failings, even if not raised at the time. However, that is not the way this case has been advanced by either side. I can consider all the procedural criticisms raised.

7.30 Paragraph 20 of the ACAS code refers to moving to a first and final written warning. For the same reasons as set out above in relation to paragraph 19, it cannot be said the respondent was wrong to move directly to dismissal.

7.31 Paragraph 21 of the ACAS code envisages giving a warning and clear instructions as to how an individual should improve and also giving consideration to demotion. None of that you usurps the operation of, and logic of, paragraph 23, which applies in the case of conduct so serious it warrants instant dismissal.

7.32 Finally, I note the general reference to dismissal by a manager. I do not read the ACAS code to be so restrictive as to limit this to line managers. There is no reason why a manager in the human resources department should not be delegated to deal with the dismissal.

7.33 Finally, I would note that the tribunal should remind itself that it is always considering the character of the conduct. In the context of unfair dismissal, gross misconduct may be a convenient label for conduct that is sufficiently serious to justify dismissal.[2] The question is always whether the respondent has acted within the band of reasonable responses in treating that conduct as sufficiently serious to justify dismissal.

7.34 I have noted that there are potential arguments in relation to the role of the dismissing manager: there are potential shortcomings and failures. However, even at the dismissal stage, the investigation was sound and sufficient. The claimant was given sufficient opportunity to put his case. To the extent there was any deficiency, there can be no doubt that Mr Davies put it right on appeal. He had the requisite belief. The investigation was reasonable and sufficient. The investigation supported his belief. There is no aspect of the appeal procedure which would lead to a finding of unfair dismissal. I have therefore found that the dismissal was within the band of reasonable responses.

7.35 I need not consider in detail contributory fault nor whether the dismissal would have occurred at the same time had a fair procedure been followed.

7.36 As regards contributory fault, I find as a fact that the claimant did leave the premises early on 23 August 2016 and 19 September 2015, as alleged by the respondent. Thereafter, he falsified his leaving time. Thereafter, he falsely claimed money which was not due to him. Thereafter, he lied about it to the investigating manager Mr Rigby, the dismissing manager Ms York,

[2] The claimant has relied on *Sandwell & West Birmingham Hospials NHS Trust v Westwood 2009 EAT 032*. I have not found that case of particular assistance. It was concerned with the correct characterisation of admitted conduct, and that is not the case here. I do accept it is not for the employer to be the arbiter or what conduct could be seen as gross misconduct; it is for the tribunal to consider if it was reasonable for the employment to come to that view. The cases of *Bowater v Northwest London Hospitals NHS Trust 20011 EWA civ 63* adds nothing in this case – I accept the employer cannot be the final arbiter of its own conduct.

and the appeal manager Mr Davies. If at any time I am required to consider contributory fault, it will be on the basis of those findings.

Employment Judge Hodgson
19 October 2016