EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr J Gilsenan **v** **United Biscuits (UK) Ltd t/a Pladis**

Heard at: Watford **On**: 9 August 2017

Before: Employment Judge Bedeau

Appearances

For the Claimant: In person
For the Respondent: Mr David McCrum, Solicitor

RESERVED JUDGMENT

1. The claimant's unfair dismissal claim is not well-founded and is dismissed.

2. The provisional remedy hearing listed on Monday 27 November 2017, is hereby vacated.

REASONS

1. In his claim form presented to the tribunal on the 29 March 2017, the claimant claimed that he was unfairly dismissed from his employment as Warehouse Team Manager, after 13 years' service. In the response, it is averred that he was dismissed for conduct, in that he had not accurately recorded the times he worked. A fair procedure was followed and dismissal fell within the range of reasonable responses.

The issues

2. The issues for the tribunal to hear and determine are as follows:-

   2.1 What was the reason for the claimant's dismissal as shown by the respondent?

   2.2 Had the respondent at the time of the dismissal, formed a genuine belief based on reasonable grounds in the claimant's guilt?

2.3 If so, had the respondent prior to the claimant's dismissal, conducted a reasonable investigation?

2.4 If so, at the time of the claimant's dismissal, had he respondent considered any mitigating factors?

2.5 If so, was the decision to dismiss within the range of reasonable responses open to a reasonable employer to make?

2.6 If the dismissal was procedurally unfair, would the claimant have been dismissed if a fair procedure had been followed?

2.7 Had the claimant contributed to his dismissal?

2.8 If so, to what extent?

The evidence

3. I heard evidence from the claimant **who did not call any witnesses**. On behalf of the respondent, evidence was given by Mr Andrew Greasley, Supply Chain Manager, Manchester and by Ms Theresa Frain, Human Resources Business Partner.

4. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 446 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

5. The respondent is a food manufacturing company with operations nationwide in the United kingdom employing 4,000 people.

6. It has a disciplinary policy which has a non-exhaustive list of examples of what may constitute gross misconduct entitling the respondent to dismiss the employee summarily unless there are genuine mitigating circumstances. The dismissed employee has the right of appeal. The list includes, amongst others:

> "Theft, fraud, deliberate falsification of records." (pages 9 - 17 of the joint bundle)

7. The claimant commenced employment with the respondent on 1 March 2004. At all material times, he worked as a Warehouse Team Manager at the respondent's McVitie's Harlesden site and reported to Mr Marcus Pymer, Supply Chain Manager. About 580 people are employed at the site.

8. His original shift pattern was 12 hours a day commencing at 6.00am and finishing at 6.00pm working either two or three consecutive days including weekends. He managed warehouse staff. The night shift would start at 6.00pm and finish at 6.00am. As there was no Warehouse Team Manager on duty during the night shift, Mr Pymer and the claimant agreed that the

claimant should vary his working hours to start at 6.30am to 6.30pm to enable him to overlap with the night shift workers and to give instructions to them. Mr Pymer only worked normal daytime business hours.

Anonymous complaint

9. In August 2016, Ms Theresa Frain, HR Business Partner at the Harlesden site, received anonymous information in which it was alleged that the claimant and other warehouse managers were not working their contracted hours and that the claimant was spending time on gambling websites. After reading it she asked Mr Stephen Edwards, Supply Chain Excellence Lead, to carry out an investigation into the claimant's attendance at work over a three months period from 1 May to 4 August 2016.

10. The respondent operates a clocking in and out system whereby every time an employee enters or leaves the site, their times of entry and exit are recorded. There is also the Departmental Google Attendance Sheet which the claimant was required to enter the hours he worked.

The investigation

11. Mr Edwards, during his investigation, established by looking at the claimant's clocking in records from 1 May to 4 August 2016, that he did not complete his full 12 hours shift on 32 of his 42 shifts, including not starting work on Sunday until 08.00 on 6 out of the 42 shifts. It meant that during the period in question he worked 12 hours 35 minutes less than his contracted hours. (62- 82, and 99)

12. Mr Edwards had originally calculated the shortfall in hours as 17 hours 42 minutes, but during the disciplinary hearing he was invited to consider his calculation, which was later amended to 12 hours 35 minutes. (88)

13. As part of the investigation, he met with the claimant on 26 August 2016 and notes were taken by him of their meeting. When asked what was the reason for having swiped in late, the claimant said that the change to his working hours from 6.30am to 6.30pm, was not agreed, therefore, he was not late. What was agreed was that there should be "flexibility" around his team and the business needs at the time. He said, as an example, that on Tuesday 23 August 2016, he swiped in around 6.30am but left at 7.00pm. He did not watch the clock every minute and would leave when the shift had settled and everyone was in place.

14. He was asked why he had swiped out early, he replied by saying again that he did not watch the clock and that he was guilty of naivety. It was put to him that on three occasions he did not swipe in and out and was asked what was the reason. He was unable to give one and said that he could not remember. He was aware that it sometimes happened with operators that the system did not always "pick it up." He was asked to explain why he would arrive at 8.00am on Sundays instead of 6.30am. He replied that the reason for the late start on Sundays was because he moved house the previous year and

believed that the London Underground 24hour tube service was going to start operating much earlier, but that was not the case. He was, therefore, not able to get a tube to work in time to start at 6.30am. He was asked whether the late start on a Sunday morning was agreed with Mr Pymer, to which he replied by saying that there was no agreement and that he did not tell Mr Pymer because he was afraid that he would be told to start at 6.00am. He also did not think at the time that it was an important issue as the shift was under control. He said that he showed commitment by paying £45.00 per trip for a taxi and did not think it was a problem. He also said that he needed to leave on or around 4.30-5.00pm once or twice a month, to collect his tablets and that his early departure was agreed by Mr Pymer.

15. He was asked what kind of example he was setting to his staff in not fulfilling his contractual hours. He replied by saying that he did not think that his behaviour set an example but the teams saw him working in all areas, he did not watch the clock and by working into the night beyond the end of his shift, was the example he had set.

16. In relation to accessing gambling websites at work, the claimant explained that he would look at Sky News during the day to keep up to date and did not have an account with either Facebook or Twitter. He did not do social networking and no-one else had his password. He was not sure why gambling websites were showing up on his account. When invited, he did not sign the interview notes. (95-97)

17. In relation to the claimant house move a year earlier, Mr Edwards looked at his clocking in records between September 2015 to April 2016 and noticed that he had only started on time on one Sunday during that period, as well as arriving late and leaving early on other days. Overall, he worked 45 hours and 48 minutes less than his contracted hours. These figures were later amended allowing for two weeks in December 2015. The amended figure was 46 hours 3 minutes. There were subsequent errors in the calculations resulting in a shortfall of more than the earlier calculations. (pages 100-105)

18. Mr Edwards spoke to Mr Pymer on 5 September 2016. He was asked what working agreement he had with the claimant and with Mr John McNally, another Warehouse Manager, who was also the subject of the anonymous complaint. He replied that they were 6.30am to 6.30pm for the claimant and 5.00am to 5.00pm for Mr McNally. The times were to consider the start of the night shifts to provide for a short period management oversight. Any time in excess of the contracted hours were to be taken off in lieu. The agreement was made orally and not in writing. Mr Pymer said that the claimant did not talk to him about his Sunday working hours nor was there an agreement that working from home would be classed as working time. He acknowledged that the claimant would take calls while at home, but this was just a normal part of the job. He said that although the claimant did not talk to him about moving house, it was something he became aware of. (108)

19. After completing his investigation, Mr Edwards prepared a written summary of his findings. In relation to leaving the site early, particularly at weekends,

during the period from 1 May 2016 to 4 August 2016, the claimant failed to complete the full 12 hour shifts on 32 out of 44 shifts. In his figures, he excluded the claimant training days and holidays.

20. With regard to not starting his Sunday shift until after 8.08am, Mr Edwards had checked the records for the previous 12 months and discovered that there was only one occasion, 3 January 2016, when the claimant commenced his shift before 06.30 and it was at 05.59. He found that the claimant did not review his working hours with Mr Pymer "..despite John having a problem getting to work on a Sunday due to the claim of him moving home." Over the 3 months period he also found that the claimant had worked 17 hours 42 minutes short of his contracted hours and from September 2015 to April 2016, 45 hours 48 minutes. He concluded that there was a case to answer and provided his reasons. In relation to accessing gambling websites in work time, there was insufficient evidence to support the allegation and no further action was required. (110-112)

The claimant's suspension

21. In a letter dated 7 September 2016, Mr Edwards informed the claimant that he would be suspended from work from 6 September 2016. The purpose of the suspension was to fully investigate the potential gross misconduct allegation, namely that he breached his contractual obligations by failing to work his contractual hours. He was advised that his suspension would be on full pay and was not a disciplinary sanction. He was not required to attend work, but was required to remain available if he had to be contacted by the respondent. (114)

The disciplinary hearing

22. In a letter dated 13 September 2016, sent by Mr Arthur Lawrence, Manufacturing Manager, the claimant was invited to attend a disciplinary hearing scheduled to take place on 16 September 2016 and was warned that a potential outcome may be his dismissal. He was reminded of his right to be accompanied at the hearing. Together with the letter was a copy of the investigation pack. (126 and 128)

23. The claimant's line manager, Mr Pymer, did not conduct the disciplinary hearing in accordance with the respondent's procedure because he had been questioned as part of the investigation.

24. As a result of the claimant request further documents and his challenge to Mr Lawrence chairing of the disciplinary hearing as not independent of management at the Harlesden site, the hearing was rescheduled to take place on 21 November 2016, to be conducted by Mr Andrew Greasley, Supply Chain Manager of the respondent's Manchester factory site.

The claimant's grievance

25. On 21 September 2016, the claimant lodged a grievance in which he complained that Mr Edwards should not have been instructed to carry out the investigation as he had an ulterior motive, namely he was told by the claimant that he, the claimant, was unwilling to continue in his ambassador role. The claimant had been designated one of 8 ambassadors under a project operated by the respondent, originally known as PACE and later GOAL 21. His role was to promote "culture change" and behaviours in the workplace. In the claimant's case, in the Supply Chain. He asserted that in August 2016, he told Mr Edwards that he was not willing to carry out his ambassador role and that his decision did not find much favour with Mr Edwards. He believed that from that moment Mr Edwards held a grudge against him because he decided to step down from the role. (136-138)

26. Mr Greasley decided to consider the grievance first before conducting a disciplinary hearing, as the issues raised in both proceedings overlapped.

27. The disciplinary hearing was again rescheduled and took place on 13 December 2016. He told the claimant at the start of the meeting that he did not uphold his grievance. He found that the reason why Mr Pymer did not conduct the disciplinary process was because he was a witness during the investigation. There was also no reason to suggest that there was any bias on Mr Edwards' part. The claimant's decision to relinquish his responsibilities as an ambassador had no impact on Mr Edwards' decision that there was a case to answer regarding leaving work early. Mr Edwards had no recollection of the various statements attributed to him by the claimant as having an impact on his decision. (172)

28. At the disciplinary hearing, the claimant was accompanied by Marion Corcoran, Co-ordinator. Mr Mark Randal, Human Resources Advisor, was the note-taker and Mr Greasley was chaired the meeting. The claimant did not deny the accuracy of the recorded hours worked and said that he had licence to manage his own time and was not a clock watcher. He had always asked Mr Pymer when he wanted to leave the site early; he worked shifts when not scheduled to do so, which made up the shortfall in hours; overall, he worked more than his contracted hours, if his work from July 2014 was to be taken into account; and he did not believe that he was doing anything wrong. (174-190)

29. The hearing was adjourned for Mr Greasley to investigate the matters raised by the claimant. When Mr Pymer was spoken to, he said to Mr Greasley that the claimant expected to work no more and no less than his contractual hours and that his hours should have been recorded on the Department Google Attendance sheet, referred to as the Attendance sheet. (198-201)

30. Mr Greasley then examined the Attendance sheets in respect of the claimant's hours recorded and found that they did not match his clocking in and out records covering the same period. The records revealed that there had been a shortfall in hours in most cases but the Attendance sheets

recorded the full 12 hours as having been worked by the claimant on each shift. It suggested to Mr Greasley that the claimant was deliberately misreporting his hours on the sheets. (202-210)

31. Mr Greasley also examined the claimant's clocking in and out records, starting from 1 June 2014 and established that he had clocked in and out on four occasions between 1 June 2014 and 27 March 2015 and had been working his contractual hours up to and including July 2015, but could not find that he had worked any additional hours during that period. A discount was given for his attendance at training.

32. The disciplinary hearing reconvened on 4 January 2017, with the same people in attendance. With regard to the Attendance sheets, the claimant said that the information would be inputted by another colleague called Khalid and that if Khalid was not there he would input the information including the night shift staff. He said the Warehouse Co-ordinators would also input the information in relation to the attendance of staff. When they were absent, both managers would carry out that work. The Attendance sheet was not meant to be used by Team Managers and the information recorded should be disregarded. He acknowledged not having worked some of his contracted hours.

The claimant's dismissal

33. The hearing was adjourned for Mr Greasley to consider his decision. When it was reconvened, he communicated his decision to the claimant, stating that he decided to dismiss him. Although he had reviewed the respondent's records going back to 1 June 2014, he could not draw any conclusions in respect of the period 1June 2014 to March 2015, due to the lack of clocking in and out data. He took into account that the claimant had worked his contractual hours from 28 March to 31 July 2015, but could not find that he had worked any additional hours during that period. From the clocking in and out records, there was a shortfall of nine hours in August 2015 which when added to the shortfalls from 1 May 2016 to 4 August 2016, meant that he did not complete a full 12 hour shift on 32 of his 42 shifts and had not started work on Sundays until after 8.00am on 6 out of the 42 shifts. There was a significant shortfall in the hours worked assessed at over 61 hours between August 2015 to August 2016.

34. Mr Greasley had already discounted the time the claimant was not scheduled to work but did in fact attend work, namely on 15 and 16 February 2016. He was satisfied that the claimant's ambassadorial duties all fell within his normal shift pattern and were not on days he was not expected to work. Only on rare occasions did the claimant sought permission from Mr Pymer to leave work early. Mr Greasley took into the account what the claimant had said during the investigation meeting with Mr Edwards, that he had not spoken to My Pymer about his late Sunday starts because he was afraid that he would be told to start work at 6.00am, whereas during the disciplinary hearing he said that he discussed all his working arrangements with My Pymer. The claimant further stated that the reason why he could not get into work before 8.00am

on Sunday was domestic and not the delayed start of the London Underground's 24 hours service.

35. Mr Greasley's review of the Attendance sheets compared with the claimant's clocking in and out records, strongly suggested the claimant had falsely recorded his working hours.

36. With all the above taken into account and bearing in mind the claimant's submission that there was a shortfall in the hours recorded compared with the hours worked; that his explanations for the shortfall were contradicted by the documentary evidence; and that he did not seek Mr Pymer's permission to start work late on Sunday morning, led Mr Greasley to conclude that the claimant had dishonestly recorded his working hours, particularly having regard to the Attendance sheets. He told the claimant that he was dismissed for not working his 61 hours. He considered his length of service and good work record, however, taking into account his managerial role, there had been a serious breach of trust placed in him by the respondent. He decided that the offence was so serious it warranted his immediate dismissal for gross misconduct. (212-227)

37. On 11 January 2017, Mr Greasley sent the claimant written confirmation of his dismissal. It is a detailed document covering the various points raised by the claimant and the matters relied upon by Mr Greasley in support of his decision. It was decided that the claimant should be paid up until 4 January 2017 and was advised of his right of appeal. (228-233)

<u>The appeal hearing</u>

38. On 18 January 2017, the claimant appealed against the decision to terminate his employment. He wrote;

> "I wish to appeal this decision because information and evidence that this decision was based on was insufficient and incomplete and the company was unable to produce the necessary documentation to prove the allegations."
>
> Therefore, I will be producing my own evidence at the appeal hearing when schedule……." (234)

39. The appeal hearing was held on 7 February 2017 and was chaired by Ms Nina Sparks, Factory General Manager. Ms Frain attended to provide human resources support. Also in attendance were the claimant and Marion Corcoran. Ms Sparks was unable to attend the tribunal hearing to give evidence as she was ill. Ms Frain attended in her place.

40. The claimant put 14 grounds in support of his appeal. The principal grounds being: he believed that Mr Pymer had confirmed that he had a licence to manage his own time; he had not been provided with any evidence of the shortfall in hours; the scope of the investigation changed over time; he believed that there was a connection between his decision to relinquish his ambassadorial duties and the decision that Mr Edwards should carry out the

investigation; and that the shortfall in hours should have been addressed earlier. (238-241)

41. Ms Frain, in evidence, said and I do find as fact that the appeal hearing was adjourned in order to allow Ms Sparks to conduct her own investigation into some of the matters raised by the claimant. In particular, how it had been established there was a significant shortfall in the claimant's hours worked when compared with his contracted hours? SHe was satisfied that the claimant had been provided with all the relevant evidence in relation to the shortfall prior to the disciplinary hearing. Further, she formed the view after considering the evidence before her that there was a significant shortfall in the hours worked when compared with the claimant's contracted hours. She considered the spreadsheets provided to her by Mr Randal and established that the occasions when the claimant arrived late or left early by fewer than 10 minutes, amounted to 3 hours out of 61 hours. (256-258)

42. Together with Ms Frain she met with the claimant on 2 March 2017, who was again accompanied by Marion Corcoran. She read from a prepared statement and informed the clamant that his appeal would be dismissed. In her conclusion, she said the following:-

> "In addition, in the adjournment, I decided to have a look at the hours that you had not worked to see if they were the result of starting or leaving 10 minutes or less than your start or finishing times. I reviewed these results and found that it only made a marginal difference to the overall number of hours that you were short of. To be clear, this amounted to less than 3 hours. I have decided to uphold the decision to dismiss you for breaching your employment contract by not working your full contractual hours and for fraudulently recording hours that you did not work made by Andrew Greasley. This is because I no longer have confidence in your integrity. Your actions are a fundamental breach of trust combined with your apparent unwillingness to take responsibility for your actions. You have consistently looked to blame others for the investigation and for not picking up that you were not working your contractual hours. You have not apologised for your mistakes and have not even offered to repay the hours owed. This is not what I would have expected from you and I am very disappointed that this is where we have ended up. My decision concludes the appeal's process." (268-270)

43. Ms Sparks' decision was confirmed in writing in a letter sent to the claimant dated 3 March 2017. It is useful to cite it in full as it demonstrates the detailed way she considered the issues. She wrote:

> "Dear John
> **Outcome of Appeal Hearing**
> I am writing to confirm the outcome of your appeal against the decision made by Andrew Greasley, Supply Chain Manager, to summarily dismiss you on 4th January 2017 for breaching your employment contract by not working your full contractual hours and for fraudulently recording hours that you did not work. The appeal was heard in 2 parts on Tuesday 7th February 2017 and Thursday 2nd March 2017. You were accompanied by your work colleague, Marion Corcoran, at both meetings and I was accompanied by Theresa Frain, HR Business Partner.
>
> Having listened carefully to everything you and your representative had to say on Tuesday 7th February, I adjourned the hearing to do some further investigations and

consider my decision. I then reconvened the hearing on 2nd March to give you my decision. In doing so, I took you through each of the grounds of your appeal in turn before giving you my overall decision:

- **At the last meeting, you had said that you had a licence from your manager to manager your own time and that you believed that Marcus had confirmed this.**
  I told you that in due course of the investigations, Marcus confirmed that he had agreed to vary your contractual start and finish times by half an hour to 6.30am to 6.30pm to enable you to have regular contact with your team on night shift. He also said that he made it clear that you needed to work the contractual hours that you were being paid for and record your hours on the Departmental attendance sheet. He expected you to agree any lieu time owed when you had gone above your contractual hours. He was also clear that in the first 2 quarters prior to the implementation of Jenga in June 2016, you had worked flexibly but that he did not expect you to work more or less than your contractual hours. Andy Greasley considered these points at your disciplinary hearing and it is specifically covered in the outcome letter. It is my opinion that Marcus did **not** give you the freedom to work less than your contractual hours.

- **You asked why the investigation focussed on the hours you worked between 2015 and August 2016?**
  I explained that the investigation initially looked at a 3 month period prior to 31st August 2016. However, in your statement to Steve Edwards on 31st August 2016, you told him that you had moved house to the Embankment in July 2015 and that you had found that you could not get to work on time for a 6am start because the tubes were not running. That is why the investigation was broadened to include that time. Since then you asked Andy to look further back than that time because you felt you had been doing additional hours and that these needed to be considered too.

- **You said that you believe that you have not been provided with any evidence of the shortfall in hours so there is no proof of the allegations that you have not worked your contractual hours. You think that the 61 hours that you are alleged to have not worked are a "wild" estimation.**
  I told you that I believe that you have been provided with all the necessary data around your hours of work. This includes printouts of clocking and spreadsheets summaries of the information. Both Steve and Andy carried out detailed reviews of the additional hours that you seemed to be short of. I do not believe that there have been any shortcuts or estimates given in this process. It has all been based on data.

- **You said that a number of phone calls outside his working hours should be counted as working hours. You estimate that there were about 51 in 3 years.**
  I explained that as a manager, we all take calls at home from time to time. You claimed you took around 50 in 3 years – so between 1 and 2 calls a month would have been an unreasonable number given your role. As Andy told you, there is a requirement in your contract that we all have to do our contractual hours **plus** whatever additional hours are necessary to do the role.

- **You said there have been numerous allegations made against you and the scope of the investigation has changed – covered starting late and finishing**

early, missing 61 hours of work time, misuse of Company property and finally fraudulently entering information on the Company website.
I said that the 2 original anonymous allegations were that you had been using gambling websites at work in work time and that you had been starting work late and leaving early. These allegations were made against a number of people in the Warehouse – not just you. They were all investigated and where necessary, appropriate action was taken to deal with them. Steve concluded that there was no case to answer for you on the use of gambling websites but that there was a case on the early and late departures. Because of the number of occasions that you had been leaving early or coming in late, there was then the concern that you had not fulfilled your contractual hours. I therefore believe that these two issues are linked – they are not separate. Then, it became apparent that you had been entering hours onto the Department Attendance sheet that you had not worked and again, because this related to the original allegation, it was considered by Andy at the hearing.

I told you that I believe that you need to take responsibility for the fact that you were not doing contractual hours and that you were recording them incorrectly – if you had been doing this, there would have been no case to answer against you and you would not have been dismissed.

- **You said that you believe that there was a connection between your decision to relinquish the PACE ambassador role and Steve Edwards' carrying out an investigation into these allegations.**
  I explained that I was not aware that you had relinquished responsibility for being a PACE Ambassador for many months after you had been suspended. Steve would have been aware of this but that was not the reason for him conducting the investigation. Steve was asked to do the investigation because he is not involved in the Warehouse area and is therefore independent.

- **You said that the CCTV records should have been checked to see if you were leaving early or starting late.**
  I said that the CCTV records have a finite life span and would not have been available to be viewed at the point in time that Steve was conducting his investigation or when Andy was holding the hearing because they no longer exist. However, the information obtained from the KABA system on when you clocked into and out of site was sufficient evidence to establish a pattern of early departures and late arrivals.

- **You believe that you were treated differently to other Team Managers because you were taking calls outside of hours and had a lower salary compared to the others.**
  I told you that I am unclear as to the relevance of this point. You and you alone are responsible for working your contractual hours and what other people are paid and their role is irrelevant.

- **You said that that the QTAR records from 1st June 2014 to 13th March 2015 show you clocking in sporadically because QTAR wasn't recognising the new shift pattern. You said that you were clocking in and out of site so you were not in breach of the Health and Safety rules.**
  I explained that in the adjournment, I have looked at some other QTAR clocking information from that time and they are equally sporadic. I therefore accept your explanation that the system was not accepting clocking on the new

shift patterns and that that was what was causing the missing swipes. I therefore agree that you were not in breach of the site Health and Safety rules.

- **You said that on 29th November, you had come in to do a stock take on your rest day and that day should have been taken off from the overall calculation of the shortfall in hours.**
  I said that I have checked the information and I confirmed that this day has already been taken out of the overall calculation of the shortfall of hours.

- **You said that on 8th May, Marcus agreed that you could leave early but said that you did not have Marcus' agreement to come in late.**
  I told you that the hours that you had agreed with Marcus that you could leave early have been already excluded from the calculation but the hours that you came in late have been included.

- **You said you had relinquished membership of the Trade Union when you became a Team Manager because you believed that you were instructed to do so at a presentation about the role.**
  I said that this is clearly a misunderstanding. The briefing about the Team Manager role that you would have been taken through at the time the restructuring was taking place explained that the Team Manager group are not represented by the UNITE Zone 4 bargaining group and that salaries and terms and conditions are not bargained for collectively. Instead, they are individually negotiated. I have reviewed the presentation given and it simply says that Team Managers will no longer be covered by UNITE Zone 4. This does not affect your right to be a member of a Trade Union. However, I do not believe that this misunderstanding has had an impact on your case – indeed, you have been accompanied throughout this process by a work colleague who was previously a Shop Steward.

- **You claimed that your previous 13 years of service were not taken into account in Andy Greasley's decision to dismiss you.**
  I said that one of the points considered by Andy in his outcome summary was your employment record. Andy's conclusion was that the your actions in not working your contractual hours and completing a Google sheet with hours that you had not worked constituted a fundamental breach of trust and confidence – regardless of your length of service or appraisal ratings. I am aware that you have been with the business since 1st March 2003 and that you have progressed with the company to a Team Manager role in that time. Andy reviewed your record including the appraisals that you had had before making his decision.

  From my own point of view, I explained that I know that your appraisals under the current system showed your performance to have met expectations. You were also selected to be a PACE ambassador and I believe that you made a good contribution to the roll out of this important initiative for the site. Unfortunately, I do not believe that this offsets the breakdown in trust and confidence that you have caused by failing to work your contractual hours and fraudulently completing the Google sheet to show that you were working more hours than you really were.

- **You did not understand why the 61 hours shortfall in hours had not been addressed before.**
  I said that the simple answer to this point is that the reason no one spoke to you about this before was because no one knew what you were doing until we had

> an anonymous tip off that it was happening. Your manager trusted that you were doing your contractual hours and had no reason to doubt that you were – until the tip off.
>
> In addition I told you that in the adjournment I had decided to have a look at the hours that you had not worked to see if they were the result of starting or leaving 10 minutes or less than your start or finish times. I reviewed these results and found that it only made a marginal difference to the overall number of hours that you were short of. To be clear, this amounted to less than 3 hours. I then asked you repeatedly if you agree with my overall conclusion that you had not worked your contractual hours and you eventually conceded that you had not done so. I felt that it was very late in the process for you to make this concession.
>
> I then told you that I had decided to uphold the decision to dismiss you for breaching your employment contract by not working your full contractual hours and for fraudulently recording hours that you did not work made by Andy Greasley. This is because I no longer have confidence in your integrity. Your actions are a fundamental breach of trust combined with your apparent unwillingness to take responsibility for your actions. You have consistently looked to blame others for the investigation and for not picking up that you were not working your contractual hours. I told you that I did not believe that you had apologised for your mistakes and that you had not even offered to repay the hours owed. You said that you had apologised to Andy Greasley and had just assumed that you would have repaid the hours owed and had therefore not offered to do so. I told you that this is not what I would have expected from you and I am very disappointed that this is where we have ended up. I told you that my decision concludes the Appeals process.
>
> I asked you if there was anything you wished to say in response. You said that you were disappointed with the outcome and the length of time that it had taken for your case to be concluded. You said that you felt that the level of punishment was "over the top" in relation to what you had done. You said that you planned to take legal action against the Company and would be speaking to ACAS about your case.
>
> At the end of the hearing, Theresa explained that you had been paid a full month's salary in February 2017 because of an administrative error in the HR Service Centre. She apologised for the mistake and any inconvenience caused. She told you that she has instructed the HRSC to calculate the over payment which will be off set against any holiday pay that you are owed for any outstanding holidays. The HRSC will be in touch with you direct about the repayment arrangements." (272-277)

Mr John McNally

44. The claimant asserted that Mr John McNally, Warehouse Manager, was treated more favourably, in similar circumstances, when compared with his treatment. As previously stated, Mr McNally was also the subject of the anonymous allegations. Mr Greasley did not conduct the disciplinary hearing in his case. It was conducted by Mr Pymer who decided not take any disciplinary action. Although Mr McNally had left the site early on a few occasions during the period 1 May to 6 August 2016, overall, he worked 2 hours 41 minutes more than his contracted hours during that period. In Mr Pymer's disciplinary outcome letter dated 14 November 2016, sent to Mr McNally, he wrote the following:-

"This is to confirm the outcome of the disciplinary hearing that was held on Monday 7 November 2016. I conducted the hearing and was accompanied by Mark Randal, HR Advisor. You decided to attend the hearing alone.

The purpose of the hearing was to consider if any disciplinary action would allocated to you, in accordance wit the company's disciplinary policy, for the allegation of leaving the site early.

During the hearing on Monday 7 November 2016, I informed you that I had reviewed the statements and facts in relation to your case. I asked you to provide me with the reasons for leaving the site early. You informed that on the one occasion you had left the site 1:30 hour early, had informed me and obtained permission. As for the other times where you had left a couple of minutes early, this had been due to you calculating your start time and end time incorrectly. You also stated that you believe the company actually owed you hours.

The meeting was adjourned for me to read through all the notes and evidence as well as your statement and to consider everything you had to say at the hearing. I reconvened the hearing later that same shift to provide you with my decision.

Upon reconvening, I informed you that I had taken into consideration the following:

1. You have been flexible in your working as demonstrated in the recent move to cover all shifts, and I can confirm that you have worked 2 hours 41 minutes more than your contractual hours for the period 1 May 2016 to 6 August 2016.

2. I agree with your statement that you have always asked for authorisation to leave site in unusual circumstances. I have now started to record this to avoid any confusion in the future.

Based on this I will not be taking any disciplinary action in this regard. However, I would like to set out what I require from you in relation to working hours.

1. You must continue to inform me if you are leaving earlier than your agreed finish times, so that I can agree to this.

2. I appreciate that you normally arrive at site early however, my expectation is that you should be leaving the site at 5.00pm, your agreed finishing time.

3. Finally, I would recommend that you reconfirm to your team your standard start and finish times, also, if there are temporary arrangements for you to cover different shift times, make sure that they are aware of this in advance to avoid any misconceptions that you are leaving the site early.

I would just like to add that as a manager you need to be a role model for your team and you need to be mindful of how you are being perceived by your team……." (290-291)

45. The above are my material findings of fact.

Submissions

46. There was insufficient time to hear submissions and to give judgment. I, therefore, ordered that the parties should exchange their written submissions by 4.00pm 18 August 2017 with supplemental submissions by 4.00pm 25 August 2017 and for copies of those submissions to be sent to the tribunal for my attention. I listed the case for a provisional remedy hearing on Monday 27 November 2017 for one day, if the claimant is successful. The submissions were duly received in accordance with the orders made. I have read them and I have taken into account the cases referred to.

47. I do not propose to repeat the submissions herein having regard to rule 62(5), schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The Law

48. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

49. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

    1.1 First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee?

    1.2 Second whether that genuine belief was based on reasonable grounds?

    1.3 Third, whether a reasonable investigation had been carried out?

50. Finally, in the event that the above are established, was the decision to dismiss within the band of reasonable responses?

51. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

52. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

53. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

54. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

55. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

56. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

57. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

58. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was in an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, the comment made. The employment tribunal found by a majority that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677.

59. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee.

> "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

60. In the case of Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, a judgment of the EAT. It was held in that case that in order for disparity in treatment to apply, there must be truly "parallel" circumstances in the cases.

Conclusions

What was the reason for the claimant's dismissal?

61. I am satisfied that the reason for the claimant's dismissal was that he did not work his contracted hours during the relevant period. This was the conclusion came to by both Mr Greasley at the disciplinary hearing and Ms Sparks at the appeal hearing, The deficit in hours was quite significant. He was dismissed for that reason and it fell within conduct under section 98(2)b ERA 1996.

62. The respondent had shown that the reason for the claimant's dismissal was conduct, a potentially fair reason.

Had the respondent conducted a reasonable investigation?

63. Had the respondent conducted a reasonably investigation into the claimant's failure to work his contracted hours? He was invited to meet with Mr Edwards as part of the investigation and was given the opportunity to state his case in response of the two allegations: the hours worked; and accessing gambling websites. Mr Edwards concluded that there was a case to answer in respect of the hours worked but no further action would be taken in respect of accessing gambling websites.

64. The claimant was notified of the disciplinary hearing and at his request, the hearing was rescheduled to allow him time to obtain further evidence and prepare his case. His concerns about the partiality of the managers at Harlesden to conduct the disciplinary hearing were taken into account and Mr Greasley was instructed to conduct the hearing as he had no managerial connection with the Harlesden site. The hearing had to be rescheduled again to take into account Mr Greasley's availability.

65. I was satisfied that the claimant and his companion were given the opportunity to put forward the claimant's account and defence to the allegation at the disciplinary and appeal hearings. He was provided with a copy of the investigation pack to prepare his case and upon his request was

provided with further evidence. Accordingly, the respondent had conducted a reasonable and fair investigation into the allegation.

Were there reasonable grounds for believing in the claimant's guilt?

66. I have concluded that the respondent has established that they were reasonable grounds upon which to find the claimant guilty of the offence alleged. Of importance is the evidence in the possession of the respondent at the time and not what additional evidence was put forward during the tribunal hearing unless it impacted upon the quality of the investigation but I have concluded that the investigation was reasonable and fair. There was evidence from Mr Pymer that he had not given the claimant the flexibility to work less than his contracted hours. The claimant had been provided with all the documentary evidence. The clocking in and out records and Attendance sheets were considered and they, on a reasonable view, show a significant shortfall in the hours worked compared with his contracted hours.

67. As further evidence came to light, the scope of the investigation did change and this was explained to the claimant who was given the opportunity to put forward his account. It widened because the claimant referred to his attendance over the previous year. Neither Mr Greasley nor Ms Sparks concluded that there was a causal connection between the claimant's decision to relinquish his ambassadorial role and his subsequent disciplinary treatment. Nor was there any evidence the respondent was seeking to remove Mr Pymer.

68. The evidence as to how the investigation was initiated was that it arose as a result of concerns raised by a number of employees about the Warehouse Managers' commitment to working their hours. They specifically alleged that the claimant and Mr McNally were not working their contractual hours. I accept that the shortfall in hours had changed but, on any view, it was significant.

69. Mr Greasley took into account the claimant's length of service and good disciplinary record but concluded, as did Ms Sparks, that his conduct was so serious that it affected the respondent's trust and confidence in him. He blamed others for his failures and was reluctant to accept responsibility. As a manger, he was required to set a good example to his staff and he failed in that regard. The conduct in question came within the list of examples of gross misconduct entitling the respondent to terminate the employment summarily.

70. Having regard to Section 98(4) ERA, on the facts as found by the respondent, it cannot be said that the decision taken to dismiss fell outside the range of reasonable responses open to a reasonable employer in the same or similar circumstances.

Alleged inconsistent treatment

71. I accept that the treatment of Mr McNally was wholly different when compared with the claimant's treatment at the disciplinary stage. However, I

take the view that there were significant differences in their circumstances, in that in Mr McNally's case there were occasions when he worked less than his contracted hours but the number of hours were fewer than that of the claimant. Having assessed his work, Mr Pymer concluded that he worked in excess of his contracted hours. In the claimant's case, there was a significant shortfall. The case of Mr McNally is not an appropriate or "parallel" case of inconsistent treatment.

72. I have, therefore, come to the conclusion that the claimant's unfair dismissal case is not well-founded and is dismissed. The listing of the case on Monday 27 November 2017, for a provisional remedy hearing, is hereby vacated.

_____
Employment Judge Bedeau

Date: …5 November 2017……..

Sent to the parties on: .....

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For the Tribunal Office