EMPLOYMENT TRIBUNALS

Claimant: Mr J Sanderson

Respondent: Jagex Ltd

Heard at: Cambridge Employment Tribunal (by CVP)

On: 26 – 28 January 2022 (3 days)

Before: Employment Judge Hutchings

Representation
Claimant: in person
Respondent: Ms C Jennings (Counsel)

JUDGMENT having been sent to the parties on 20 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim presented on 28 November 2018 the claimant complained of unfair dismissal in relation to an allegation by the respondent of misconduct. In essence, the claimant's position is that he was not guilty of the misconduct as alleged, that the respondent caried out insufficient investigation into the allegations made, the outcome of the investigation was predetermined, he was not shown evidence relating to CCTV footage and the decision to dismiss was not a decision a reasonable employer would have reached given all the evidence.

2. By a response form of 12 February 2019, the respondent resisted the claim. It's case, in essence, is the claimant was fairly dismissed for misconduct in the form of accessing player accounts, it's belief in guilt was genuine having carried out a reasonable investigation and the dismissal was within the band of reasonable responses.

Preliminary matters

3. At the beginning of the hearing, before I heard any evidence, I had to deal with two of preliminary matters:

   3.1. The claimant and respondent could not agree the cast list and chronology, and both provided separate copies to the Tribunal the day before the hearing. The claimant's version identified additional individuals and documents. Ms Jennings explained that given the late delivery of the claimant's version and the number of additions, the respondent had not had the opportunity to review the documents in any detail. On a cursory review the respondent contends that the additional individuals, events, and documents referred to in the claimant's version were irrelevant, but that without a more detailed consideration of the documents with the respondent she could not provide detailed objections. I noted the late submission of these documents, that it was a matter for the Tribunal to decide if documents were relevant or irrelevant; given we are at hearing stage in a case dating to 2018 pragmatically the Tribunal would refer to claimants version and consider for itself the relevance or otherwise.

   3.2. The third document (named DSTAR) submitted by the claimant the evening before the hearing was a series of heavily redacted documents setting out exchanges of emails dating to 2017 and 2018. The respondent objected to the inclusion of this document on the grounds it was new documentary evidence, not previously seen by the Respondent, and that it related more to a claim of wrongful dismissal, which was not a claim in the case. The claimant stated that he had added this document as a reference to events not covered in the respondent's chronology. He confirmed they were referenced in his chronology. Given the many opportunities to provide evidence, and that the Tribunal would refer to the claimant's chronology and cast list, which covered the points in the DSTAR document this document was not accepted by the Tribunal.

Issues for the Tribunal to decide - Unfair dismissal

4. Over the last 2 days the Tribunal has heard issues as to liability only in relation to the claim for unfair dismissal. The case management order of Judge Allen dated 13 May 2021 detailed the issues for the Tribunal to decide. I do not propose to read them out; they can be referenced at page 95 of the Hearing Bundle, but I will summarise them.

5. The Tribunal was hearing issues as to liability only in relation to the claim for unfair dismissal. The issues on liability have 2 core elements:

   5.1. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct; and
   5.2. If so, was the dismissal fair or unfair within section 98(4). Did the respondent in all respects act within the band of reasonable responses?

6. For the claimant's claim of unfair dismissal, the focus under section 98(4) is on the reasonableness of management's decisions. In reaching my decision it is immaterial what decision I would have made about the claimant's conduct.

When considering the fairness of the sanction, I must not substitute my own view for the employer's view; the Tribunal must decide if the sanction fell within the range of reasonable responses.

7. This is something Ms Jennings reminded me of in closing submissions, but as Mr Sanderson is not represented, I would like to make the Tribunal's jurisdiction in this case clear. Ms Jennings acknowledged in cross examination and again in closing submissions that the Claimant is here to clear his name. That is not a ruling that the Tribunal can give, and I understand from some of the references made that there are other investigations on-going in this arena.

8. To decide whether Mr Sanderson is guilty or not of the misconduct alleged against him is not a decision the Tribunal can make. The Tribunal's function is to consider the reasonableness of the dismissal, not whether Mr Sanderson was guilty of the misconduct. I must not substitute my own view for the employer's view; the Tribunal must decide if the management decisions and the sanction of dismissal without notice fell within the band of reasonable responses. In identifying that band is to consider whether a reasonable employer with the Respondent's resources would characterise the conduct being considered here as gross misconduct and whether a reasonable employer would dismiss without notice.

Procedure, documents, and evidence

9. The claimant was not represented and gave sworn evidence. The respondent was represented by Ms Caroline Jennings of Counsel, who called sworn evidence from Mr David Lomax, VP People Operations, Mr Neil McClarty, VP of Product and Player Strategy and Mr Nick Deliueff, senior VP of Games Development. Evidence was considered by the Tribunal on liability only, including the principle established in the case of *Polkey v A E Dayton Services* [1987] IRLR 503, HL ('Polkey').

10. I considered the documents from an agreed 246-page bundle which the parties introduced in evidence.

11. Mr Sanderson and Ms Jennings, on behalf of the Respondent, addressed the Tribunal on liability.

Relevant legal framework – unfair dismissal

12. I did not address the legal framework for unfair dismissal as this is not required for an oral judgment. Pursuant to rule 62(5) I am required to identify the relevant law in these reasons. I do so below.

13. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95. This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

14. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent

shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

15. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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.

16. In misconduct dismissals, there is well established guidance for Tribunals on fairness within section 98(4) in the decision in *Burchell 1978 IRLR 379.* The Tribunal must decide whether the employer had a genuine belief in the employee's guilt.

17. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made. The Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23* and *London Ambulance Service NHS Trust v Small 2009 IRLR).*

18. Mr Sanderson and Ms Jennings addressed me on fairness within section 98(4) which I have considered and refer to where necessary when reaching my conclusions. I have foremost in my mind that the employer is the primary fact finder; the Tribunal's role is to review of the facts evident during the disciplinary process, not what may be raised at a later date. *LB Brent v Fuller,* CA, at [32] of *Cossington.*

Findings of fact

19. These are the relevant facts. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. I am not going to state page numbers; all documents referred to are in the agreed Bundle. There was no dispute as to the primary facts in relation to the way in which the employment was terminated. I will summarise.

20. The claimant, Mr Sanderson, was employed by the respondent, Jagex Ltd, as a content developer from 23 November 2015 until his dismissal on 28 August 2018. The respondent operates an online, browser-based video games developer and publisher business based in Cambridge, employing around 350 employees. Mr Sanderson's role focused on designing and developing content updates for a game which has been online for about 10 years called 'Old School RuneScape'.

21. During the period May to July 2018 the respondent noticed what it termed 'suspicious activity' whereby some player accounts were being accessed without proper authorization, potentially to steal the online wealth associated with them, and that internal player support systems were giving away player accounts without the respondent's approval.

22. Initial investigations led the respondent to conclude in July 2018 that this activity linked to the claimant's staff account and user log in details. An email dated 25 July 2018 from the Respondent's Head of IT to Mr Lomax and Mr McClarty and one other identified the Claimant as 'the likely suspect'. It refers to CCTV records, WIFI access records, records of the Claimant's logins into the Respondent's system and the need to tie this evidence together, I quote, 'the smoking gun in a sense' before continuing that 'based on … conversations with HR we have enough evidence to terminate the suspect.' This was a statement made before any investigating officer had been appointed. It was a statement made to the individuals subsequently appointed as investigating officer, Mr Lomax, and disciplinary officer, Mr McClarty.

23. Mr Lomax was asked to investigate. On 27 July he interviewed the employee in Player Support who had raised concerns and two individuals in IT who had investigated unusual activity on some player accounts; the discussion centred on CCTV records of Mr Sanderson's movements, a Samsung android device linked to the suspicious activity and the points of log in to the WIFI systems for that device. These conversations were minuted. In these conversations Mr Sanderson's log in was flagged as having accessed the accounts, along with another individual. In one of these meetings the individual tells Mr Lomax that 'it was my initiative to investigate CCTV and suspicious behaviour once we had a potential suspect. *[purely based on the suspicion of that subject'*]. These interviews discuss CCTV footage relating to Mr Sanderson and his whereabouts.

24. Later the same day Mr Lomax interviewed the claimant. Notes were taken. At this meeting Mr Sanderson was told of the internal investigation and a potential link to his account login. Following the meeting Mr Sanderson was sent a letter suspending him (and I quote) '*pending an investigation into the allegations of gross misconduct made against you'* There are no details of the gross misconduct alleged against Mr Sanderson in this letter. I find this statement premature; the interview notes for 27 July meeting record Mr Lomax outlining possible outcomes, but no allegations of misconduct are made against Mr Sanderson. In reconsideration the respondent has challenged this finding.

25. IT investigations led to a Samsung mobile device being linked to the suspicious activity on the basis that it was linked to several WIFI receivers in the Cambridge office at the same time the suspicious activity was undertaken. I have a lot of documentary evidence on technical aspects of the investigation. Mr Lomax produced evidence of his investigations [summarised at page 183] in the form of a 3-and-a-half-page report which essentially summarises his 27 July meetings and 4 reasons why he considers a disciplinary hearing appropriate [185-192], together with an investigation summary comprising documents.

26. On 30 July Mr Sanderson emailed Mr Lomax asking for clarification of the allegations against him and when he may receive evidence in support. Mr

Sanderson also queries why he was refused his request to bring a companion to the investigation meeting. In reply he is told he will receive at least 3 days' notice so the hearing, the evidence at least 2 days before and told that there is no right to a companion at an investigation meeting, that he has the right to be accompanied at the disciplinary hearing.

27. Mr Neil McClarty was appointed chair to the disciplinary hearing. In evidence Mr Lomax states that he does '*not recall having any discussion with Mr McClarty about this matter prior to the Disciplinary hearing'*. Both Mr Lomax and Mr McClarty received the email from Mr Codero on 25 July where Mr Sanderson was identified as the 'likely suspect'. On 1 August 2018 Mr McClarty wrote to Mr Sanderson to invite him to a disciplinary hearing on 6 August [193]. Paragraph 3 of this letter summarises the purpose of the hearing to: '*consider an allegation you have abused your privileges and/or access to Jagex's internal systems to purposedly and fraudulently steal customer accounts by granting sole access to those accounts to someone other than the account owner'*. The letter bullet points '*breaches as detailed in the company disciplinary procedure'*. A copy of the company disciplinary procedure was enclosed with the letter. The copy before the Tribunal does not include the actual attachment sent. The bullet points referred to as *'general breaches'* are not specific' and seem to be copied and pasted from another source.

28. The Tribunal has a copy of the Respondent's disciplinary procedure which bullet points *'matters of misconduct…the company views as amounting to misconduct'*. In Mr Lomax's witness statement, he discusses *'the nature of the offence being investigated',* a series of bullet points taken from a mixture of the Disciplinary Handbook and Information Security Handbook. These are different from the nature of the allegations set out in the letter inviting Mr Sanderson to the Disciplinary hearing. I find that the allegations in the letter are not specific. They are different to allegations referenced in Mr Lomax's evidence. The letter does not include the investigation report. It states that Mr Sanderson has *'the opportunity to view investigation documents prior to the hearing and these will be made available to you on 2 August'*. The letter informs Mr Sanderson of his right to be accompanied and that if the allegations are proven to be true, the outcome could be (among other things) *'ultimately your dismissal from the company'*. The hearing back is sent to Mr Sanderson by email late on 1 August.

29. Mr McClarty conducted the disciplinary hearing on 6 August. I have notes of this meeting, at which Mr Sanderson requests a hard copy of the information pack. The meeting is adjourned to provide this. Mr Sanderson was accompanied and provided a defence document. Mr McClarty adjourned the hearing to consider and further investigate the questions raised by the claimant at the hearing and the material Mr Sanderson had put forward in defence. The disciplinary hearing was reconvened on 28 August. I have the notes of this meeting. These notes do not address the contents of the defence document in any substance. Mr McClarty refers to an email of 24 August which he states provides 'clarity around the points raised'. There is no substance to that email. It is a discussion of the timing of the reconvened meeting, attaches the notes of the first meeting and refers to some 'additional information', which is not attached to the Tribunals copy.

30. Following the reconvened disciplinary meeting, the decision is taken to dismiss Mr Sanderson. He is informed by letter on 29 August [226]. The letter refers to

'strong evidence to support the conclusion' the conclusion Mr Sanderson is guilty of serious misconduct. There follow 4 sentences setting out this strong evidence. There is a reference to the action being a direct breach of company policies [227] followed by the generic quote from the Disciplinary Handbook.

31. Mr Sanderson appeals the decision to dismiss him in an email on 1 September [233], which sets out the basis of his appeal. On 4 September he is invited to an appeal hearing on 12 September. His is told of his right to be accompanied. The appeal hearing is conducted by Mr Belieff. I have notes of this hearing. The line of questions in this hearing invites Mr Sanderson to 'prove his innocence'. On appeal the decision to dismiss Mr Sanderson is upheld. He is informed of this my letter on 20 September There is no substance set out in the letter as to the basis on which these decisions been made. It summarises the discussion, refers to the appeal officer having 'given full consideration …and looked into the points' Mr Sanderson raised, but give not details of the decision process or grounds. The same day the respondent issues a public announcement that a member of the old school team has been dismissed following misuse of moderator privileges.

32. There are references in the 25 July email to the cost to the Respondent of the suspicious activity being £217,000, Mr Lomax in evidence refers to a real world value 'being in excess of £200,000…..confirmed by the Respondent internal investigations team'. I have not seen any evidence to substantiate these sums or explanations as to how the figures are arrived at.

Submissions

33. At the conclusion of the evidence Ms Jennings on behalf of the Respondent and Mr Sanderson made an oral submission.

34. Ms Jennings submitted that the claimant had accepted that it was reasonable for the respondent to dismiss someone found guilty of misconduct and that this was within the band of reasonable responses. She submitted that the respondent had conducted a full and thorough investigations from 27 July and that the disciplinary process had been meaningful in its engagement. She referenced 4 holes in the evidence that Mr Sanderson had identified in his defence and reminded the Tribunal of the Respondent's position in respect of each, submitting that, on the balance of probability the Respondent had discharged its burden to show reasonable grounds for the dismissal. Counsel concluded by submitting that if the Tribunal decided that the procedure was unfair, and that if a fair procedure had been followed, then Mr Sanderson would have been dismissed in any event on the basis of the evidence, as the respondent had discharged the burden of proving reasonable grounds for the dismissal therefore, applying the principles in POLKEY, given the claimant's conduct was culpable and blameworthy, any award should be reduced by 100%.

35. The claimant submitted that a reasonable investigation was not conducted and the decision to dismiss was based on a process whereby his position that there were critical flaws in the evidence, which by its very nature was technical and complex. He submitted that while claims were made in meetings and correspondence that the queries he raised were investigated, he did not get a conclusive answer, or any clarification was without substance and therefore not

satisfactory and that he was not provided with a clear written explanation. He spoke of his queries being brushed aside as minor. The claimant submitted that before the investigation process he had already been named as the likely suspect and that the decision to investigate him was based on him being identified in this way. Mr Sanderson concluded by submitting that the approach taken was guilty until proven innocent.

Conclusions

36. The effective date of termination was 28 August 2018. It is admitted that the Claimant was dismissed. In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct relating to suspicious account activity on OldSchoolScape online gaming accounts, conduct being a potentially fair reason.

37. At the time the decision was taken to dismiss Mr Sanderson did the respondent have a genuine belief based on reasonable grounds that he was guilty of the conduct?

38. The Tribunal must not substitute its own mindset. I must consider the mental processes of the people who made the decisions and in determining fairness consider the circumstances (including the resources of the employers undertaking). The question for me is, in August 2018 did the respondent act in a reasonable way given the reason for the dismissal. Based on the information available at the time of the dismissal and appeal decision was the view that there was misconduct by the claimant within the band of reasonable responses. The grounds for reaching this view are complex.

39. The issues with this dismissal stem from the email of 25 July. That email identifies the claimant as the 'likely suspect', that outline evidence referred to in the email needs to be '*tied together*' ('the smoking gun' that gives 'based on conversations with HR we have enough evidence to terminate the suspect'). As Mr Lomax commented, this communication is inappropriate and has connotations of guilty as charged, rather than the appropriate starting point in any investigation; the accused is innocent until proven on the factual evidence (here on the balance of probability) guilty. There are references to financial damage to the respondent as 'street value of these accounts / items of £217,000'. I have not seen any evidence to substantiate the figure, but it is considerable damage. Such references place in the mindset of anyone receiving the email that there is a person of interest (indeed this phase was used in oral evidence several times by the Respondent's witnesses) that there it is important for the business (given the reference to the value of 'damage' and police and authorities) to hold someone responsible. Looking at the contents of this email objectively, that is not an unreasonable conclusion.

40. The email was sent to the investigating officer, David Lomax and the dismissing officer, Neil McClarty prior to either of their appointments. This begs the question as to how the Respondent could have possibly thought these two individuals could be part of this investigation with an open mindset. Or indeed how they as individuals could have thought they could go into the investigation with a 'blank sheet' and objective approach, essential when formulating a genuine belief in the guilt or otherwise of someone being investigated (and ultimately dismissed) for gross misconduct in these circumstances.

41. Mr Lomax's letter of 27 July inviting Mr Sanderson to a disciplinary hearing is badly worded at best. It refers to 'allegations of gross misconduct against the claimant' before any have been made. Mr Lomax seeks to clarify this statement in his evidence to the Tribunal, that what he meant by this wording was pending the outcome of his investigation it could potentially result in allegations of misconduct. But this is not what he said in 2018. His clarification confirms that at the time the letter was drafted the investigation was not concluded; indeed, it was the letter that notified Mr Sanderson of his hearing. The statement in his letter is clear. He jumped the gun. His mind was not a blank sheet, casting doubt on a genuine belief. He already had in his mind that Mr Sanderson was the likely suspect. He had been told so by the head of IT. He had already been told in the interview concerning CCTV footage, which took place before the letter was drafted that the CCTV footage was being investigated to fit the person of interest. The wording in the letter is clear; were allegations of gross misconduct against Mr Sanderson (and possibly his guilt) in the mind of Mr Lomax (on 25 July) before he started his investigations on 27 July. Indeed, in reply to the 25 July email he recognises that the statement is 'not appropriate'. I am not satisfied that those, making the decision had a blank mindset. How could their belief in guilt be genuine when it was clouded before they looked at the evidence?

42. Mr Lomax's appointment as investigating officer and Mr McClarty's appointment as disciplinary officer brings the process below that expected of a reasonable employer in the Respondent's circumstances (350 employees); I will return to this point later.

43. I turn now to reasonable grounds, that being evidence the respondent had at the time linking Mr Sanderson to the misconduct.

44. I pose this question: are the grounds used by the employer at the time reasonable when the investigating officer and dismissing officer have been told, prior to considering any grounds that the respondent has its suspect and there is sufficient evidence to terminate.

45. A reasonable employer with that conversation already in its mindset would find it difficult to formulate beyond a pre-determined decision. The focus of evidence would be towards the named individual. That is not a criticism; it is human nature. That is why decision makers come, to quote Mr Belieff, with a blank mindset and truly independent. Otherwise, there is a very real risk, not necessarily consciously but within the subconscious, that the evidence gathered is focused to the individual who in the mind is the 'likely suspect'. That cannot be unheard and is context for the evidence gathered as grounds for dismissal at the time. I deal with the point below when considering the fairness of process.

46. Everyone involved in the process admitted that the evidence was complex. The information available at the time on which Mr McClarty and Mr Belieff based their decision that Mr Sanderson was guilty can be summarised:

    46.1. Mr Sanderson's moderator account code: G_8e9nrvubd4'. had accessed all hacked accounts.

46.2. Access was activated using 2 factor authentication

46.3. That a particular Samsung android device was responsible for the suspicious activity

47. A process of triangulation to determine the location of the device the times of the suspicious activity (determined by WIFI records of which WIFI access point the device was using when the activity occurred. IT tracked the 'movements' of the device around the building where it was logging into WIFI capability. The device was only active when the suspicious activity was taking place. The third element in the triangulation was CCTV footage. CCTV footage was reviewed at the times the device was active in the locations where the device was linking to WIFI within the building.

48. A correlation was made that, on some occasions Mr Sanderson was seen in the location of the device at the time it was active with suspicious activity. At other times he was not show directly in the location but in the vicinity. The Respondent documented this evidence

49. There is a table of 69 compromised accounts, 15 of which were accessed by Mr Sanderson's accounts. There is a table of 2 authentication access linking Mr Sanderson's account and a virgin media IP address in the vicinity of home (information which the claimant asserted was available online. This is not accepted as he was unable to prove this was the case). There are some no data entries, where it is not possible to identify the username logging in. There are some records for CCTV footage, adjusted to reflect timing issues with clocks on the WIFI routers and CCTV cameras not being in sync.

50. In summary these are the facts on which the Respondent based its conclusion that the Mr Sanderson was guilty. The way in which Mr Lomax and Mr McClarty assessed Mr Sanderson's explanation for his behaviour the fact they could not have had a blank mindset, is relevant to whether they had reasonable grounds for their belief he was guilty of misconduct, to the procedure they followed and what penalty they imposed

51. The range of reasonable responses test applies to all aspects of what the respondent did. Mr Sanderson contends that if all his questions and defence arguments had been properly considered and investigated, with outcomes presented, and these investigations investigated by individuals who were not at risk of making a predetermined decisions (that is to say they had not received the 25 July email) he says he would not have been found guilty. There are factors in support of the contention that the decision was predetermined: the wording of the investigation letter, their reference in interviews to the likely suspect, the comment in Mr Lomax's interview with IT that '*it was my initiative to investigate CCTV and suspicious behaviour once we had a potential suspect, Purely based on the suspicious of the person'.* The CCTV evidence used as the grounds for the decision had the time was to fit the likely suspect, Mr Sanderson. How can these grounds be reasonable in the first instance if this was the approach being taken in gathering evidence? Alarm bells should have rung at this time for the investigating officer that the evidence was potentially compromised in this way from being reasonable, or earlier given that he had been told who that 'likely suspect' was.

52. To determine whether this was the case a reasonable employer would consider the challenges and defences of the claimant considering its own evidence to make an overall determination.

53. Mr Sanderson raised questions with the evidence with the documents, the fact that the device was not found when all his device at the office (where some of the suspicious activity was undertaken) were confiscated before allegations were made against him, questions with the CCTV footage to which a reasonable employer with the resources (particularly in terms of technology understanding and systems) would have considered / investigated further. Mr Sanderson expressed concerns that it was someone using his account. Was this investigated. The evidence is not clear. The grounds adopt a stance of that Mr Sanderson is guilty and the grounds focus on this. He is asked to prove his innocence. The grounds are linked to the failure of genuine belief. I find the lack of blank mindset clouded the grounds considered by the employer.

54. Looking at the evidence available at the time and the conversations / line of questioning of Mr Lomax and Mr McClarty took was based not balanced. In interviews they reference having investigated the questions raised by Mr Sanderson but the outcome letters, in which a reasonable employer would set out the substance of the grounds do not reference these.

55. They did not consider as a ground the obvious question a reasonable employer would consider in the circumstances: motive. Why would Mr Sanderson engage in this activity? There were no facts before the deicsio0n makers in relation to this. A reasonable employer would ask this question.

56. Did Mr Belieff have a genuine belief and reasonable grounds. He had only joined the Respondent in his Cambridge office shortly before being asked to hear the appeal. He had had no contact with Mr Lomax or Mr McClarty other than handover of evidence. His belief was genuine at appeal stage. Were the grounds he based his decision on reasonable?

57. Did the respondent carry out as much investigation into the matter as was reasonable in concluding that Mr Sanderson was guilty of misconduct?

58. It is clear from what I have said about that from the outset it did not. How can it be fair that an investigation into gross misconduct for which the ultimate penalty is dismissal without notice be conducted by individuals who have been told that the person they are investigating is the likely suspect, that the evidence needs to be tied together as a smoking gun and that some of the evidence gathered and used as evidence on which the to reach a conclusion was gathered with the name of the suspect in mind. That is not an objective, fair and reasonable investigation.

59. The respondent submitted in evidence and submissions to the Tribunal that its investigation was so careful and reasonable and robust. I disagree. In an organisation of 350 people on the Cambridge site, 2 of the 3 people who received the email on 25 July in which Robert Codero identified are tasked with conducting the investigation and the hearing. No reasonable employer would have adopted that approach. I find that from the outset the respondent failed to follow a reasonable process. Although I have mentioned it above, to be clear, the 25 July email sent to 153 and 154 to Mr Lomax, investigating officer who

carried out the investigation and Neil McClarty who chaired the disciplinary hearing and made decision 'which employee was the likely suspect. We have 'higher assurances that this suspect is being malicious' There is no evidence before the Tribunal what these 'higher assurances' were. The language here is key. There is a strong sense that Mr Sanderson is 'guilty' before the investigation has begun. Therefore, how can it be fair and reasonable to appoint Mr Lomax as investigating officer and Mr McClarty to chair the disciplinary hearing.

60. Indeed, Mr Lomas replies to say '*we should get together to discuss, email really isn't appropriate*' – not independent to carry out investigation. At this stage a reasonable employer would have identified that it was not appropriate, fair or reasonable for Mr Lomax to be involved at all.

61. In his evidence Mr Lomax says, '*on or around 27 July I began to carry out a fact-finding investigation*' This was after he had replied to email of on 25 July which had identified the claimant as the 'likely suspect' [153]. In his evidence to the Tribunal Mr Lomax says 'as a manager and HR professional I had extensive experience of circumstances leading to disciplinary processes (WS14). Surely should have realised having read the email not appropriate for him to conduct and to suggest someone else.

62. The investigation meeting on 27 July, which was minuted, was heavy handed in approach. It was an investigation meeting not a disciplinary hearing. In evidence to the Tribunal Mr Belief commented that such matter was serious for the respondent but also for the claimant personally and for his livelihood and career. An investigation is a fact finding.

63. I find that the correspondence from the Respondent is not that of a reasonable employer with the Respondent's resources. Mr Sanderson contends that the queries he raised on complex technical evidence were not robustly investigation and he did not receive clarification on the queries he raised. He did not get clear evidence or satisfactory explanation of complex technical evidence. The outcome letters for the disciplinary and appeal hearings fall below the standard of a reasonable procedure. A disciplinary outcome letter forms the basis of a fair appeal procedure. A reasonable employer, certainly with the Respondent's resources, and given that the ultimate consequent is immediate termination of employment (something the Respondent in evidence recognised as very serious for the individual concerned) would set out clearly the allegations (rather than copying and pasting generic terminology from policy documents) and for each allegation in turn set out the basis of the conclusion. This is not an unreasonable expectation, particularly where the nature of the evidence on which the decision is based is complex and contested, as here. By setting out clear allegations, issues, and findings an employer conducts a fair process that enables the accused to properly prepare for an appeal hearing, this ensuring that the appeal hearing is fair and reasonable for all parties. This did not happen.

64. Similarly, the appeal letter does not give adequate explanations. The content in the letters is not commensurate with a fair process. I find that Mr Sanderson did not get the clarification and adequate explanations he was seeking in raising his defence questions. The minutes of the 2 disciplinary hearings and appeal

hearing and the content of outcome letters evidence this. They are light of specifics; the focus is

65. Mr Lomax refers to an 'investigation report'. I query their use of the word report. It is a pack of documents and summary of interviews, including that with Mr Sanderson on 27 July. A reasonable employer would have set out it's case clearly against the accused where the conduct has been identified as resulting in dismissal without notice.

66. A reasonable employer would have appointed officers to investigate and carry out a disciplinary hearing who no previous knowledge of matter. Mr Lomax and Mr McClarty had already been told Mr Sanderson was the likely suspect and should have been terminated.

67. While not a right (and therefore there is no reason to inform someone attending a investigation meeting of a right to be accompanied), a reasonable employer would not had refused such a request, particularly given the respondent itself considered the matter so severe. To do so was heavy handed when it did not need to be so.

68. When investigating the concerns with evidence raised by Mr Sanderson a reasonable employer would have provided something more than we have investigated these, provided a response beyond there is not evidence of this.

69. The outcome letters do not reflect a reasonable investigation. There are no specifics of the allegations of gross misconduct, details of technical evidence or replies to issues that were raised by Mr Sanderson which led to the adjournment of the disciplinary hearing and on appeal.

70. I find, therefore, that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1998

Findings on Polkey

71. As I discussed with the parties prior to closing submissions, the decision of the Tribunal that the process was unfair leads to consideration of the principle in Polkey; should a reduction in the compensatory award that will be made to Mr Sanderson to reflect the likelihood that there would have been a fair dismissal in any event. Ms Jennings submitted:
    71.1. that a Polkey reduction of 100% would be appropriate; and
    71.2. It would be just and equitable to reduce any award given Mr Sanderson's conduct was culpable and blameworthy.

72. Based on the evidence before the Tribunal I do not agree. That investigation would be a blank mindset of innocent until proven guilty, in which Mr Sanderson's queries and concerns with the evidence would have been properly investigated and answers given. That he is blameworthy and culpable on the evidence at the time is speculative. He has flagged other explanations which would need to be investigated. The employer did not consider motive. There is evidence linking the Claimant to the suspicious activity, but it is not conclusive. Again, in saying this I have clear in my mind that in undertaking the exercise of any reduction under POLKEY I am assessing what this employer might have done had the investigation been fair and reasonable. I must assess the actions

of the employer before me on the basis that the employer this time would have acted fairly though it did not do so beforehand. Polkey reductions tend to arise in cases where there has been procedural unfairness. Here it also relates to my finding that the employer, given it's mindset, in reaching its conclusion failed to fairly and reasonably consider Mr Sanderson's explanations and provide a reasonable response to these. It is appropriate in assessing just and equitable compensation what might have happened had it not acted unfairly in that way.

73. This is a very difficult situation due to one of the failures of procedure being decision makers not having a blank mindset. Had a proper investigation taken place, clear allegations set out and responses fairly considered, it is not inevitable that Mr Sanderson would have been dismissed. For this reason the reduction under Polkey is 25%. I note in providing these reasons that this finding has been reconsidered. The reconsideration finding is in the remedy judgment.

74. The next step is for the Tribunal to hear evidence and submissions to determine the remedy. I have a remedy bundle. A hearing on remedy will be listed for a day. At this hearing I will hear submissions on contributory fault.

Employment Judge **Hutchings**

11 March 2022

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE