mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr Emmanuel Amoako**

Respondent: **CIS Security Ltd**

Heard at: **East London Hearing Centre** **On: 11-13 July 2017**

Before: **Employment Judge Goodrich (sitting alone)**

Representation

Claimant: In person

Respondent: Mrs T Plant (HR Director)

JUDGMENT having been sent to the parties on 20 July 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS (oral reasons were given to the parties on 13 July 2017)

The claim and the issues

1 The background to this hearing is as follows.

2 The Claimant applied to ACAS for early conciliation, as prospective Claimants are now required to do. His ACAS Early Conciliation Certificate was dated from 17 October 2016 to 4 November 2016.

3 The Claimant presented his Employment Tribunal claim on 2 December 2016.

4 In box 8.1 of the Claimant's claim form the boxes were ticked for unfair dismissal, disability discrimination, notice pay and holiday pay.

5 In box 9.1 of the claim form was a tick that the Claimant was claiming compensation only, not reinstatement or re-engagement.

6 Accompanying the Claimant's claim form were detailed particulars of claim

drafted by the solicitors then representing him.

7 The particulars of claim included a detailed account of events, giving the Claimant's account of what had occurred.

8 Towards the end of the particulars of claim was an analysis of why it was contended that the Claimant's dismissal was unfair. These included the following grounds:-

8.1 The Respondent failed to provide a potentially fair reason for the dismissal, as the allegations the Respondent sought to rely on would not amount to gross misconduct which would warrant summary dismissal.

8.2 The decision to dismiss was not in accordance with equity and the substantial merits of the case.

8.3 The Respondent failed to carry out a fair and independent investigation by allowing Ms Fichtmuller to assist with the appeal process, despite being involved in the initial decision to dismiss and being very influential in the dismissal.

8.4 The decision to dismiss did not fall within the band of reasonable responses.

8.5 The working relationship between the Claimant and Respondent had not broken down.

8.6 The Respondent did not adequately consider the Claimant's mitigating circumstances.

8.7 The Claimant's colleague was not dismissed for leaving a site unattended for 20 minutes and failure to follow protocol including filling out time record sheets in advance and was only disciplined after the Claimant had raised his concerns.

8.8 Mr Dawson had pre-empted the outcome by notifying his colleagues of this dismissal before it had taken place due to the disagreement which had taken place a few months prior. The Respondent failed to give consideration to downgrading the offence, for considering an alternative sanction.

9 The Respondent entered a response denying the Claimant's claims, other than that they accepted that the Claimant was owed outstanding accrued holiday leave; and stated that this would be paid.

10 The Respondent, in their grounds of resistance, gave detailed grounds, including giving their account of events. Amongst the points in response to the Claimant's unfair dismissal claim were:-

10.1 The Claimant was dismissed for gross misconduct.

10.2 A fair process was followed.

10.3 The Claimant had falsified records by completing entries in the daily occurrence book (DOB) in advance of the activities having taken place.

10.4 He had failed to follow site access control procedures.

10.5 He had failed to follow the uniform and health and safety policy and code of conduct protocol.

10.6 The decision to dismiss the Claimant was fair and reasonable in all the circumstances and fell within a range of responses to the allegations made by the Claimant.

11 A preliminary hearing was conducted by Employment Judge Prichard on 13 February 2017. Following the preliminary hearing he directed that a letter be written to the Claimant's solicitors, giving a strike out warning for the Claimant's disability discrimination claim because he considered it had no reasonable prospect of success. The case was withdrawn by the Claimant's solicitors and dismissed by Judge Prichard.

12 At the outset of this hearing I discussed with the parties the issues I needed to decide and discussed how I would conduct the hearing, including such matters as timetabling.

13 Mrs Plant, on behalf of the Respondent, notified me that the Claimant's outstanding holiday pay had been paid to the Claimant on 10 February 2017. The Claimant agreed that he had now been paid what was due to him. I, therefore, dismissed this aspect of his claims.

14 I went on to discuss the Claimant's remaining claims, namely his unfair dismissal and wrongful dismissal claims.

15 The agreed issues for me to decide were as follows:-

Unfair dismissal claim

15.1 The Respondent accepts that the Claimant is entitled to bring an unfair dismissal claim, his claim is in time and no jurisdictional issues arise.

15.2 The Respondent contends that the reason or principal reason for the Claimant's dismissal was conduct.

15.3 The Claimant disputes that conduct was the reason or principal reason for his dismissal. He believes that the principal reason for his dismissal was that Mr Dawson, who is the Claimant's manager, had a bad relationship with him and used the events as a pretext for dismissing him.

15.4 The parties dispute whether the dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996 ("ERA").

15.5 If successful in his unfair dismissal claim the Claimant seeks compensation not reinstatement or reengagement with the Respondent.

15.6 If the Tribunal decides that the Claimant was unfairly dismissed the Respondent would contend that the Claimant would or might have been dismissed had fair procedures been followed; and that the Claimant caused or contributed to his dismissal. It would contend that no compensation or reduced compensation should be paid. The Claimant would resist any such submissions.

Wrongful dismissal

15.7 The Respondent contends that the Claimant committed an act or acts of gross misconduct so as for the Respondent to dismiss him without payment of notice pay. The Claimant denies that he committed any act or acts of gross misconduct.

The relevant law

16 Section 98(1) Employment Rights Act 1996 ("ERA") provides that it is for the employer to show the reason or principal reason for the employee's dismissal and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

17 The burden of proof on showing the reason or principal reason for the dismissal is on the employer. If the employer fails to satisfy section 98(1) and (2) ERA the dismissal will be unfair.

18 One of the reasons falling within section 98(2) ERA is a reason which relates to the conduct of the employee.

19 If the employer has satisfied the Tribunal that the reason for the dismissal complies with section 98(1) and (2) ERA the Tribunal will consider whether the dismissal is fair within the meaning of section 98(4) ERA. The burden of proof in making this assessment is neutral.

20 Section 98(4) ERA provides:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits

of the case."

The Tribunal will take into account, where it considers it relevant, provisions of the ACAS code of guidance on disciplinary and grievance procedures.

21 In the case of *British Home Stores Ltd v Burchell* [1978] IRLR 379 guidance was given that in a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

22 In considering whether or not a dismissal was fair a tribunal will usually consider both the procedures adopted by the employer and the sanction or penalty of dismissal. In both these respects the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

23 It has been emphasised by the Court of Appeal that the starting point of considering unfair dismissal is the wording of the act itself; and that the band of reasonable responses is not infinitely wide.

24 Where a dismissal is held to be procedurally unfair a Tribunal may consider what the impact would have been had fair procedures been followed. If the employee would or might have been dismissed fairly had fair procedures been applied a tribunal may reflect this possibility in assessing the amount of loss to be awarded to an employee. Section 123(1) ERA permits such an assessment.

25 Section 123(6) ERA provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. In order to do this an employment tribunal must make three findings. First, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. Second, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy. Third, there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

26 In considering wrongful dismissal a tribunal will consider whether conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the

employer should no longer be required to retain the employee in his employment. Whether particular misconduct justify summary dismissal is a question of fact. The character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee vis-à-vis the employer must all be considered in determining the extent of the duty of trust and seriousness of any breach thereof.

The evidence

27 On behalf of the Respondent I heard evidence from Mr Michael Dawson, who at the relevant time was security contract manager for the Respondent's contract with the London Borough of Hackney; Ms Hayley Fichtmuller, Regional Human Resources Manager for the Respondent; and Ms Aman Dhillon HR Manager for the Respondent.

28 In addition I was provided with a witness statement for Mr Tony Graves Customer Services Director for the Respondent. He did not, however, attend the Tribunal hearing. The explanation for his non-attendance was that he had intended to come as a witness but had been delayed in returning from holiday.

29 On behalf of the Claimant, I heard evidence from the Claimant himself.

30 In addition I considered the documents to which I was referred in an agreed bundle of documents provided for this hearing.

Findings of fact

31 I set out below the findings of fact I consider relevant and necessary to determine the issues I am required to decide. I do not seek to set out every detail provided to me. Nor do I seek to make findings on every detail on which the parties disagreed. I have however considered all the evidence provided to me, it is fresh in my mind and I have borne it all in mind.

32 The Claimant, Mr Emmanuel Amoako, commenced employment as a security officer with an employer described as "Carlisle" on 1 July 2006.

33 Around November 2013, his employment transferred to the Respondent in these proceedings, CIS Security. It is accepted that the transfer was a transfer to which the "TUPE" regulations applied.

34 By the time of the Claimant's dismissal he was, therefore, an experienced security officer.

35 The Respondent is a large employer. According to its ET3 response it has 1,400 employees.

36 As one would expect of a large employer the Respondent has its own human resources department ("HR") and policies such as disciplinary and grievance policies.

37 In its policies on discipline and grievance it gives examples of what is treated as amounting to gross misconduct. Examples given are falsification of company or

client's documents or systems including check calls, sleeping on duty and leaving the place of work without permission.

38 The Respondent's relevant human resources managers for the purposes of these proceedings were Ms Hayley Fichtmuller and Ms Aman Dhillon. Ms Dhillon was the HR officer who covered the Respondent's contract with the London Borough of Hackney on which the Claimant was working; although both she and Ms Fichtmuller covered each other's duties such as when one was absent.

39 At the time of the Claimant's dismissal the relevant hierarchy of management included that the security supervisor for the site on which the Claimant was working and led to his dismissal was a Mr Faizal Javed; and Mr Michael Dawson, who was the security contract manager for the Respondent's contract with the London Borough of Hackney to provide security services. Mr Dawson was Mr Javed's manager.

40 One of the sites for which the Claimant was a security guard was a hostel for vulnerable people. It is a site for which the Respondent provides security officers under a contract with the London Borough of Hackney. The types of vulnerable adults that live at the hostel include victims of domestic violence, individuals fleeing from gang warfare and individuals with mental health problems. There are about 60 residents in the hostel, some of whom are children.

41 In addition to the Respondent's managers, the hostel managers had responsibility generally for the smooth day-to-day running of the hostel, including for the security services provided by the Respondent for the London Borough of Hackney.

42 The main duty for the security officers at the hostel in question including access control to the building, patrolling it, key holding, attending the fire alarm panel in the event of an activation and dealing with emergency situations. The London Borough of Hackney had assignment instructions to CIS Security Ltd which set out what the security officer's duties were, which included such issues as those that I have described.

43 Up to the events that gave rise to the Claimant's dismissal he had had disciplinary proceedings taken against him in January 2014 although not taken by Mr Dawson. The disciplinary sanction imposed on him had expired by the time of events in question.

44 On 20 July 2016, the Claimant was working on a night shift at the hostel for vulnerable adults, starting at 7pm. He took over from another security officer who informed him that the CCTV and security cameras were not working and that he had contacted the manager of the hostel to let her know.

45 The day in question had been a particularly hot day and the security office/ reception area where the Claimant was based was hot.

46 The Respondent has a daily occurrence book ("DOB") which their security officers were required to complete.

47 The DOB would record, amongst other matters, times of the occurrence in

question, details of the occurrence and action taken; and had a column for the security officer to sign. Security officer patrols were items to enter into the book, as were the recording of visitors, as were any unusual occurrences.

48 On the evening in question the Claimant had completed details of the patrols carried out by him during his shift, although many of the patrols were for later in the shift, so he had not completed them. For all of them, he had entered that all was “ok. He had not, however, signed the patrols to confirm that they had been completed.

49 Shortly before 10:45pm two of the residents of the hostel, a couple, went out of the building via the security desk where the Claimant was stationed and left their keys with him. They were well known to the Claimant as they frequently went out of the building to smoke cigarettes. Generally they would return shortly afterwards once they had completed smoking. The building is a non smoking building.

50 The building is a secure building in that, unless an individual has a key, they could only gain access through pressing a buzzer that was linked to the security area/ reception area, where the security officer would press a button to let the individual concerned into the building.

51 A short while after the couple in question had gone out they buzzed the door in order to be let back into the building. The Claimant pressed the buzzer and let them back in.

52 Because the CCTV was not working the Claimant was unable to identify it was indeed the residents that had gone out a few minutes earlier that he was letting back in. He did not go out of his office to the door of the building to check who he was letting in.

53 The residents collected their keys and left the reception area.

54 Unknown to the Claimant, Mr Dawson was “tailgating” the residents in question and was let in when the Claimant pressed the buzzer. As indicated above the Claimant was unaware that he was also letting in Mr Dawson.

55 Although Mr Dawson worked day time hours, from time to time he went to visit sites at which night shifts were being worked. He had visited other sites on the evening in question including a site at Oswald Street.

56 Having obtained entry, shortly after the two residents had left the reception area Mr Dawson went to the security desk. He observed that the Claimant was reclining in a chair with his feet on another chair and had his eyes shut. He was also barefoot. He was not wearing the shoes he was expected to wear as part of his uniform but was wearing sandals or flip flops. He was not wearing a tie and his ID card and SIA license were not visible.

57 Mr Dawson took photographs of the Claimant which were produced to me as part of the documentation. These showed the Claimant reclining in the chair with his feet up on another chair and his eyes shut. Mr Dawson also looked at the DOB in order to sign that he had attended the building. When doing so he noticed that the

Claimant had, as recorded above, already filled in the patrols for his shift from 20:00 to 04:00 and recorded “all ok”. None of the patrols had been signed by him.

58 Mr Dawson challenged the Claimant on what he had seen. He instructed him to wear his footwear and to go out to his car to collect them. He expressed dissatisfaction as to the Claimant’s appearance, his posture and his clothing. The Claimant’s shirt was tucked out and he was not looking smart.

59 In dispute is whether Mr Dawson issued the Claimant with a verbal warning and conveyed the impression that this would be the only disciplinary sanction for what had occurred (as was the Claimant’s evidence); or whether he did no such thing.

60 I find that Mr Dawson did criticise and reprimand the Claimant for his actions. The parties agree this. It is possible, therefore, that the Claimant had the impression that these criticisms and reprimand were a verbal warning. I find that it was not, however, Mr Dawson’s intention that this would be the only disciplinary sanction. If it had been his intention it is unlikely that he would have taken the photographs that he did or that he would have contacted the HR department the following morning for advice on how to proceed.

61 Part of the Claimant’s case is that he was treated inconsistently with how colleagues of his had been treated.

62 When cross-examined by the Claimant Mr Dawson stated that on 21 July 2016 he had seen other individuals who were not wearing their correct uniform and he also gave evidence about the circumstances and action taken to an individual called Mr Younis.

63 Mr Younis was wearing a tracksuit bottom and t-shirt, contrary to the Respondent’s uniform policy and was issued with a written warning following a fact finding investigation conducted by him.

64 At the Oswald Road site the security officer had left the site for 20 minutes and had filled in the DOB before he had carried out the patrol in question, albeit it was about 40 minutes in advance rather than for all the patrols due for the night.

65 This was described by Mr Dawson as amounting to falsification of the DOB. The individual was given a verbal warning. Mr Dawson’s explanation was why this individual was given a verbal warning when on the face of it he had committed two acts of gross misconduct, rather than a more severe disciplinary sanction, was that he took into account that it was a hot day and that there had been no water on the site so that the individual had gone home because of this. Mr Dawson also stated that if the Claimant’s only disciplinary offence had been to falsify the DOB he, likewise, would have been given a verbal warning for this.

66 The following day the Claimant was suspended. He was notified in writing that he was to attend a fact finding meeting with Mr Dawson. The meeting was described as being to discuss the allegations of sleeping on duty and falsifying the DOB. He was notified not to contact any of the employer’s customers, suppliers or work colleagues save for union representation for the purpose of obtaining advice. He was notified that

it was a fact finding meeting, not a disciplinary meeting.

67 In dispute is whether the disciplinary processes instigated by Mr Dawson were a pretext caused by the Claimant having verbally complained to him about being frequently sent to the Oswald Road site (an unpopular site with the security officers). I find that this was not the case. Firstly, colleagues of the Claimant were disciplined for breaches of policy as described above. Secondly, the Claimant on the evening in question had clearly committed misconduct as I refer to further below. Thirdly, Mr Dawson appeared plausible in stating that this was not his motivation. I have in mind that a discussion or complaint such as this is different from a full blown formal grievance been taken out and it appeared to me that it was unlikely that discussion of this type would be the predominant motive for dismissing the Claimant.

68 The fact finding meeting took place on 22 July 2016. Prior to that meeting Mr Dawson had prepared some notes on what he had observed and set out four allegations namely, sleeping on duty, falsifying the DOB, not wearing full uniform and releasing the access control without checking who was entering the building. He stated at the end of the document that he believed all four listed allegations had been committed, that he had put the hostel resident safety at risk, his own reputation at risk, that he had lost all confidence and trust in him and would not feel comfortable with him working on any of the sites going forward. Expressing such opinions does call in to question whether at an earlier stage Mr Dawson had decided that the Claimant's breaches of rules were appropriate for dismissal. This is an issue to which I will return as part of the Claimant's case is that the dismissal was influenced by Mr Dawson and predetermined by him.

69 At the fact finding meeting Mr Dawson discussed the allegations against the Claimant.

70 As regards the allegation of sleeping the Claimant categorically denied that he had been sleeping, although he apologised for not being alert and looking at the person before they came in.

71 There was discussion as regards allowing an individual to enter on to the site and about the DOB. The Claimant explained that he had always filled in the DOB in that way and that he had not signed the books so that it was not finished. He said that as he had been told now that it was wrong he accepted that and would not do so again.

72 The Claimant in the course of the interview explained that he had diabetes, information that he had not previously disclosed to the Respondent.

73 As regards letting people in without identifying them the Claimant apologised and also explained about the non functioning of the CCTV.

74 The outcome of the fact finding meeting was that the Claimant remained on suspension and a disciplinary hearing was arranged.

75 The Claimant was sent a letter requiring him to attend a disciplinary hearing. He was notified of his right of accompaniment.

76 The allegations against the Claimant were of sleeping whilst on duty, failure to comply with the uniform policy, allowing unidentified personnel to enter the site without firstly confirming who they were and falsifying the DOB.

77 Enclosed with the letter requiring the Claimant to attend the disciplinary meeting was a copy of the notes of the fact finding meeting, copies of the photographs taken by Mr Dawson and a copy of the site DOB for 20 July.

78 The disciplinary hearing was conducted by Mr O'Keeffe. Accompanying him was Ms Hayley Fichtmuller from Human Resources. She explained her role as being to take notes and give advice where asked, although the decision was that of Mr O'Keeffe. She explained that Mr O'Keeffe was experienced in conducting disciplinary hearings and that it was unlikely that he would have asked or needed much in the way of advice.

79 The Claimant was accompanied by a friend of his who was not a work colleague but permitted to attend by the Respondent.

80 At the disciplinary hearing the allegations against the Claimant were discussed.

81 In response to the allegation concerning the DOB the Claimant explained that he did not put his signature into the book until the patrols had been done. He explained that when Michael (Dawson) came he told him that this was bad practice. He further stated that he had not been trained that the proper completion of the DOB was a legal requirement.

82 As regards the allegation of sleeping on site the Claimant reiterated that he had not been asleep. He also complained that he had felt intimidated by Mr Dawson at the fact finding meeting. He explained that the CCTV had not been working, that it had been very hot and that he had been seen giving the resident the key.

83 There was a discussion about the Claimant's footwear. There was a discussion about the Claimant having diabetes.

84 The discipline hearing was adjourned in order for Mr O'Keeffe to speak to Mr Dawson.

85 Mr O'Keeffe's discussions with Mr Dawson took place with the Claimant not present although Ms Fichtmuller was listening to the discussion on the speaker telephone.

86 After about 20 minutes Mr O'Keeffe and Ms Fichtmuller returned to the disciplinary hearing. In dispute was whether his manner to the Claimant changed from being reasonably friendly to being hostile when he returned after his discussions with Mr Dawson. I find that he was probably not hostile and accept that he conducted disciplinary hearings calmly, although I also accept that there was some change in Mr O'Keeffe's manner. I so find because Mr O'Keeffe's decision to dismiss the Claimant was made without any further adjournment and after communicating with the Claimant what he had discussed with Mr Dawson. If, therefore, Mr O'Keeffe had not made up his mind whether to dismiss the Claimant before speaking to Mr Dawson, it is

likely that he had done so before returning to the room, so his manner may have changed.

87 The manner of the dismissal leads me to find that Mr Dawson may well have influenced Mr O'Keeffe's decision to dismiss the Claimant whether or not he openly expressed an opinion to that effect to Mr O'Keeffe.

88 Mr O'Keeffe verbally communicated to the Claimant that he had been dismissed and gave brief reasons for doing so. His reasons did not show that he had addressed, considered or analysed the Claimant's mitigation and defence to the allegations.

89 Ms Fichtmuller drafted the letter of dismissal and sent it for Mr O'Keeffe's approval.

90 The letter of dismissal stated that despite listening to his representations they had concluded that the Claimant's conduct was sufficiently serious to warrant summary dismissal. The reasons given for dismissal were sleeping on duty and not being alert during his shift on 20 July 2016 by making a place to sleep and take his footwear off to rest his feet on a chair; falsifying the DOB on this date by stating that he had completed patrols when the time had not yet passed; failing to wear the correct uniform that included appropriate footwear for the role; and not having his SIA licence worn on him; and allowing an unidentified person to enter on to the premises without checking to see who they were when the site was one for vulnerable people which had resulted in a loss of trust and confidence with him.

91 The Claimant was notified of his right of appeal and did appeal, by letter dated 3 August 2016. Amongst the grounds of appeal were that the conclusions drawn were in some respects not supported by the evidence and that the decision to dismiss without any previous warnings was too harsh. He also complained that he had sought to make contact with potential witnesses, and had been informed that they had been instructed not to provide any information in regard to events that had taken place and if they were to do so they would face disciplinary action. He referred to a memo that had been written by Michael Dawson on 25 July and asked that staff were advised that it was lawful and reasonable to provide information to trade unions in relation to disciplinary processes.

92 The letter was written by Mr Coleman, from Unison trade union, on the Claimant's behalf. Ms Dhillon accepted that this was a serious allegation made by the trade union representative.

93 There was an exchange of emails in which Mr Dawson explained that the Claimant had, following his dismissal, attended the Respondent's premises to seek to obtain support by drafting a letter to Mr Graves, who was to be the officer conducting the appeal.

94 This email exchange was not communicated to the Claimant and he was never informed either at the appeal meeting or subsequently what had been the response to this complaint.

95 An appeal meeting took place on 17 August 2016. Attending with the Claimant

was Mr Peter Coleman from Unison. Attending Mr Graves was Ms Dhillon from Human Resources.

96 There were no minutes of the appeal meeting. Exactly what was discussed was not ever recorded, although agreement was reached that a series of questions would be put from the Claimant and his representative to be answered by Mr Dawson. In dispute is whether Mr Graves told the Claimant that the actions of which he was accused did not amount to gross misconduct. On the balance of probabilities I find that he did say something to this effect, although what he probably meant was that he was considering the allegations as a whole as to whether they amounted to gross misconduct and accepted that individually they did not.

97 In between the appeal hearing and the appeal outcome Mr Graves spoke to a number of individuals involved including Mr O'Keeffe, Mr Dawson, Ms Fichtmuller and Ms Smith (another HR Adviser).

98 Mr Coleman and Mr Graves had an exchange of emails, together with Ms Dhillon in which the questions were communicated to Mr Dawson and he gave his replies. Amongst his replies were that he had completed five sites visits on that night in question and that three officers were not in full uniform. He confirmed that not wearing uniform was not gross misconduct. He also described, contrary to the Respondent's disciplinary procedures, falsification of the DOB as being misconduct (rather than gross misconduct). This is consistent with his response to which I referred earlier when he was cross-examined.

99 Ms Dhillon, who had been dealing with the case, was about to go on holiday. She had drafted an appeal outcome letter for Mr Graves before going on holiday. She notified Mr Coleman that in her absence the appeal would be dealt with by Ms Fichtmuller. Mr Coleman and the Claimant were unhappy about this in view of her involvement in the Claimant's dismissal. They notified her of this and agreement was reached that the outcome would not be given until after her return from holiday.

100 The appeal outcome letter was dated 11 October 2016 dismissing the Claimant's appeal. The form of it took the questions given to Mr Dawson and responses from him. No reference was made to the allegation of witness intimidation. Nor was the Claimant asked whether there were any witnesses he wished to contact in order to attend an appeal on his behalf. Amongst the conclusions were upholding the original decision. As regards the item of being asleep Mr Graves stated that he may not have been in a deep sleep but the perception of him with his feet up and eyes closed would not be acceptable.

Closing submissions

101 Both representatives gave typed closing submissions supplemented by oral ones.

102 In addition I had given the parties a summary of the legal principals, referred to above, together with points of concern to me that I wished to have address.

103 Both gave submissions which I have borne in mind although I do not set them

out here in detail.

Conclusions

104 What was the reason or principal reason for the Claimant's dismissal? In addition to this being the test under section 98(1) and (2) ERA it also forms the first part of a guidance in the *British Home Stores* case – namely did the Respondent believe that the Claimant had committed the misconduct in question?

105 I find and conclude that the individuals concerned, namely Mr O'Keeffe and Mr Graves, did believe that the Claimant had committed the misconduct alleged. I say so with some qualifications. Firstly, neither Mr O'Keeffe nor Mr Graves were present to give evidence on what was their thinking. As referred to above they showed little sign of having addressed the Claimant's defence and mitigation or allegations that he in turn made. Nor am I clear that the Respondent's witnesses involved believed the Claimant to be asleep as opposed to whether they were unsure one way or the other and believed him not to be alert and giving the impression of being asleep.

106 It was not satisfactory that neither of the key decision makers were present at this Tribunal hearing, although the human resources officers giving advice were there; their evidence was that neither of them were the decision-makers and that it was Mr Graves and Mr O'Keeffe's decisions alone. I am satisfied from the evidence as a whole, that the reasons given in the letter of dismissal and the dismissal of appeal were the reasons for the dismissal, rather than those put forward by the Claimant.

107 I have gone on to consider section 98(4) of the ERA and the guidance given in the British Home Stores case. I gave some further consideration as to whether there were reasonable grounds for the Respondent's belief and whether they conducted as much investigation as was reasonable below. Mr Dawson did witness the events in question himself; and he interviewed the Claimant himself on the spot as well as through the fact finding meeting.

108 Did the procedures adopted by the Respondent fall within or outside the band of reasonable responses having in mind the size and administrative resources of the Respondent?

109 I have concluded that the Respondent's procedures lay outside the band of reasonable responses that a reasonable employer might have adopted, including because:-

109.1 The Respondent is a large employer and can reasonably be expected to have robust disciplinary procedures.

109.2 I am satisfied, contrary to the Claimant's submissions, that the Respondent was not in breach of the ACAS Code of Practice on disciplinary procedures. Although ACAS guidance (not statutory ACAS code but the non statutory supplementary guidance) does state that, whilst it is not required to have a representative at her disciplinary investigation meeting, some employer's procedures allow for this, it is not a statutory requirement.

109.3 The Respondent had a disciplinary investigation, a disciplinary hearing and an appeal, as recommended in the ACAS code.

109.4 In this particular case it would have been better if Mr Dawson had attended the disciplinary hearing as a witness. He was both the investigating officer and the key witness. The Claimant and Mr Dawson were disagreed about various key matters, such as whether the Claimant was asleep at the time in question. It would have been better for him to have been present to give the Claimant an opportunity to question him.

109.5 Adjourning the disciplinary hearing to have a private conversation with Mr Dawson was at least unwise. Having the adjournment, coming back and deciding to dismiss the Claimant without any further adjournment to reflect on his decision was likely (as was the case here) to give the Claimant an impression that it was Mr Dawson influencing the dismissal, whether or not this was the case. Nonetheless, Mr O'Keeffe did recount to the Claimant what he said he had discussed with Mr Dawson and invite the Claimant's response; and Mr Coleman and the Claimant were given an opportunity to ask further questions of Mr Dawson as part of the appeal process.

109.6 The Claimant gave his mitigation or defence to the allegations to Mr O'Keeffe and Ms Fichtmuller and made some allegations himself. The documentary evidence does not show that Mr O'Keeffe considered them. They are not reflected in any analysis in either the verbal decision to dismiss or the written dismissal. Nor, as referred to above, was Mr O'Keeffe present to satisfy me that contrary to the documentation he had in fact given these issues for consideration and why he had rejected them. It is important to consider and give credit for any exculpatory factors there may be. For example, the Claimant said that he did not know and have not been trained on the way he had filled the DOB out amounting to falsification. It was important to deal with this defence and that there was no satisfactory evidence that he had done so.

109.7 Failure to do so also gives the impression of the decision being predetermined.

109.8 The allegation that witnesses of the Claimant had been intimidated from being willing to come to his disciplinary hearing was an important allegation. It was important for Mr Graves to deal with it. Merely to have some communication with Mr Dawson and accept his response without discussing the matter with the Claimant was not the action of a reasonable employer. Nor did he overcome what might have been the initial problem by checking with the Claimant and his union representative whether in fact he wanted to bring any witness to an appeal and reassuring any potential witnesses that they would not be penalised for doing so.

109.9 Mr Graves also conducted further investigations between the appeal

meeting and the outcome. There is nothing wrong with an employer doing this provided that it is done openly and either the meeting is reconvened in order to consider the additional evidence obtained, or at least have a written record of what was discussed and invite the person meeting the appeal to consider it. A reasonable employer would not carry out further investigations in this way. The Claimant was unaware that the Respondent had done this until the hearing of this case.

109.10 It was also unsatisfactory to have an appeal meeting with no minutes and the subsequent dispute of what was discussed.

110 Viewed overall, therefore, I have concluded that the procedures adopted by the Respondent lay outside the band of reasonable responses of a reasonable employer of the Respondent's size and administrative resources might have adopted. The dismissal was therefore unfair.

111 I have gone on to consider whether the sanction or penalty of dismissal fell within or outside the band of reasonable responses a reasonable employer might have adopted.

112 This is a more difficult issue to decide and not helped by the absence of two key witnesses. I have in mind the nature of the hostel in question and the serious shortcomings on the Claimant's part.

113 In this particular case I have concluded that the sanction lay outside the band of reasonable responses. I do not regard the comparators given by the Claimant as exact comparators. Their circumstances were different from those of the Claimant, as Mrs Plant has submitted. What was shown, however, was a general climate of slackness in complying with the rules. Failure to fill in a DOB was classified under the Respondent's procedures as gross misconduct. Yet it was treated as only meriting a verbal warning for another individual even although that individual had committed another act of gross misconduct by being absent from the site (albeit with mitigating circumstances). There were not mitigating circumstances, so far as I am aware, for his failure to complete the DOB; and Mr Dawson did state in his evidence that the Claimant's DOB falsification would have only amounted to a verbal warning had there not been other failings. What was also missing was any evidence, particularly documentary evidence other than instructions of Hackney Council, and a statement that the Claimant had been trained, to show that there was a regular reminder of the consequences of not complying with these serious matters. Usually in theses as to the standards to be expected and consequences of not doing so. The Respondent is a large employer and well able to remind employees of the importance of matters it regards as being exceptionally important to comply with strictly.

114 I have concluded, therefore, that both the Respondent's procedures and the penalty of dismissal lay outside the band of reasonable responses a reasonable employer might have adopted and the dismissal of the Claimant was unfair.

115 Employment Tribunals have been encouraged to separate findings of fact on unfair dismissal from those amounting to wrongful dismissal or contributory fault.

116 I have considered whether the Claimant caused or contributed to his dismissal, as provided for in section 123(6) ERA.

117 Did the Claimant engage in culpable behaviour? I find that he did. I find, on the balance of probabilities (just) that he was not asleep on duty. He had just let in the residents in question. He was undoubtedly not properly alert and gave the impression that he might be asleep.

118 The Claimant did act on an assumption that the two people he was letting in were the same individuals as the two that he had let out. As it turned out he was correct but it was an assumption on his part. It was an unwise assumption to make in a hostel such as the hostel in question. He did not comply with the uniform policy and he was not wearing his SIA badge.

119 I also find that the Claimant's culpable behaviour did contribute to his dismissal- it was why he was dismissed. It would be appropriate to reduce his compensation for contributory fault, to the extent that it is just and equitable to do so.

120 I have considered what the outcome might have been had fair procedures been followed. The probable outcome is that the Claimant would have been given a final warning. If therefore he had committed any further disciplinary offences probably within the next 12 months, he would have been highly likely to have been dismissed.

121 I have gone on to consider wrongful dismissal. Was the Claimant's behaviour such as to warrant summary dismissal? For the reasons given above I have concluded that it stopped just short of this.

122 As neither representative made submissions on mitigation of loss I reserved this issue until hearing further submissions as part of consideration of the Claimant's remedy.

Remedy

123 After I had given my decision on the Claimant's unfair and wrongful dismissal claims I considered remedy.

124 The Claimant's solicitors had prepared a schedule of loss. I went through the schedule of loss with the Claimant and Mrs Plant. They reached agreement as to the mathematical calculations contained in them. The Claimant and Respondent had adjusted the figures for net and gross weekly pay which led to adjustments on the basic award, compensatory award and notice pay claim.

125 The bundle of documents contained documents concerning the Claimant's efforts to find another job. Mrs Plant accepted that the Claimant had applied for numerous other jobs. The Claimant had not, however, provided copies of his payslips, although the solicitor's schedule of loss had set out in the calculations how much the Claimant had been earning in his new employment. This showed him as earning £108.24 per week for a period of 36 weeks from 4 November 2016-14 July 2017. I asked Mrs Plant whether she wished remedy to be adjourned in order to provide copies of the Claimant's wage slips; or whether she was willing to accept that these

were the sums the Claimant had in fact obtained. After reflection and discussion with Ms Dhillon, she decided that, in order to conclude the remedy hearing without the need for another hearing, she accepted the Claimant's figures.

126 The issues for me to determine, therefore, in this remedy element of the hearing were:-

126.1 Whether the Claimant would or might have been fairly dismissed later had he not been unfairly dismissed.

126.2 Whether the Claimant had failed to mitigate his losses by not looking for another job in the security industry. The Claimant's explanation for not looking for a job in the security industry was that he felt that, having been dismissed for gross misconduct and only having had one employer (including his TUPE transfer) he had no prospect of getting another security industry job. Ms Dhillon, on the Respondent's part, assured me that the Respondent would provide a reference to the Claimant that would be a brief reference giving the Claimant's dates of employment and would contain nothing to state that he was dismissed for gross misconduct so as to prevent him obtaining another job.

126.3 Whether having obtained another job the Claimant had failed to mitigate his losses by not working full-time. The Claimant's explanation for this was that the job he was offered was for 24 hours per week. He stated that he was content to work this number of hours as it was a new type of work for him and he wanted to gain experience before seeking to persuade his employer to offer him more hours. He also stated that, in view of the Respondent's reassurance, he would now apply for security industry jobs.

126.4 The extent to which I should reduce the award for contributory fault.

127 I heard submissions on these issues.

Conclusions on remedy

128 I consider that if fair procedures had been followed the probability is that the Claimant would have been given a final written warning. I find that it is probable that the Claimant would not have committed further misconduct between then and now. He had worked for Carlisle Security for many years as a security guard without having been dismissed. Although he had received a final written warning from the Respondent in January 2014 he had worked without further disciplinary issues during the 18 month duration of the final written warning and subsequently until the date of the events that gave rise to his dismissal. In all he had worked with the Respondent following his TUPE transfer for about two and three quarter years before being dismissed. Probably, I find, he would not have committed a further disciplinary offence up to the time of this Employment Tribunal hearing, although there is a possibility that he would have done and that he would have been dismissed.

129 So far as mitigation is concerned, it is understandable that an employee

dismissed for gross misconduct in the Claimant's circumstances, with him being a longstanding employee, would have feared that the reference he would have been given would prevent him from getting another job. Looking for another type of work was, I find, a reasonable mitigation to begin with. Both parties, I find, bear some responsibility for the Claimant not up to now having sought work as a security officer. On the Claimant's part he was the person looking for a job and could have checked whether his assumption was correct. On the Respondent's part they have been dealing with ACAS through the early conciliation procedures and through the litigation. They could have assured the Claimant that they would not have given such a reference as to prevent him getting another job. It was in their interests to do so as, should they be unsuccessful in defending the proceedings, as it might help to limit the Claimant's losses.

130 The Claimant's mitigation was reasonable in accepting a 24 hours per week job as, obviously, this was better than having no job at all. It was also reasonable for him to settle into the job before seeking to persuade his employers to work extra hours. I find, however, that he could reasonably have been expected to do more before now to have tried to increase his hours of work. I accept Mrs Plant's submissions to that effect. Even if he had, however, he might have still had a shortfall from what he was earning with the Respondent. His new job is low paid work.

131 I also find, as highlighted above, that it would be just and equitable to reduce the Claimant's compensation pursuant to section 124(6) ERA as he did engage in culpable or blameworthy behaviour, as described above, and it did contribute to his dismissal.

132 Pursuant to section 123(1) ERA what compensation do I consider just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer? To what extent I consider it just and equitable to further reduce the Claimant's compensation pursuant to section 123(6) ERA having in mind that I am already making a reduction under section 123(1)?

133 I have taken a broad-brush approach to this issue as Employment Tribunals are frequently encouraged to do. I decided to limit compensation to a further 25 weeks (beyond the 10 weeks wrongful dismissal notice pay); and to reduce both the basic and compensatory award by 50%.

134 Thereafter the figures for compensation were agreed by the parties as follows:-

Wrongful dismissal: (10 weeks pay at £345.27 per week net pay)	£3,452.70
Unfair dismissal compensation: Basic award (10 weeks at £427.46 less 50% deduction for contributory fault	£2,135.23
Loss of earnings at £1,381.08 prior to the Claimant obtaining employment	£1,964.13
For 21 weeks net losses following obtaining his job together	

with loss of statutory rights amounting to £400 (all with 50% deduction for contributory fault) amounts to	£3,745.21
The Claimant's hearing fee amounted to	£1,200.00
The total sum owed to the Claimant was agreed as amounting to	£8,659.83

Employment Judge Goodrich

3rd August 2017