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EMPLOYMENT TRIBUNALS

Claimant: Mr J Ramachandran

Respondent: Trenitalia c2c Rail Ltd

Heard at: East London Hearing Centre

On: 6-7 July 2017

Before: Employment Judge Ross (sitting alone)

Representation

Claimant: Mr W Young (Counsel)

Respondent: Mr M Humphreys (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The name of the Respondent be substituted with "Trenitalia c2c Rail Ltd".
- (2) It is declared that the Claimant was unfairly dismissed.
- (3) The Claimant's compensatory award be reduced by 100% under section 123(1) Employment Rights Act 1996 and due to contributory fault under 123(6) Employment Rights Act 1996.
- (4) Pursuant to section 122(2) Employment Rights Act 1996, it would be just and equitable for the basic award to be reduced to nil.
- (5) The complaint of wrongful dismissal is dismissed.
- (6) The complaint in respect of unpaid holiday pay is dismissed upon withdrawal.
- (7) The complaints under section 11 Employment Rights Act 1996 in respect the alleged failure to provide a statement of terms and conditions, and a statement of variations to such terms and conditions, are dismissed.

REASONS

1 The Claimant was continuously employed by the Respondent and its predecessors in title from 31 March 2003. By a claim form presented on 14 December 2016, the Claimant presented the following complaints following his dismissal on 19 September 2016:-

- 1.1 wrongful dismissal;
- 1.2 unfair dismissal;
- 1.3 failure to provide a statement of particulars of employment contrary to section 1 and/or section 4 of the Employment Rights Act 1996;
- 1.4 a complaint in respect of unpaid holiday pay.

2 On the first day of the hearing the Claimant withdrew the complaint in respect of accrued but unpaid holiday pay.

The issues

3 The parties agreed a list of issues in the form attached to this set of reasons.

4 I formally record that I allow the name of the Respondent to be substituted with "Trenitalia c2c Rail Ltd", having been informed that this Respondent was now the franchise holder and any liabilities have been assigned to it. This application was not opposed by the Claimant.

The evidence

5 There was an agreed trial bundle (pages 1 to 314). Pages in this set of reasons refer to that bundle.

6 I pre-read the witness statements and then heard oral evidence from the following witnesses:-

- 6.1 Lisa Hayter (Duty Station Manager);
- 6.2 Julie Davis (now Group Station Manager);
- 6.3 the Claimant.

The Claimant did not seek to rely on the two other short witness statements included in the witness statement bundle.

Findings of fact common to both wrongful dismissal and unfair dismissal

7 The Claimant was employed by the Respondent's predecessor as a Customer Services Advisor. Initially, he was employed on a part-time basis. Although the

Respondent's witnesses were not able to produce a copy of his original statement of terms and conditions, the Claimant admitted signing one, but he could not recall if he was given a copy. I find that it is likely that if he signed one, he was given a copy, and that he was signing in part to confirm receipt.

8 In about June 2016, the Claimant was appointed to a full-time role of Customer Services Advisor. There is no evidence that he was provided with a new statement, but he was sent a letter on 6 June 2016 (page 107) which sets out the amendments to his terms and conditions.

9 As to the role of Customer Services Advisor, and the procedure for emptying Scheldt and Bachmann ("S & B") ticket machines, Ms Hayter was not challenged on her evidence at paragraphs 6 to 13 of her witness statement which I accept. I also accepted her evidence at paragraphs 14 to 30 of her witness statement, which explain how money within the ticket machines is conveyed to the ticket office, the procedure followed, and how it was accounted for, in the normal course of events.

The allegation

10 On 6 June 2016, by telephone, Ms Hayter was made aware of an accounting discrepancy involving S & B machine 3403 at Barking Station, by Richard Davis, a Revenue Control Manager. He followed this up in an email (page 181).

11 All cash ticket sales from both ticket offices (where a Fastis machine is used) and S & B machines are recorded on a system called "Lennon". The Lennon report provided by Mr Davis (page 182) showed that he could not find any entry for the sale of £3,017.05 or any corresponding credit for S & B machine 3403 for the 16 May 2016. His email indicated that over £3,000 was outstanding and he assumed investigation was required. I accept Ms Hayter's evidence that she receive this information late on 6 June 2016.

12 Mr Davis also produced an accountancy sheet to show money was missing. This is a balance sheet (page 184) showing the start of shift total on 17 June 2016 to be £2,387.10 and the end of shift total on 16 June 2016 to be £5,404.15.

13 Given that information, Ms Hayter was bound to investigate what happened to that sum, which she did. Ms Hayter then checked the end of shift figures for money on 16 May 2016 and the start of shift figures from 17 May 2016 (page 185), and the cash sales figures for machine 3403. She concluded that total cash sales on 16 May 2016 were £3,017.05. She believed that deducting the coins in the vault (amounting to £52.20) the amount that should have been in the bill vault was £3,065.

The investigation

14 Ms Hayter was appointed to carry out her investigation, which began on 7 June 2016.

15 Unfortunately, the videos produced by the relevant CCTV camera were only kept for 22 days. Ms Hayter mistakenly thought they were kept for 28 days. Originally, on 8 June 2016, Ms Hayter had requested CCTV files covering machine 3402. On

realising her error, on 10 June 2016, she requested CCTV files for machine 3403, but by this time they had been erased. I realise this was an unfortunate mistake, that might in some cases make an investigation unreasonable; but it did not make this investigation inadequate or unreasonable in this case. In this case, what happened at machine 3403 could be deduced from the documents and data evidence, which Ms Hayter proceeded to collect in a rational and reasonable way. I accepted Ms Hayter's evidence about her investigation and why she took the steps as she did. She was an honest and reliable witness.

16 In short, because of Mr Davis' information, Ms Hayter's initial focus was on the evening of 16 May 2016.

17 Having examined the staff rota, Ms Hayter identified Mr Patel, Mr Bhuta, and Mr Palmer, had each been on duty in the ticket office on the evening of 16 May 2016. Their shift sheets did not show any money was paid in which was taken from an S & B machine.

18 At first, Ms Hayter prepared: "Please explain" forms for these three men, asking if they had any reason to attend to machine 3403 on 16 May 2016. Mr Bhuta and Mr Patel were on holiday at the time the investigation began and away until the 11 and 18 July respectively. This caused delay, which the Respondent was not able to do much about.

19 At this stage Ms Hayter thought that the money had gone missing on the 16 May, so the Claimant was not issued with a "Please explain" form.

20 Ms Hayter was able to view CCTV files that she had received in respect of machine 3402. These showed Mr Bhuta walking back through the ticket barrier at 22:02 on the 16 May 2016, heading in the direction of machine 3403. He was viewed returning about 10 minutes later, carrying some cards (shown on the video still photo at page 200). He was not carrying any cash vaults. The cash vaults are the same size as the trial bundle (i.e. a lever arch file) but two or three times thicker. This made Ms Hayter believe that Mr Bhuta had not taken the missing money.

21 Having received the "Please explain" forms back, Ms Hayter interviewed each of the three employees working on 16 May 2016. The interviews are at pages 192 to 198. Both Mr Patel and Mr Parmer replied they had not attended machine 3403 on the evening of 16 May 2016.

22 Mr Bhuta, having originally stated in his form that he could not recall if he attended machine 3403, gave the following evidence:

"There are some things I remember if it is the same day I am thinking of. Not sure if it is the right date but having done some research, I may now be able to shed some light on the matter.

I never empty machines at night. I've never done it at 8 o'clock. I remember it was myself, Ilyas and Chris working at the front. I was on a break and I heard a customer say that he had lost his money in the S&B machine. I asked Chris what had happened and he said the customer had got £20 stuck in the machine.

The customer had left so I said to Chris that I would go and have a look. I went and had a look and it was stuck in the back of the mechanism. I retrieved it. Chris got in contact with the customer about his £20. On this occasion the machine gave me 'end of shift' cards. It has done this before. If this happens then I leave a note for the morning shift. On this occasion I left a note. The member of staff the next morning went sick so it was emptied by another member of staff."

23 Although Mr Bhuta did not state this, Ms Hayter decided that he had switched off the power supply to the note vault to recover the £20 for the customer. This caused machine 3403 to issue End Of Shift ("EOS") cards when the power was switched on again.

24 These EOS cards were not found by Ms Hayter, but she believed Mr Bhuta's account, because she believed the CCTV evidence showed him returning through the ticket barrier with the EOS cards in hand (see page 200), and because Mr Patel stated when money got stuck he would reset the vault and EOS cards were issued, and Mr Parmer thought Mr Bhuta had brought EOS cards back with him.

25 Mr Parmer could recall Mr Bhuta helping with some money that had got stuck, but he could not say whether he had returned with anything or with the EOS cards.

26 Having received the above evidence, Ms Hayter decided to consider who had emptied the machine 3403 on the 17 May 2016. Given the information that Ms Hayter had originally received (at page 181), which pointed to the discrepancy arising on 16 May 2016, it was reasonable for Ms Hayter to expand the investigation to include the Claimant at this point rather than any sooner. This was because it was only at this point that Ms Hayter looked to see who emptied the machine on 17 May and saw it was the Claimant.

27 The Claimant was interviewed on 3 August 2016. I accept Ms Hayter's evidence about that interview, and notes of it are at pages 201 to 203. In that interview, the Claimant could not recall who was present when he emptied the vault, by which I infer he means removing the vault from the machine. When prompted by looking at the roster in the interview he stated that it was Mr Kelly. The following is an extract of the interview:

"LH - Do you remember who emptied it with you?"

JA - I can't remember.

LH - Would it help if I told you who you were on with that day (LH and JA look at the roster).

JA - I think it was Sam.

LH - Would they have been there when you opened the box?"

JA - No.

LH - *Did you notice anything strange with the notes?*

JR - *I can't remember.*

LH - *According to the sheet there was no notes in the box.*

JR - *There couldn't have been much money because it only took me ten minutes to do that machine before I did the other one."*

28 An S & B machine takes about £3,000 in bank notes each day at Barking station. According to the sheet signed by the Claimant after he counted it, there was only a £52 loss on 17 May 2016. The Claimant denied taking the missing money.

29 On 3 August 2016, Ms Hayter interviewed Mr Bhuta again, and he denied taking the money (pages 206 to 207).

30 On 10 August 2016, Ms Hayter interviewed Mr Kelly. It was part of the Claimant's case that the delay before she interviewed Mr Kelly was unreasonable and Mr Kelly could not recall events. In fact, the evidence Ms Hayter obtained from Mr Kelly was different and not consistent with the Claimant's evidence at his interview. Mr Kelly stated that he definitely would not have gone with the Claimant to empty the machine, given it was a Tuesday and he would have been too busy to help (page 211).

Further investigation: The S & B Report

31 Ms Hayter made some further enquiries with S & B about the EOS cards and vault movements in machine 3403.

32 Despite repeated requests, the party responsible for providing the S & B report failed to provide it until 8 September 2016.

33 When received, Ms Hayter honestly believed that this report showed that Mr Bhuta did not remove the note vault on 16 May 2016 and could not therefore have taken the money, for the reasons that she gives at paragraphs 74 to 88 of her witness statement and particularly paragraph 88.

34 It is important to note that Ms Hayter also made enquiries of the external IT manager responsible for the S & B reports. This includes:

"On 16th May, at 19:58:25, the TVM is showing an event at the BN inlet which creates an error or warning condition, this could be commensurate with a note jam.

At 20:00:05 the BNA shows "Encash money on Init" indicating that any note that was held at the BNA has been put into the vault, so there would be no jammed note for station staff to find.

...

At 20:04:18 the TVM reports "Bill Vault changed without Power", there has been no mains power event but it may be possible to achieve this by disconnecting the power supply to the BNA, within a second it shows Banknote Vault removed. This would need to be re-produced to know for certain the effect on the Event Detail Report. There is no doubt that the machine believes that the box has been removed, that is why the Cash on Hand Cards are produced.

After the door is closed at 20:55:43 there are a series of events throughout the night whereby the Banknote System OK event repeatedly shows, I don't believe it would do that if there was no vault in place."

35 Due to the combined effect of the S & B report and the other evidence Ms Hayter believed that the Claimant must have taken the missing money.

36 On 9 September 2016, the Claimant was suspended and charged with gross misconduct. The charges are set out at page 245.

37 Ms Hayter prepared an investigation report at pages 178 to 247. Her recommendations are at page 213.

38 The second charge against the Claimant was that he had removed and kept the missing £3,065 from machine 3403.

39 I accepted the additional points made by Ms Hayter in her witness statement at paragraphs 99 to 106.

Findings of fact relevant to the unfair dismissal claim

The Respondent's disciplinary policy

40 The Respondent's disciplinary policy is at pages 66 to 96. It gives examples of gross misconduct including theft. Also at page 67, it states:

"1 Introduction

*The object of the disciplinary procedure is to ensure that breaches of discipline are dealt with **quickly** and fairly. Speed, consistent with a proper consideration of the case is necessary in order not to keep the employee in suspense longer than necessary.*

There is no intention of imposing upon our domestic disciplinary arrangements the legal niceties of a Court of Law, but it is important not only that justice should be done, but that it is clear to all that it is being done.

2 Who does the procedure cover?

*The procedure applies to **all** c2c employees.*

Whilst the services of an employee may be terminated during the probationary period on the grounds of unsuitability, in the case of any chargeable offence they should be dealt with in accordance with the Disciplinary Procedure.

*This document is, however, only intended as a guidance note for Managers and **does not** form any part of any employee's Contract of Employment."*

The disciplinary proceedings

41 The Claimant was sent a copy of the investigation pack and report prior to the disciplinary hearing. He chose not to be represented at the disciplinary hearing. He asked to view the CCTV in advance of the hearing (only the stills at page 220 to 221 were in the pack), but was told he could view it at the hearing, which did happen. I find this was reasonable in the circumstances where there was no contemporaneous CCTV evidence of machine 4303 and given the nature of the Claimant's defence – that he emptied the machine vault on 17 May 2016 in the excess ticket office but that he had not taken the money.

42 The disciplinary hearing took place on 19 September 2016. Notes of that hearing are at pages 253 to 255. These notes are accurate if not verbatim. The meeting lasted 35 minutes before the break for Ms Davis to reach her decision. It is notable that part of the 35 minutes must have involved viewing the CCTV evidence which the employer had, lasting from about 19:55 to 20:15 (with the material part being from 20:02 to 20:12) on 16 May 2016, showing Mr Bhuta going through the barriers and back to the ticket office which Ms Davis believed showed Mr Bhuta going to help to retrieve a customer's jammed £20 note from machine 3403.

43 At the start of the disciplinary hearing Ms Davis stated:

"The investigation has already been done and we are here today just to listen to you if you have any additional points to raise."

This is alleged to suggest that all the facts stated in the investigation were simply rubber-stamped by Ms Davis.

44 Having seen and heard Ms Davis give evidence, I was satisfied that she was aware of the role required of her as disciplinary officer and the need to make her own findings of fact. In response to my question, she stated:

"Yes I thought the pack set out what was likely to have happened in fact, I did not think I needed to let Ms Hayter reinvestigate any area".

45 This explains the relatively short nature of the hearing, taking account of the time spent on the CCTV evidence. In my view, given the circumstances in this case, this was a reasonable way for this disciplinary hearing officer to proceed. It is important to note that the Claimant did not dispute that the money had gone missing, nor did he dispute the technical data evidence from the S & B machine at this disciplinary hearing. He did not seek to cross-examine any witness.

46 Ms Davis found that the video evidence showed Mr Bhuta returning through the barriers with the EOS cards on 16 May 2016. I find this was a reasonable interpretation open to her on the basis of the still frame evidence (page 200).

47 At the disciplinary hearing, having admitted that the S & B machines usually took £2,500 to £3,000 per day in cash, the Claimant stated that the machine took nothing on 16 May 2016.

48 The Claimant's evidence was that Mr Kelly had been with him when he counted the money, and that when he went back to the machine, he was taking notes and customers were buying tickets.

49 Ms Davis adjourned the hearing to consider her decision. I accepted her evidence that she genuinely believed that the Claimant had taken the missing money. Ms Davis did not believe the Claimant's account. In particular:-

- 49.1 She believed had changed the story from the time of the investigation interview, in which he had stated that Mr Kelly was not present when he opened the bill vault to count it.
- 49.2 From Ms Davis' experience, it would have been very unusual for the second person to remain (that is, Mr. Kelly in this case) while the money was counted.
- 49.3 The Claimant's evidence had been that there was nothing strange about the notes (see page 202), but on the Claimant's account there was no cash in the vault on that day, save for some element of float. Ms Davis said that this should have rung alarm bells and the duty station manager should have been informed by the Claimant. This was very suspicious to her.
- 49.4 The CCTV that was available did not show Mr Bhuta carrying a vault through the barriers on 16 May 2016 after he had attended to the machine around 8pm.
- 49.5 Ms Davis did not believe that Mr Bhuta would have taken the bill vault out of the machine and then take the money out of the bill vault in a public area.
- 49.6 Ms Davis believed that the S & B report supported Mr Bhuta's account of events. She believed that the crucial evidence was that the same bill vault had been in place since the morning of 16 May 2016 and the Claimant was the first person to remove it and used the cash key to do so. The S & B report recorded when the cash key was used.
- 49.7 Ms Davis could find no other possible explanation as to where the money had gone. All the evidence pointed to the Claimant having taken it.

50 Despite his long service, Ms Davis decided to dismiss the Claimant for gross misconduct. It was not suggested that if she had honest belief based on reasonable grounds after reasonable investigation that this sanction was outside the band of reasonable responses.

51 Paragraph 14.10 of the policy provides a right of appeal. It provides that an appeal must be made within seven days of the employee being advised of the punishment.

The request for the appeal

52 The Claimant was informed of his dismissal after the adjournment. The reasons given were as follows:

“Based on the evidence in the pack and all the evidence from staff and the S & B report prove that you was the last person responsible for this money”.

53 The Claimant was dismissed without notice. He was informed that he should write to request an appeal within seven days. This was repeated in the dismissal letter of 19 September 2016 (page 256) which stated that:

“Further to the disciplinary hearing held on 19th September 2016, I write to confirm that you will be dismissed from the employment of c2c. This dismissal, in accordance with Clause 9 of the disciplinary procedure and takes immediate effect. A copy of the hearing notes will be forwarded in due course.

You have the right to appeal against this decision and if you do so, this must be in writing (within seven days). The basis of this appeal can either be that you feel the facts were not properly presented or that the punishment was too severe.”

54 The Claimant prepared two letters of appeal. The first letter was received on 27 September 2016 (one day late). This is at page 257 to 259. He appealed on the ground of “*lack of evidences*”. He had not received the minutes of the disciplinary hearing up to that point, contrary to what he had been promised at the end of the disciplinary hearing.

55 Although no-one from Human Resources gave evidence, it appears that a HR officer advised that the appeal would not be heard because the appeal request was received outside the seven day time limit within the disciplinary procedure and because HR did not consider the ground of appeal to be “*particularly compelling*” as Ms Davis put it in her witness statement, because he had not pointed to anything wrong with the decision or to new evidence.

Findings of fact: wrongful dismissal

56 The outcome of this complaint boils down to a fairly narrow factual question: is it likely that the Claimant took the missing money? It was admitted in evidence and submissions that the sum of £3,065 did go missing; and on the evidence of the S & B report and the Lennon report this is what I would have found in any event. The Claimant admitted that the real issue was whether the bill vault was removed and emptied between 20:04 (when Mr Bhuta opened the machine) and 06:52 on the 17 May 2016 when he removed the bill vault.

57 I concluded that it was likely that the Claimant did take the missing money. In reaching this conclusion I directed myself in accordance with the law set out in respect of the standard of proof applying in civil cases. In particular, I took into account *In re B* [2009] 1 AC 11 at paragraph 62 and following paragraphs, which applied *Re H* [1996] AC 563. I reminded myself that where in essence an allegation of fraud is made, this is less likely than negligence; and that the more improbable the event, the stronger must be the evidence that it did occur. There is heightened civil standard of proof which is virtually indistinguishable from the criminal standard: see *In Re B* at paragraphs 66 and 69. I concluded that this was a case where the heightened civil standard should apply and I reminded myself that the Respondent needed to adduce cogent evidence to prove its case.

58 Having weighed all the evidence I was satisfied that the standard of proof was discharged for the following reasons:-

- 58.1 The Claimant was not a reliable witness on certain key facts. I did not accept his evidence that he had not taken the money.
- 58.2 The Claimant did change his evidence between the investigation interview and the disciplinary hearing. At the hearing, he claimed Mr Kelly was with him when money was counted. I failed to see why this would have happened given that Mr Kelly was working on the ticket window at a busy time of day (a Tuesday morning).
- 58.3 I found it implausible that the Claimant would have found that the machine had taken no notes yet not mentioned this to the duty station manager, or if he was present, to Mr Kelly (who would surely have remembered such a surprising fact, given the machines usually took over £2,500 cash per day).
- 58.4 The Claimant admitted that having emptied the machine 3403, he returned to the excess ticket office with the vault. He admitted he left machine 3403 at 06:52:57 i.e. 06:52 and 57 seconds. He admitted it would have taken him 30 to 40 seconds for him to reach the ticket office. I find on the evidence that the Claimant counted the money in the note vault at about 06:53 and 40 seconds. This is significant because at page 106(a) to (j), there is a report of sales made by the Fastis machine operated by Mr Kelly on the 17 May 2016. This shows continuous sales from 06:53 to 07:37 that morning. I find it practically impossible for Mr Kelly to have been present when the Claimant counted the money in the note vault in the excess ticket office, on the 17 May 2016 from 06:53 and 40 seconds.
- 58.5 The Claimant refused to admit that it was unlikely that Mr Bhuta would have emptied cash out of the bill vault on 16 May 2016 when he attended to the machine at about 20:04. I noted that the machine was in a public place in the station in full view of CCTV, but still he refused to accept that this was unlikely.

- 58.6 I find as a fact having studied the still at page 200 that Mr Bhuta did not return through the ticket barriers with any vault, having attended to ticket machine 3403 on the evening of 16 May 2016 in order to remove the jammed note. This provided some corroboration of Mr Bhuta's account that he had not taken the missing money.
- 58.7 I found as a fact that Mr Bhuta did not take the money. In order to remove the money from the note vault he would have had to use a cash key, a fact which was common ground. The Claimant's case was that Mr Bhuta had done so, but this did not show on the S & B report because the power had been switched off to the note vault. I rejected this as inherently unlikely because it would have involved Mr Bhuta removing £3,000 in cash in full public view below the CCTV cameras and by inference hiding it on his person.
- 58.8 The Claimant admitted, as the S & B report showed, that the same bill vault had been in the ticket machine throughout the 16 May 2016 until removed by the Claimant on the morning of 17 May 2016. The Claimant accepted a separate key was required to remove the bill vault from the machine. On the S & B report entry 534 (at page 238) showed the Claimant using the cash key to remove the bill vault from the machine. The S & B report does not show the cash key being used with the removal recorded at 20:04 of the S & B report (page 233) which is consistent with Mr Bhuta's account of turning the power off to the bill vault to un-jam the machine. The Claimant relied on Mr Key's statement at page 222:

"At 20:04:18 the TVM reports "Bill Vault changed without Power", there has been no mains power event but it may be possible to achieve this by disconnecting the power supply to the BNA, within a second it shows Banknote Vault removed. This would need to be re-produced to know for certain the effect on the Event Detail Report. There is no doubt that the machine believes that the box has been removed, that is why the Cash on Hand Cards are produced.

After the door is closed at 20:55:43 there are a series of events throughout the night whereby the Banknote System OK event repeatedly shows, I don't believe it would do that if there was no vault in place."

But I find the thrust of Mr Key's report points to the Claimant being the only person to have in fact removed the bill vault. His evidence is that the bill vault was likely to be in place at 20:04:20 due to the report reading "Banknote System OK" (entry 362 at page 234).

- 58.9 The S & B report on the CCTV footage corroborates Mr Bhuta's account that the EOS cards (showing a nil cash balance) were produced when he switched the power off and on again. These cards and the note written by Mr Bhuta were never found. I find it likely that the Claimant disposed

of these when he decided to take the money. I cannot see who else had the opportunity or the reason to dispose of these documents.

58.10 The S & B report provides cogent evidence against the Claimant. He relied on the fact that the machine door was opened on two occasions after 20:04. He maintained that where there was no power to the machine it could not be said what had happened to the bill vault between 20:04 and 20:55 on 16 May 2016. I find that the S & B report (entry 362) shows that the bill vault was in place throughout the times 20:10:55 and 20:12:44 and 20:50:28 and 20:55:23. This is corroborated by the absence of evidence that the cash key was used to remove the vault from the machine at any point between 20:04 and 20:55, and further by the fact that the report does not record the bill vault being reinserted at any point from when the machine was first open by Mr Bhuta at 20:04.20.

59 In conclusion I find that Mr Kelly was not present when the bill vault was open and the cash counted by the Claimant, the bill vault was present in machine 3403 at 20:04 on 16 May 2016 and was not physically removed until the Claimant did so on 17 May 2016, and when the Claimant opened the bill vault in the ticket office he did so with Mr Bhuta's EOS card showing a nil balance but with the vault containing £3,065.

60 The inference I draw is that this was an opportunist theft, with the Claimant believing that the EOS cards showing a nil balance on 16 May 2016 meant that it would go unnoticed.

The Law

Gross misconduct

61 Gross misconduct is conduct which is so serious that it goes to the root of the contract. It must be conduct so serious as to amount to repudiatory breach. By its very nature, it is conduct which would justify dismissal, even for a first offence.

Unfair Dismissal

62 In determining whether a dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within s.98 ERA.

63 A potentially fair reason is one which relates to conduct: s.98(2)(b) ERA.

Reasonableness: s.98(4) ERA 1996

64 I directed myself to section 98(4), which I will not repeat here. The burden of proof on the issue of fairness is neutral.

65 In conduct cases, in considering the fairness of a dismissal, the classic questions for a Tribunal to consider are:

65.1 Did the employer have an honest belief that the employee was guilty of misconduct?

65.2 Was that belief based on reasonable grounds?

65.3 Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See *BHS v Burchell* [1980] ICR 303)

66 The principles which the Tribunal must apply when applying section 98(4) are as follows:

66.1 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

66.2 On the issue of liability of the unfair dismissal the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

66.3 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See *Foley v Post Office and HSBC Bank plc v Madden* [2000] IRLR 3.)

67 The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see *Sainsbury plc v Hitt* [2003] ICR 111. I directed myself to the following passage in *Hitt*, with emphasis added by me, which I found to be relevant to this case:

"The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. **The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.** The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing. Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require

them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out.”

68 Reading *Hitt* and *Foley* together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer, in this case, a school.

69 In cases where allegations are based on circumstantial evidence (i.e. on inferences), greater investigation will be required: *ILEA v Gravett* [1988] IRLR 947.

70 Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of the case, the employee's reputation or ability to work in his or her chosen field of employment is potentially in issue.

71 There was discussion as to whether *Monji v Boots Management Services Ltd* UAEAT/0292/13 had created a heightened test of reasonableness in such cases. In that case, HHJ Eady QC was helpfully explaining that serious allegations of criminal behaviour require careful investigation. A careful and conscientious investigation of the facts is required, and inquiries should focus no less on exculpatory evidence than on the evidence that may prove the charges in question.

72 The reference to a heightened standard at paragraph 47 of *Monji* does not mean that the investigation must be a CID style one, nor that the investigation must be more than reasonable; but it highlights that, given that the purpose of the investigation is to establish whether there are reasonable grounds for the suspicion of gross misconduct in the form of a criminal offence, a more careful investigation is required which produces more cogent or weighty evidence.

73 Speaking for myself, I see no real difference between what is stated in *Moncrieffe v LUU* UAEAT/0235/16, where a heightened standard in certain cases was doubted, or in *Monji*; but, if there is, I tend to prefer the fuller statement of law given in *Monji*, which is comprehensive and relies on a consistent line of authority.

Appeals

74 In *Taylor v OCS Group Ltd* [2006] EWCA Civ. 702, [2006] IRLR 613, it was stated that ultimately a tribunal must look at the overall fairness of the procedure, and not just consider whether the appeal had taken the form of a rehearing rather than a review.

Separate and gradual fact-finding

75 I reminded myself of the guidance provided by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 261:

“44 I agree with the EAT that the ET was bound to make findings of fact about Mr Small's conduct for the purpose of deciding the extent to which Mr Small's conduct contributed to his dismissal. That was a different issues from whether the Trust unfairly dismissed Mr Small for misconduct. Contributory fault only arose for decision, if it was established that the dismissal was unfair. The contributory fault decision was one for the ET to make on the evidence that it had heard. It was never a decision for the Trust to make. That makes it different from the decision to dismiss, which was for the Trust to make. It was not the role of the ET to conduct a re-hearing of the facts which formed the basis of the Trust's decision to dismiss. The ET's proper role was objectively to review the fairness of Mr Small's decision by the Trust.

45. I am unable to agree with the EAT that the ET kept the issues and the relevant facts separate or that it avoided the error of substituting its own judgment about dismissal. Although the ET rightly warned itself against substitution and thought that it was not falling into that error, my reading of the reasons is that its findings of fact about Mr Small's conduct seeped into its reasoning about the unfairness of the dismissal.

46.It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."

Submissions

76 Mr Young provided a skeleton argument with authorities which I read over lunch before submissions began. He supplemented the submissions orally, referring to various cases, most of which I found of marginal relevance.

77 Mr Humphries made oral submissions. I thank both Counsel for their diligence; neither could have done more for their client. I have taken account of all the submissions even if I have not referred to them in this set of reasons.

Conclusions

78 Applying the findings of fact to the issues set out above, I reach the following conclusions.

Issues 1 to 4: unfair dismissal

79 The Claimant admitted in evidence the reason for dismissal was because Ms Davis honestly believed that the Claimant was guilty of gross misconduct, namely the theft of £3,065.

80 Gross misconduct is a potentially fair reason for dismissal.

81 I conclude that Ms Davis had reasonable grounds for her belief in the guilt of the Claimant for all the reasons that she gave set out at paragraph 49 above.

82 The Claimant contends that the investigation was outside the band of reasonableness, so the Respondent could not satisfy itself that the Claimant had taken the money. I disagree. I find that the investigation by an experienced officer who had herself been a Customer Services Adviser, was well within the band of reasonableness.

83 I have noted the allegation that Mr Bhuta gave “conflicting evidence” but I do not agree, so that it is correct that Mr Bhuta could not at first recall opening the machine when he completed the “Please explain” form. I find this entirely understandable given that it was approximately four weeks later when he completed the form on the 17 June 2016. The investigating officer and the disciplinary officer both took into account this form.

84 I do not consider the delay in the commencement of the investigation involved any undue or unreasonable delay. It was the result of circumstances: Ms Hayter was only informed of the missing money on 6 June 2016; then the CSA employees working on 16 May 2016 were unavailable due to their holidays; then Ms Hayter was on holiday; and then the third party responsible for the S & B report delayed one month in producing it.

85 What seemed more important to me is that within a short time of the S & B report being received, the Claimant was suspended and a disciplinary hearing arranged. The Claimant was given a copy of the evidence, given the opportunity for representation and shown CCTV evidence at the disciplinary hearing which took place promptly on the 19 September 2016. From the interview of Mr Kelly, it is clear that the passage of time had not caused him to be hesitant or be unable to recall what had happened on the 16 May 2016.

86 The lack of CCTV evidence in respect of machine 3403 for the 16 May 2016 or the 17 May 2016 is unlikely to have been crucial. The S & B report recreated what had happened particularly when interpreted with the other evidence such as CCTV that was available. In the relatively recent past no CCTV would have been available in such a case; and the employer in such a case would have had no trouble reaching a conclusion without it on these facts. This is because on the facts of this case there was no doubt that the money had been taken and the witness and data evidence pointed to the Claimant as the guilty person.

87 Although the investigation and the disciplinary hearing were both found reasonable in the circumstances, the manner in which the Respondent dealt with the appeal request was anything but. I have no doubt that the failure to afford the Claimant an appeal made this dismissal unfair. This is for the following reasons:-

87.1 The Respondent had relied on the seven day time limit within which an appeal must be submitted under its policy. It treated this as set in stone.

This is an unfair and impermissible approach to the policy given that the policy itself refers to it as a guidance note for managers, and that the “legal niceties” of a court of law do not apply. Quite why a one day extension to the seven day time limit was not in these circumstances permitted is impossible to comprehend.

87.2 The circumstances which are referred to above, which in all fairness to the Claimant required an appeal, are as follows:-

87.2.1 The Claimant had a right of appeal conferred by the disciplinary procedure.

87.2.2 The ACAS Code requires a right of appeal, and only requires that this be carried out without unreasonable delay.

87.2.3 The Claimant had been an employee for a long time, some 13 years, with an unblemished disciplinary record to this point.

87.2.4 The Claimant was seeking only a very short extension of time in which to appeal. There was no question of the evidence or people’s memories having gone stale.

87.2.5 Before the decision to refuse was made, there is no evidence as to any investigation for the reason for the delay. Had any investigation been carried out the Respondent would have seen that the Claimant had tried to appeal in time.

87.3 Furthermore I found that the Respondent failed to give effect to the whole scheme of its policy and practice in respect of an appeal (insofar as I heard evidence about it). As Ms Davis admitted the letter of dismissal gave the Claimant no reason to explain why his account was not accepted. The only reasons he was given was the single sentence I have quoted from the disciplinary hearing. Moreover, as at the date he was required to appeal he had not received the notes of the disciplinary hearing, contrary to the representation made to him at the disciplinary hearing. Given these facts it was unfair to refuse him the opportunity to appeal partly or wholly on the basis that his appeal did not seem to HR to warrant an appeal. I asked rhetorically how could they have known?

87.4 Moreover at paragraph 21 of the disciplinary policy, it states that an appeal can only be based on the severity of the punishment or misinterpretation of the facts (page 77). So given that binary choice, I fail to see why the appellant needed to state more than he did in his appeal request.

88 I conclude the failure to afford an appeal to the Claimant made this dismissal unfair. I bear in mind that this is a large employer with a longstanding experience of employee relations in disciplinary matters. Holding an appeal would be a routine matter costing very little in terms of time and management resources.

89 Save for this point, I should add that I found the decision to dismiss well within the band of reasonable responses open to this employer on the evidence generated by the investigation for all the reasons given by Ms Davis.

Issue 5

90 Having considered all the evidence that would have been before the officer hearing the appeal, I note that it would have been the same as that before Ms Davis. In the light of this, I find it 100% likely that the appeal would have failed. The evidence collected was cogent and provided a strong case against the Claimant.

Issue 6

91 I find that the Respondent did fail to comply with the ACAS Code. I find that the Respondent breached paragraph 22 of the code by failing to give the Claimant the reasons for his dismissal. The Respondent also breached paragraph 26 by failing to allow the Claimant an opportunity to appeal. This failure was unreasonable for all the reasons that I have given.

Issue 7

92 The Claimant contributed to his dismissal by blameworthy conduct in taking the money identified to be missing, over £3,000. It would be just and equitable to reduce any compensatory award by 100%.

93 In addition, pursuant to section 122(2) of the Employment Rights Act 1996 given the Claimant's conduct, I consider that the basic award should be reduced by 100%. This must be just in a case in which I have found that the employee stole the money that led to his dismissal.

Issues 8 and 9

94 I found as a fact that the Claimant was guilty of gross misconduct. The Respondent acted lawfully by dismissing him summarily. The claim for wrongful dismissal is dismissed.

Issues 10 to 12

95 In submissions, Mr Young accepted that the Respondent's letter of 6 June 2016 set out the changes in the Claimant's statement of terms and conditions, after he became a full-time employee. The complaint under section 4 Employment Rights Act 1996 was not pursued, and I therefore dismiss it.

96 In respect of the complaint that the Claimant was not provided with a statement of terms and conditions in 2003, I have found that on balance he did receive a copy of the statement of terms and conditions at that time. I find it unlikely that he signed something but was not given a copy of it, particularly within a large employer such as this railway company. This complaint is also dismissed. If I am wrong about this I would have found it unjust to award the Claimant any sum under this head given the findings of fact that I have made against him.

Summary conclusion

97 In the light of the above conclusions the complaints of wrongful dismissal, the complaint under s.11 Employment Rights Act 1996, and the claim for holiday pay are dismissed,

98 The complaint of unfair dismissal is upheld. A declaration of unfair dismissal shall be made, but the Claimant is not entitled to any compensation.

Employment Judge Ross

24 July 2017