



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mr P Nguyen

v

**Respondent:**  
Heathrow Express Operating  
Company Ltd

**Heard at:** Reading

**On:** 6 November 2017

**Before:** Employment Judge George

## Appearances

**For the Claimant:** Ms C Lord (Counsel)

**For the Respondent:** Mr D Mitchell (Counsel)

## RESERVED JUDGMENT

1. The name of the respondent is changed to Heathrow Express Operating Company Ltd.
2. The claimant's claim of unfair dismissal is dismissed.

## REASONS

1. The claimant started work for the respondent on 25 April 2010 as a Mobile Sales Advisor (hereafter referred to as a MSA). Following a sales transaction which took place on 22 December 2016, he was suspended on 23 December 2016. What happened in relation to the sales transaction is contentious, and explored in more detail below. In outline, two customers purchased tickets for travel on the Heathrow Express which were then cancelled and, according to the respondent's computer system, refunded. The customers attempted to travel on the tickets which had been invalidated and an investigation was commenced which revealed that the customers had been served by the claimant. That initial investigation led to the suspicion that a refund had been generated and the cash which would, in a genuine refund situation, have been repaid to the customers, had been intercepted. The tickets had been issued by the claimant's device and therefore suspicion fell on him.
2. His suspension was confirmed in a letter which is at page 58 of the bundle. He was dismissed for alleged theft and failure to follow company policy in respect of cash handling on 23 January 2017. He undertook early

conciliation between 13 February and 13 March 2017 and then presented his claim form on 25 March claiming only unfair dismissal. The respondent defends the claim and entered a response on 3 May 2017. The response is at page 14 of the bundle and the claim form at page 1.

3. The parties have prepared a bundle of documents which runs to more than 145 pages and page numbers in these reasons refer to page numbers in that bundle. The respondent called two witnesses: the Senior Sales Manager, Mr Spencer Adaway and the Customer Service Manager, Ms Krystyna Michlicka. Ms Michlicka took the decision to dismiss and Mr Adaway was the appeal officer. The claimant gave evidence himself and was supported in his claim with evidence from Mr Behram Billimoria. All of the witnesses had prepared witness statements which they confirmed in evidence. Mr Billimoria had prepared two witness statements as had Mr Adaway.

### **The Law**

4. The relevant statutory provisions in complaints of unfair dismissal where the respondent alleges that dismissal was because of the claimant's conduct are s.98(1), (2)(b) and (4) of the Employment Rights Act 1996 (hereafter referred to as the ERA). It is for the respondent to show the reason for the dismissal and that it is a reason falling within s.98(2). In this case the respondent relies on conduct which is a potentially fair reason within s.98(2).
5. If I am satisfied that the respondent has proved a potentially fair reason for dismissal then I must go on to consider whether the decision to dismiss the employee was fair or unfair. That depends on whether in all the circumstances the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee.
6. When the employee's conduct is said to be the reason for dismissal then I find guidance for the approach I should take to that task in British Homes Stores v Burchall [1980] ICR 303 EAT and other subsequent cases which built upon what has become known as the "Burchall test". I need to be satisfied that, before deciding to dismiss, the employer had formed a genuine belief in the employee's guilt. However, in order for it to be reasonable for the employer to treat the conduct as sufficient reason to dismiss, the employer must have had in mind reasonable grounds for that belief and at the stage that the belief was formed the employer must have carried out as much investigation as was reasonable in the circumstances.
7. I must also ask myself whether the conduct of the respondent fell within what has been described as the "range of reasonable responses". It is not whether I would have reached the same conclusion as the employers in question, but whether their conclusion or decision was one within the range of responses to the employee's conduct open to the reasonable employer.

8. The same is true of the employer's conduct of their investigation into the claimant's alleged misconduct. The question for me is whether the investigation was within the range of reasonable responses which a reasonable employment might have adopted: J Sainsbury plc v Hitt [2003] ICR 111, CA. On the one hand, the employer does not need to carry out an investigation of such thoroughness that it could be compared with a police investigation. On the other hand, as the ACAS Guide to Discipline and Grievance at Work says at paragraph 4.12

"The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against"

9. If the tribunal finds that the dismissal was unfair and has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome. Mr Mitchell argues that, in the event that the claimant is successful in his unfair dismissal claim, compensation should be reduced for this reason.
10. Finally, the provisions of s.122(2) and 123(6) of the Employment Rights Act 1996 set out the powers of the tribunal to reduce any basic and compensatory awards because of conduct or contributory fault respectively. Against, I am asked to make an order under these sections in the event that I conclude that the dismissal was unfair.

## Issues

11. As I have already explained, the issues are those set out in British Home Stores v Burchell. First, I need to consider whether the respondent had a genuine belief in the guilt of the claimant; secondly, whether that belief was based on reasonable grounds; and thirdly whether at the time the belief was formed, the respondent carried out as much investigation as was reasonable in all the circumstances.
12. The particular matters that are relied upon by the claimant as indicating that his dismissal was unfair are:-
- 12.1. That no reasonable employer would have found him guilty of gross misconduct on the basis of the evidence available to them;
- 12.2. In particular, the claimant puts forward three possible explanations for any discrepancy in the cash handling and his returns from 22 December. He argues that, given those potential explanations (see the particulars of claim at page 12 and following), no reasonable employer would have found him to be guilty. First, he argues that there is no evidence that the customers did not in fact receive the cash that was refunded to them and it is possible that the customers

then passed on the invalid tickets for someone else unwittingly to use. Secondly, he argues that a technical problem between the purchase of the ticket and asking for a refund might have caused no cash to be transferred. Thirdly, he argues that the handheld terminals or HHTs which were used by the MSAs are frequently faulty and the incident could have occurred due to technical issues beyond his control.

- 12.3. The next main argument he raises is that there was a failure to follow policy in this case. He complains first that he did not see the CCTV footage in advance of the disciplinary hearing. Secondly, he complains that the suspension was not in accordance with disciplinary policy and it is unusual to suspend.
  - 12.4. He complains that the appeal officer was not impartial because he was the same person as the person who took the decision to suspend him.
  - 12.5. He argues that no reasonable employer would have dismissed someone with his previously good employment record.
  - 12.6. He complains about lack of investigation. Specifically that there was a failure to view relevant CCTV evidence and also a failure to investigate technical issues with the HHT. It is argued that this amounted to a failure to carry out an investigation that was reasonable in all the circumstances.
13. For those reasons, the claimant argues that the dismissal was unfair in all the circumstances and that it does not pass the test of section 98(4) of the Employment Rights Act.
  14. The respondent argues that if, contrary to their primary argument, I concluded that the claimant was unfairly dismissed for any of the above factors, then had they not been present it would have made no difference. It is argued that there should be a deduction from compensation to take account of the likelihood that the claimant would have been dismissed in any event. They also argued for a deduction from any compensation under sections 122(2) and 123(6) of the Employment Rights Act for contributory conduct.

## **Findings**

15. I make my findings of fact after considering all of the evidence before me, taking into account relevant documents where they exist, the earlier accounts given by all of those concerned about the relevant factual matters and the witness evidence, both statement evidence and oral testimony. Where it is has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including with documentary evidence. I do not set out all of the evidence in these

reasons; I set out my principle findings of fact on the evidence before me, those findings which it was necessary for me to make in order to decide the issues which the parties have asked me to decide.

16. On 22 December 2016, the claimant was on duty on a shift which started at 6.00 am (to judge by the Sales by Time Page - page 57F). By 12.00 noon, he was approaching the end of his shift. MSAs sell tickets, among other ways, through handheld terminals (HHTs) into which they log using their unique PIN code. The claimant was logged in with PIN code 3606 to a particular HHT and was working in Heathrow Terminal 4. Two tickets were issued from the claimant's HHT just after 12.30; one at 12.32 and one at 12.33. [See page 57A.] They were a single journey from Heathrow to London Paddington, each for one adult. It indicates that both tickets were paid for in cash and the price on each of the tickets was £22.00. Confirmation of that transaction appears at page 57H and the claimant accepts that he sold those tickets.
17. At 12.34, a cash refund transaction was generated by or from that HHT which still showed that user 3606 was logged in. The printed out refund slip appears on page 57E and also 57B. I can see from that receipt that it is still showing logged in by user 3606. The refund slip records a refund of £44.00 for two separate £22.00 tickets. If we look at page 57H in the list of transactions for the whole of the day the refund appears four lines down on the page when orientated in landscape format.
18. This refund caused the tickets to be cancelled or, using the terminology that the respondent uses, to be aborted. Later, two people attempted to travel on the Heathrow Express using those tickets and they were intercepted by the host. Page 57G is an email sent by the Duty Station Manager to a Mr Kenth which shows a scanned version of the tickets (including their identification numbers). He says in the e-mail that the host had contacted him and given him those tickets which recorded as being cancelled. The host's account to the Duty Station Manager (as recorded in that email) was that the customers had told him that they had bought the tickets at Terminal 4 and paid in cash.
19. This emailed information was passed on and investigated overnight. It was identified that the tickets had been issued by the claimant. The information was presented to Mr Adaway who, suspecting that this might be a case of misconduct, decided to suspend the claimant. He was the only person in the sales department with the authority to do so.
20. Before me, the claimant denied processing or giving the refund. He did take this position at one point in the appeal hearing. If one looks at page 117, part of the appeal notes, he states at one point: "Tickets were sold and I gave them to the customers who walked away. I didn't do the refund", and then a couple of lines down, he says: "I do not recall doing the refund". It is fair to say that the claimant's position has not always been absolutely consistent on this and indeed in the same meeting [page 118] he says when it is suggested to him that he did process the refund: "I

pressed it by mistake. If I did do a refund, I would have followed the correct procedure”.

21. The normal process for an MSA at the end of their shift is to cash up. They then record the amount of cash that they have on them and deduct from that the amount of the float with which they were provided at the start of their shift. They record this information on a daily cashing up form (Form F) and at page 57C, I have a copy of the Form F completed by the claimant on 22 December. This shows that he had £494.00 in cash at the time he cashed up. He deducted the float of £196.00 and therefore recorded that he had generated cash for the shift of £348.00. This was exactly the amount of cash he would expect to see based upon the transactions recorded by the HHT that shift. There was no cash discrepancy.
22. The respondent has a Cash Handling Policy, as you would imagine, and at page 27, I find the one that was in force at the time in question. Although the claimant had not seen the written policy before the date of the incident (indeed on his account he had not seen it before these proceedings), he was well aware of the following relevant provisions.
  - 22.1. First, that if a passenger is refunded the cost of a ticket, the ticket should be retained, marked “void” and submitted to the Revenue Department with the daily cashing up form (Form F).
  - 22.2. Secondly, he knew that the customer should be given the refund receipt.
  - 22.3. He also knew that any discrepancies in the cash that he had at the end of the shift and the cash he was expecting to have should be recorded on the cashing up form.
23. When Tara Walker investigated what had happened in the present case she would have known that, whatever else may or may not have happened, the refund policy had not been followed because the customers still had the tickets and they had been aborted. The respondent’s revenue department provided to her the claimant’s Form F for that shift and attached to it was the refund receipt. Although the claimant did ask to see the original at his investigation meeting, that omission was not pursued as a material unfairness before me. It was not actually asserted by the claimant that the refund receipt had not been found attached to his cashing up form.
24. The claimant had given other refunds that day and those refunded tickets were attached to his cashing up form. They are inscribed “void” as is the required practice [see that at page 57E].
25. On appeal, the claimant contended that a possible explanation for the refund was HHT error. It is accepted by the respondent that there have been a number of problems with the HHTs. Ms Michlicka accepted when it

was put to her that they were notoriously unreliable. Mr Adaway accepted the unreliable but took issue with them being “notoriously” unreliable.

26. Mr Billimoria gave evidence of problems that he had had in his experience of dealing with them. Page 60A is a document that has been compiled by a representative of the firm of solicitors who represent the claimant from a bundle of documents that have each been submitted at the end of shifts by MSAs. These documents are called Form 1s. If an MSA gets to the end of a shift and finds they have a discrepancy in the cash, either under or over, this is the form that they are supposed to submit and at page 60A and B is a printout of a spreadsheet recording some information from Form 1s that were submitted to the Revenue Department at the respondent between 2 October 2016 and 29 December 2016. The information in this form raises a possibility that HHTs can produce errors including an inadvertent refund.
27. However, in my view page 60A is not very persuasive evidence. It lists all the reported errors and I accept Mr Adaway’s evidence that each of these would be investigated by the Revenue Department and possible causes found for the problem that has been reported. This is not evidence and the Form 1s themselves would not be evidence that any individual cashing up error had been caused by a machine creating a refund without that being activated by the operative in question. At best it is evidence that there are cash discrepancies which the MSA cannot account for some of which might be caused by an unspecified HHT error. The respondent argues that had there been an error of this sort in the present case one would have expected to see a cash discrepancy to indicate that there was a “ghost” refund.
28. In my view, the distinguishing feature in the present case was not primarily that there was no cash discrepancy. The distinguishing feature is that the receipt was found on the cashing up form. If, as the claimant hypothesises, one minute after he had sold the tickets to two customers, his HHT printed out a refund receipt that he had not actioned then what possible reason could he have for attaching it to the cashing up form. Its presence evidences that the refund was actively actioned and it was certainly reasonable for the respondent to think that the fact that the receipt was on the cashing up form evidenced a conscious decision on someone’s part to tell the HHT to refund the money. The absence of a cash discrepancy indicated that the reason for that might be to intercept the money.
29. The claimant attended an investigatory meeting on 3 January. His account at that meeting broadly speaking was that he could not remember carrying out any cash refunds that day. He said that he had probably left his machine at the ticket office; he said that he had left his machine for about an hour [see page 62]; he said he had been back and forth into the customer services area leaving his HHT unattended and that somebody else must have picked up his machine by mistake and done the refund. He said he had logged off at 12.54 and he asked if CCTV available for the day could be found.

30. Ms Walker produced an investigation report that starts at page 67. It is clear that by that stage she had viewed the CCTV footage that had been requested by the claimant at the investigatory meeting. I accept that he did not see it until the disciplinary hearing. It was decided that there was a case to answer and it went forward to a hearing in front of Ms Michlicka. She concluded that the claimant was guilty of breaches of the cash handling policy and theft. The note of the hearing of 23 January is at page 77.
31. The CCTV footage that was viewed on that day was taken from the camera position directly behind the claimant where he was sitting at a desk. His request for CCTV footage was a general request. The respondent did not disclose an alternative view taken, apparently, from the front of the desk which would have shown an alternative view of the same scene, nor did they disclose CCTV footage of any other areas, notably where cashing up took place.
32. The claimant's point is that he was found guilty of theft on the basis of inferences without the respondent looking to see whether alternative CCTV views would implicate or exculpate him. When considering this point, it is relevant to consider the case that the claimant was putting forward in the investigation meeting on 3 January. It was that he had left his HHT unattended for a period of time of up to two hours (his account varies) and that another MSA had been present or a host had been present. The CCTV footage that was shown at the disciplinary hearing starkly contradicts that case in a number of respects.
33. The respondent argues that other views of CCTV footage would have been irrelevant because, even if they did not show the claimant actually taking the money, this would not have been sufficient to prove the absence of theft. The reason for that is that the MSAs wear their money belts on their person and do so in areas that are not covered by CCTV. They do not argue that there was direct evidence of the claimant removing the cash from his money belt but they inferred theft from circumstantial evidence. Therefore, say the respondent, CCTV evidence which showed other views of the claimant but which do not show direct evidence of stealing would do nothing to dispel the inferences which they drew from the circumstantial evidence which they had. I accept that, for the reasons they explain, other views of CCTV footage did not have the potential to exculpate him.
34. Ms Michlicka concluded that the receipt showed that a refund had been actively processed and therefore that the cash from that refund transaction would either have been with the customers or with the claimant. I asked her when she gave her evidence why she had concluded that the customers' evidence (at least third hand when she received it) was to be preferred over the claimant's. Points were taken, on behalf of the claimant, that the respondent did not take names and addresses of the customers; there were no witness statements from the customers; and the respondent had preferred their assertion that they had purchased the



tickets and had not been given a refund for them over that of a longstanding employee who had a previously exemplary record.

35. Ms Michlicka's response was that when she reviewed the investigation pack, she was concerned to see that the evidence and explanations provided by the claimant at the investigatory meeting were inconsistent. He had initially claimed that perhaps another member of staff had been in the ticket office and had taken his HHT - maybe another person passing by. When she reviewed the CCTV footage, it was clear that the claimant was in possession of his HHT at all times and that caused her to have concerns about the claimant's integrity.
36. Her conclusion was set out in the dismissal letter [page 85]. The claimant had told her that he could not recall processing the refund but, relying on the CCTV evidence, Ms Michlicka concluded that he was the only person in control of his HHT at the time of the refund (see page 86, third bullet point down).
37. I was shown the CCTV footage in the final hearing that covered a short period from 12.30 to 12.35. The claimant has never disputed that the figure in the CCTV footage is him. The CCTV footage in question is not continuous by which I mean that it jumps at intervals of less than a tenth of a second (approximately 6/100ths of a second) apart and therefore the film has a very jumpy quality. Quick movements could therefore be missed entirely by it. It shows two men in front of the Customer Services desk and a man who has been identified to me as the claimant serving them. The time at which filming takes place is visible on the footage. The two men leave between 12.32 and 12.33, and at 12.34 (which is the time according to the HHT's printed refund and the computer records at which the refund is carried out) the claimant is alone.
38. Taking into account the frozen and jumpy quality of the film image, it is fair to say that to me it appears to show the claimant putting his arm up towards the men as if handing them something. At the very least, I can quite see how somebody viewing that CCTV footage would interpret it as showing the claimant handing something to the men standing at the desk.
39. I therefore accept that it was reasonable for Ms Michlicka to conclude based on the times on the tickets and the CCTV footage that the claimant had sold the tickets in question and then had been alone with his HHT throughout the period in which the refund occurred, contrary to his statement to the investigatory meeting.
40. Ms Michlicka then concluded that the fact that the refund had been done meant that the claimant's cash was £44.00 short. She reached this conclusion because she was concerned about the claimant's credibility (as I have already said) and the customers had appeared to the host to be credible. If the customers were credible, and did not have the cash then the claimant was £44.00 short. Their description of where they had bought the tickets suggested that it was them who had bought them and the fact

that they had used them suggested that they had not asked for refunds. She also relied upon the computer generated report that is at page 57 H and I. She was not satisfied by the claimant's explanations including that his HHT had crashed and had needed to be reset. The reason why she rejected that explanation was he had not raised that issue before his meeting with her and had not reported that fault on the day in question.

41. The claimant appealed. Page 90 shows his grounds and they are that the possibility of unreliability of the HHT devices had not been considered fairly and other unspecified points. He elaborated his grounds of appeal (page 93) saying that he wanted to see a full log of activity and the CCTV footage of him cashing up. He repeated that he did not remember issuing the refund. This request was made on 2 February and it transpired that by that stage the other CCTV footage was no longer available.
42. On 7 March he wrote to Mr Adaway (page 100) and, amongst other things in that email the claimant challenged whether Mr Adaway was impartial because of his involvement in what the claimant called the "initial hearings". By that, the claimant meant the occasion on which he was suspended. He also wished to expand his arguments saying that there had been insufficient account taken of his previous record of employment and the evidence was inconclusive. He argued that there was no direct evidence of the theft, that the HHT equipment was unreliable and that there had been a failure to follow company protocol as well as a failure to provide the necessary CCTV evidence.
43. Mr Adaway did not reply to that email. He had apparently received other emails concerning the claimant's case from an email address which he did not recognize. However, I do not find his explanation that this made him concerned and uncomfortable about replying to page 100 for reasons of confidentiality. Page 100 was clearly from an email address bearing the claimant's name. At the very least he should have checked with HR to see whether this was the email address that they had on record for the claimant.
44. Part of the reason for his failure to respond was because the appeal meeting was due to take place the following day. However, when it was postponed and the claimant repeated the request on 10 March [see page 104] Mr Adaway still did not respond. I am particularly concerned that he did not respond to the suggestion that he was not impartial. This question is raised by the claimant in the following way:

"I will also ask you to confirm that you consider yourself sufficiently impartial enough despite your involvement in the initial hearings to be able to make what could be seen later as a fair, unbiased judgment on this matter.

Obviously a negative response to any of the above makes your participation in this process questionable and with respect maybe you should consider appointing someone who can respond affirmatively to all the above."

It is clear that the claimant was suggesting that Mr Adaway was not impartial and should consider whether he should conduct the appeal hearing or not.

45. The notes of that hearing start at page 112. Mr Adaway was accompanied by Mr Billimoria, as he had been at the disciplinary hearing.
46. Mr Adaway started the hearing by dealing with the question about whether he was impartial by stating he had no involvement in the investigation or hearings up to that point and would use the investigation as a basis for his final decision. That is a stance that he has taken in respect of his dual role in these proceedings before me. The claimant read out a statement that starts at page 114 and goes forward to page 116. In it he makes the essentially the same points that are made in his claim form.
47. I should say a little more about the power to suspend. It is touched on in the respondent's disciplinary policy. The policy starts at page 43 and suspension is referred to in 4.2, page 48, where it says as follows:

"At any stage of the investigation process, the company may, at its discretion, decide to suspend any employee, who is suspected of serious misconduct, if it is considered in the interest of the individual and/or the company to do so. Suspension in these circumstances purposes of allowing unhindered investigation to take place [sic], and does not constitute disciplinary action."
48. There is also another reference to suspension in Appendix A, page 52-53 which says that: "A suspension may be appropriate if the alleged offence could be considered to be serious or gross misconduct". Based upon the way that the act of suspension is described in the respondent's policies, I conclude that the judgment that Mr Adaway made on 23 December, when he decided to suspend, was that the allegation could be considered to be serious or gross misconduct. That is the question he is directed to ask himself under the policy. It appears to be the case that he was the only person senior enough to deal with the suspension but that does not answer these questions: Why was he conducting the appeal and was he conflicted because he had made an initial assessment that, on the face of it, the allegations could amount to serious or gross misconduct? I consider those questions in my conclusions.
49. Mr Adaway justified his decision to suspend as being necessary because of the potential for risk to the company. My view is that that would be justifiable reason to suspend under the policy, acknowledging as the respondent did that it was not a disciplinary act and was based solely on what was known at the time, before any investigation had taken place.
50. When conducting the appeal, Mr Adaway went through the evidence against the claimant again. He focused upon why there was not a £44.00 surplus in the cash (page 117). The claimant did not at any stage acknowledge that he must have done the refund and assert that the

customers must have had the cash. He was pressed by Mr Adaway on this who said:

“We can see a refund was done on your handheld terminal with your PIN. You did not leave the handheld terminal alone or with anyone else at the time. If the ticket was refunded as there was an error, or deliberately by you, you should have a £44 surplus.”

51. This seems to me to be an answer to the claimant's assertion that this may have happened by technical error. If he had sold two tickets, as he accepts he did, to the individuals and received from them £44 in cash for those tickets and then his HHT through an error created a refund or the illusion of a refund that caused the tickets to be voided, the cash in his hand would not match with the cash that the machine expected to have unless the machine had both made the error of creating the refund and then not caused that refund to be reflected in the total of the cash. However, we know that it did cause the refund to be reflected in the cash figure because page 57H shows that the refund in question (with its transaction reference) appears in the list of transactions for the day. Those transactions add up to the revenue total of £1,160.60 including a cash revenue of £347.50. That is precisely what was actually in the money belt, based on the cashing up form.
52. Mr Adaway discussed the technical issues that had been raised by the claimant. He said that it was not necessary for the performance data for the HHTs or list of technical issues to be provided. The claimant said that he had not reported the faults that he had had with the HHT on that day because he wanted to get the train from terminal 4 and did not have long until the end of his shift.
53. Mr Adaway considered his decision and sent it out in writing on 22 March. By that letter he dismissed the appeal. The letter goes into some detail. He deals with his conclusion that the fact that there had not been a £44 surplus in cash tended to suggest that his potential explanation of an error with the HHT was not plausible. Also, the conscious decision not to report the faults that the claimant said he had discovered on the HHT was not in line with company expectations and put him at risk. Mr Adaway accepted that the evidence showed that the claimant had processed not only the sale but also the refund and that he had also declared the refund via the refund slip at the end of the shift. There was no explanation as to how a technical fault could cause these various matters to occur. CCTV footage had not been available from other angles but it would not in any event have added weight to Mr Adaway's decision because they were able to make a decision on the balance of probabilities based on the evidence available. He considered the allegations of failure to follow company procedure and concluded that the procedure was followed in relation to suspension because there had been a discussion with the claimant before the decision to suspend. Suspension was not itself a disciplinary act and therefore Mr Adaway considered that there had not been a breach of procedure in relation to that. Having taken all of that information into account, he upheld the decision to dismiss.

## Conclusions

54. I now set out my conclusion on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment but I have them all in mind in reaching those conclusions.
55. Having heard from both Ms Michlicka and Mr Adaway, I unhesitatingly conclude that they each genuinely believed the claimant to be guilty of the gross misconduct that they found proved against him. I have considered the claimant's allegations against Mr Adaway that he was motivated by a desire to gain control after an incident in which a friend of his had allegedly been disciplined following reports by MSAs. This was completely denied by Mr Adaway. The timing seems to have been such a long time before the incident involving the claimant that it lacks plausibility as an allegation. Furthermore, when I consider the evidence that was before the respondent about the claimant, it was clearly something that they needed to investigate and the claimant's inconsistent answers would inevitably have given rise to concern on the part of the respondent that he was not being honest in his explanations to them. I therefore accept that it was the report by the customers that they had purchased a ticket that was appearing to be void, together with the lack of explanation for both the attaching of a refund receipt and the lack of cash surplus which gave plausibility to the customers' account. It was that which led to action being taken against the claimant and not anything involving any other employee of the company.
56. The next issue for me to decide is whether the respondent had reasonable grounds for that belief and in reaching that conclusion I consider the specific points raised about the:
- 56.1. Failure to acquire/disclose the CCTV footage;
- 56.2. Alleged unreliability of the HHTs.
57. In relation to the CCTV footage, the claimant did not make a specific request for the points of view of CCTV that he now contends were important until 2 February when that CCTV footage was not available. However, the question is whether, in the initial investigation, no reasonable employer would have failed to seek out all available CCTV in order to check whether there was any CCTV footage at which it could be seen where the claimant was taking money. I have come to the conclusion that although some employers would have looked at all available CCTV footage, it is not possible to say that no reasonable investigating officer would have done as Ms Walker did for the reason that the respondent argues. That is that, although two other aspects may have shown that the claimant did not pocket the cash when he was in shot, it would not be likely to exculpate him for the reasons I set out in paragraph 33. They were therefore essentially making an assumption that it would not show that he

had committed the theft an assumption that was in his favour and they were not therefore failing to look for evidence that had the potential to exculpate him.

58. In relation to the HHT, the claimant argues that they were frequently unreliable and that his evidence shows that the scale of the errors was widespread. He criticizes the respondent for not providing the evidence at the disciplinary hearing that has been available before me.
59. It is argued that there was a culpable failure to investigate the technical issues with the HHT. However, that has to be put in context of the case that the claimant was putting forward at that time. The fact that his case was inconsistent with the CCTV footage and was inconsistent with itself means that the relevance of all possible issues that there could have been with the HHT was limited. It cannot be said that no reasonable employer would have failed to investigate whether there was a technical problem with the HHT that caused this issue, particularly in light of the claimant failing to report the difficulties that he subsequently alleged he had encountered with them on the day in question.
60. It is not just on the information from the HHT that the claimant was found to have committed theft. There is the physical evidence of the receipt and the acceptance by the claimant that the receipt had been found on the cash handling form. If the HHT had created a refund in error, then there is no explanation for the claimant putting that refund receipt on the cash handling form and the claimant did not actively dispute that that was where it had been found. Likewise, if the refund had been issued in error, the cash in the pouch would have had a surplus and it did not. I accept that those two factors tend to suggest that there was no error on the part of the HHT. More than that, a technical error could not explain why the receipt was on the cash handling form or why a single refund transaction voided two tickets bought in separate transactions. The technical information was not, therefore, likely to exculpate the claimant. The respondent acted reasonably in reaching the conclusion that the claimant's complaints about the HHT was not an explanation for the discrepancy they had discovered.
61. A different point concerns the procedural aspects. Some employers might have shown the CCTV footage to the claimant before the disciplinary hearing but he had an adequate opportunity to comment upon it. I do not think that no reasonable employer would have failed to show that to the claimant in advance. I am also satisfied that this made no difference whatsoever to the claimant's ability to conduct his defence. He has now seen it several times and there is nothing that he has argued in relation to it that changes the way in which one views Ms Michlicka's conclusions.
62. Another procedural failing is said to be the circumstances surrounding the suspension and the fact that the suspension was by Mr Adaway who then went on to conduct the appeal.

63. Having considered the respondent's disciplinary policy, the power to suspend seems to be one that can be exercised, as is the case in many disciplinary policies, without making a judgment about whether there has been misconduct or not but in order to preserve the status quo. In this case Mr Adaway explained that the reason why he decided that suspension was appropriate was that if the allegations were proved to be true, there was the potential for an act of dishonesty to have been carried out by someone who is in a position of trust and he thought that it was necessary for the protection of the company that suspension should take place. It seems to me that suspension as a non-disciplinary act of the claimant took place and that that was in accordance with the policy.
64. There is then the separate question of whether, having made the decision to suspend, Mr Adaway should have conducted the appeal. I considered this point very carefully because essentially the question was whether Mr Adaway had and could be seen to have an open mind when approaching the evidence that was before him at the appeal stage. I have considered very carefully whether this was in fact the case, taking into account that Mr Adaway gave an unsatisfactory explanation for not responding to the claimant's concerns in writing. I also take into account that the decision to suspend involves an initial assessment that the allegations potentially involved serious or gross misconduct. On the other hand, it is significant that the decision to suspend does not involve a judgment about whether the allegations have credibility. Mr Adaway based his judgment on the fact of the allegations and the position of trust held by the claimant. Furthermore, having read through the way in which Mr Adaway investigated matters at the appeal and the detail that has gone into the appeal outcome letter, I am satisfied that there was a genuine reconsideration by him of all of the arguments raised by the claimant and this suggests that he did provide the independent appeal which a fair procedure would require. He did not prejudge the question of guilt at the point he decided to suspend. I ask myself whether no reasonable employer would have allowed the individual who made the initial decision to suspend under this policy conduct the appeal and I have concluded that the answer to that question is no. Mr Adaway's conduct of the appeal was both procedurally and substantively fair.
65. Did the respondent have reasonable grounds for their belief that the claimant had committed theft? In my view, Ms Michlicka reasonably relied upon prior inconsistent statements by the claimant in concluding that his account lacked credibility. She reasonably concluded that he had sold the tickets and that thereafter no-one else had been in possession of the HHT from which the refund had in fact been issued based upon the physical tickets, refund receipt, computer records and CCTV footage. She therefore reasonably concluded that he had issued the refund and I think for those reasons she had reasonable grounds for her conclusion that there was dishonesty in this case.
66. She went on to decide what the appropriate penalty for that was and it is argued by the claimant that no reasonable employer would have dismissed

someone with his previous good record for this action. However, given the position of the claimant and the potential for the very large sums of money in cash to be held by him in his position as MSA it seems to me that it was entirely to be expected that the conclusion that he was guilty of theft of even the relatively small sum of £44 should lead to dismissal for gross misconduct.

67. I therefore conclude that the respondent did have reasonable grounds for its decision to dismiss after as much investigation as was reasonable. The decision to dismiss was fair in all the circumstances. I do not need, therefore, to go on to consider whether there are grounds for a deduction from compensation to take account of the chance that a fair dismissal would have taken place in any event or for contributory conduct.

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Employment Judge George

Date: 2/12/2017

Sent to the parties on: 8 December 2017

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For the Tribunals Office