THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

BETWEEN:

Mr J Wilson **Claimant**

AND

Trustees of National Maritime Museum

Respondent

ON: **15 October 2018**

Appearances:

For the Claimant: **Mr Stephen Marsh of Counsel**

For the Respondent: **Mr Daniel Cashman of Counsel**

JUDGMENT

The claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and his claim is dismissed.

REASONS

PRELIMINARY

1. The respondent led the evidence of Mr Mark Grover, Head of Estates and Facilities Management. The statement of Ms Philippa Mackenzie who was a member of the Senior Management Team at the Museum and Head of Collections

Management and conducted the appeal was proffered to the Tribunal. She was unable to attend to give evidence. The claimant gave evidence on his own behalf and led the evidence of Ms Caroline Hemmington, an employee of Prospect and his trade union representative at the appeal hearing.

2. There was a bundle of documents to which reference will be made where necessary.

ISSUE

3. The issues were agreed as follows:
   Did the respondent have a genuinely held belief that the claimant was responsible for the theft of a Makita drill and charger belonging to the respondent?
   If so, did the respondent have reasonable grounds for holding this belief at the time of dismissal?
   If so, was this belief based upon a fair process in all the circumstances?

Because of shortage of time, the Tribunal only addressed the merits of the case in this hearing.

FINDINGS OF FACT

4. The claimant was employed as a security officer for the respondent from 14 August 2008 until he was summarily dismissed for gross misconduct, namely theft of a Makita Drill and charger, with effect from 10 August 2017. The conduct relied upon for gross misconduct, theft, was identified in the respondent's disciplinary policy [44], which formed part of the claimant's contract [41].

5. The respondent has a Kidbrooke site. The drill and charger were kept in a locked cupboard on that site. The key for the cupboard was accessed using a Traka system, an electronic system which was accessed by certain staff using their identity cards.

6. The drill and charger were seen on 30 May 2017 by Ms Stipala. Ms Stipala, who had been away from the Kidbrooke site between 16 and 30 June, returned on 30 June 2017 to find the cupboard door open but with the handle in the locked position, and found a number of items missing. She contacted the claimant and asked him if he knew what had happened to the tools [68A-B]. He responded that he would look when his shift began that evening.

7. When his shift had started, he answered that he had found some of the tools. He found a charger on top of a cupboard and an electric screwdriver under a bench. He also found drill bits in the drawer of the bench but not the Makita drill and charger.

8. An investigation was commenced by Nigel Box, the security manager. He spoke to Ms Stipala and the claimant, reviewed the 'Traka' system which recorded access to the cupboard keys, reviewed CCTV and extracted stills, collected photographs from the claimant, and took his own photographs. He prepared a report on 25 July 2017 [69-89]. He established that the cupboard containing the drill had been accessed last by the claimant on 22 June 2017 [72].

9. Mr Box identified three scenarios which might have caused the loss:
The cupboard was broken into.
The cupboard was not properly locked by the claimant.
The claimant unlocked the cupboard and stole the items.

10. The investigation continued on 27 July 2017. Mr Box attended the site with a contractor, Mr Lowe, to investigate the possibility of the cupboard having been forced open. The result of that investigation was written up in an email [93], and provided to the claimant in advance of the disciplinary hearing [94].

11. Mr Grover conducted the disciplinary hearing on 7 August 2017. He explained at the outset of the meeting that the matter was not prejudged, and that it was an opportunity for the claimant to bring forward any evidence he wanted [96]. The claimant said it was not unusual for staff to use tools and then not return them to the locked cupboard or for colleagues not to have their card on them and so ask another colleague to open the cupboard for them. The claimant also said that there was damage to the cupboard and that he believed that the cupboard had been broken into.

12. Of the options identified by Mr Box, Mr Grover ruled out the first option. Mr Box and Mr Lowe examined the cupboard and considered that "the door could not have been forced without causing significant permanent damage" [93]. As was put to the claimant in the disciplinary hearing [98]: "If they had taken the opportunity, would they not have taken all the items? Why would they have hidden them or left some in the cupboard? Is it not more likely that they would have taken the entire shelf? Why would they hide them and not put back in the cupboard?"

13. The second option divided into two scenarios. The first was that the claimant had negligently left the cupboard unlocked on 22 June 2017, and someone else had removed the tools in the meantime. The second was that the claimant had intentionally left it unlocked to provide cover for his theft.

14. The claimant's evidence was that it was implausible that the handle would have negligently been left in the locked position but without actually locking the cupboard [96]: "it is a two handed job, you have to push all the way over the door and turn the key and the handle at the same time". The issue of why a thief, taking the opportunity of this fortuitously unlocked cupboard, would remove one drill and hide another drill and parts in the corridor remained. This option was considered unlikely by the Mr Grover [104-105].

15. As to the scenario of the claimant having intentionally left the cupboard open, the CCTV evidence shows that, on 23 June 2017 i.e. the day after the claimant left the cupboard unlocked, the claimant drove his car towards the C-spur corridor containing the cupboard off the CCTV coverage for four minutes, and then re-parked his car [47-62]. Then, on attending work on 30 June 2017, and shortly before the claimant found some of the missing items in the corridor, he initially positioned his car off the CCTV coverage for approximately two minutes before parking it [63-68]. The claimant said that he was unloading items into the fridge on these occasions. Mr Grover considered that these periods of time gave the claimant the opportunity to remove, and then partially return, the missing tools.

16. Mr Grover considered the various options and concluded that the claimant had stolen the items. By letter dated 8 August 2017 [104-106] the decision to dismiss was communicated to him with the reasons for the decision.

17. An issue arose concerning witness statements and was resolved in advance of the appeal hearing [116]. The respondent's head of HR confirmed that there were no witness statements separate from the investigation report.

18. The claimant appealed [111] and the appeal hearing took place on 5 September 2017 126-133] The claimant highlighted in his appeal hearing the fact that the particular set of keys had been accessed 12 times [72] by Ms Stipala between the last known use of the drill on 30 May 2017 and the claimant's access of the cupboard on 22 June 2017. However, the respondent considered that the tools went missing during the period when the cupboard door was left unlocked between 22 June and 30 June 2017, rather than the period when the cupboard was locked between 30 May and 22 June 2017. This accorded with the claimant's own position that the cupboard was broken into at some point between 22 June 2017 and 30 June 2017. Ms Stipala's evidence was that she did not access the cupboard between 30 May 2017 and 30 June 2017, and that she had at no time lent her swipe card or the keys to anyone else [135].

19. The investigation continued during the course of appeal proceedings. Ms Mackenzie, who carried out the appeal, subsequently met with Mr Grover, Nigel Box and Kristina Stipala. She conducted a site visit and concluded that the cupboard had not been broken into [136]. She also considered previously-made and new points raised by the claimant and his representative at the appeal hearing [134]. The appeal upheld the decision to dismiss for the same reasons.

SUBMISSIONS

20. The Tribunal received written and oral submissions from both parties.

LAW

21. In determining whether or not a dismissal is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons.

22. The list of potentially fair reasons is set out in section 98 of the Employment Rights Act. Misconduct is a potentially fair reason. Thee was no dispute between the parties as to the reason for dismissal in this case.

Dismissal for Gross Misconduct

23. In common law gross misconduct is conduct by an employee which fundamentally repudiates his contract of employment and justifies summary dismissal. There was no dispute between the parties that theft by an employee, particularly one who was employed as a security officer would constitute gross misconduct.

Procedure when Dismissing for Misconduct

24. The statutory reasonableness test which tribunals must apply when deciding unfair dismissal complaints requires that where the employer has fulfilled the requirements of subsection (1) of section 98 of the Employment Rights Act 1996, then, the determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> b. shall be determined in accordance with equity and the substantial merits of the case.

25. In considering reasonableness in the context of a misconduct dismissal, **British Home Stores Ltd v. Burchell** [1980] ICR 303 (EAT), Arnold J held at 304 (paragraph spacing added):

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.
>
> First of all, there must be established by the employer the fact of that belief; that the employer did believe it.
>
> Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief.
>
> And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
>
> It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

26. In **Boys and Girls Welfare Society v. McDonald** [1996] IRLR 129 EAT at page 131 paragraphs 18-24, the Employment Appeal Tribunal pointed out that **Burchell** was decided before the onus under section 57(3) was neutralised.

27. The requirement of reasonableness in section 98(4) of the Employment Rights Act 1996 relates not only to the outcome in terms of the penalty imposed by the employer, but also to the process by which the employer arrived at the decision. The test is not simply, therefore, whether the dismissal fell within the 'band of reasonable responses', but also whether the procedure used in reaching the decision to dismiss satisfies the test (see **Whitbread plc v. Hall** [2001] IRLR 275). Although not having to prove that he had acted as a reasonable employer in the circumstances of a particular dismissal, an employer can expect a tribunal to want to hear evidence about his handling of the matter. Guidelines on this were offered by the Employment Appeal Tribunal in **Whitbread and Co plc v. Mills** [1988] IRLR 501 when, quoting from **Polkey v. A E Dayton Services Ltd** [1987] IRLR 503 HL, the Employment Appeal Tribunal said that an employer will normally not be acting as a reasonable employer unless, in the case of dismissal for misconduct, he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation

28. In **Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111 CA, Mummery LJ (within whom Jonathan Parker LJ and Ward LJ agreed) held at paragraph 30:

> "The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

29. If an appeal hearing is sufficiently comprehensive it is capable of remedying earlier defects in the disciplinary process. Whether or not the appeal process is sufficiently comprehensive to redress any earlier procedural defects will be a question of fact for the employment tribunal (see **Taylor v. OCS Group Ltd** [2006] IRLR 613, CA approving **Whitbread & Co plc v. Mills** [1988] ICR 776, EAT). What is necessary is for the employment tribunal to consider the disciplinary process as a whole when assessing the fairness of the dismissal. In **Khan v. Stripestar Ltd** UKEATS/0022/15 (10 May 2016, unreported) (Lady Wise sitting alone) the EAT stated that there was no limitation on the nature and extent of the deficiencies in a disciplinary hearing that could be cured by a thorough and effective internal appeal.

30. The importance of the Code of Practice was emphasised by the Employment Appeal Tribunal in **Lock v. Cardiff Railway Co Ltd [**1998] IRLR 358 EAT by reference to an earlier version. The Employment Appeal Tribunal held that:

> '[employment] tribunals should always have the Code of Practice to hand as a guide for themselves as to what is good sound industrial relations policy and practice'.

31. The Code states:

> "When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more investigations there 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 it."

32. This approach is confirmed in **A v. B** [2003] IRLR 405 EAT where it was stated that the gravity of the charges against the employee will be relevant when considering what would be expected of a reasonable investigation.

33. The Employment Appeal Tribunal in **Iceland Frozen Foods Ltd v. Jones** [1982] IRLR 439 summarised the way in which tribunals should approach the statutory question, saying at paragraph 24:

> "(1) The starting point should always be the words of section 57(3)[1] themselves;
> (2) In applying the section, an industrial [employment] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair;
> (3) In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
> (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> (5) The function of the industrial [employment] tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair."

DISCUSSION AND DECISION

34. In advance of the Tribunal hearing, the claimant contended that Mr Grover was biased towards him because of certain instances in the past. His counsel did not insist in these criticisms of Mr Grover. The claimant also criticised the fairness of the appeal hearing on the basis that the outcome was pre-judged, because the recruitment process had commenced between his dismissal on 10 August 2017 and the appeal hearing on 5 September 2017. Counsel for the claimant did not insist on this criticism.

35. The claimant criticises the investigation in a number of respects. He is critical of the fact that he was not told that Mr Box was carrying out an investigation before he was interviewed by him and that notes were not taken. However, that initial discussion with Mr Box was solely for the purposes of reporting the claimant's account on three points [69-70]. It was not to reach any conclusion about the veracity of his evidence. In line with its disciplinary policy [42] – the respondent considered that it would dispense with any formal investigatory interview, and

[1] Said provisions of the Employment Protection (Consolidation) Act 1978 having been superseded by section 98(4) of the Employment Rights Act 1996.

instead carry out the assessment of the credibility of the claimant's account at the disciplinary hearing itself. These two valid approaches are reflected in paragraph 5 of the ACAS Code of Practice: "In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing." In those circumstances, there was no procedural error in the claimant not being told by Mr Box that the interview was a formal investigatory interview, as it was not.

36. The claimant complains that of the three scenarios identified, two attribute blame to him. He suggested that Ms Stipala or another employee who had access to the keys might have stolen the tools. He suggested that the cupboard had been broken into. He says someone with expertise should have been asked for an opinion. He is critical of the still photographs provided to him from the CCTV footage and absence of witness statements. An employer is not obliged to collect witness statements, where, as on the present facts, there is not a conflicting account of an event from individuals.

37. At the first disciplinary hearing, the claimant was provided with the Box Report, which summarised the CCTV footage, rather than the footage itself because it could not be taken off the system. However, the claimant did not seek to dispute that CCTV footage. He was provided with the stills shortly thereafter [112], and he had them at the time of his appeal hearing. Additional stills from the CCTV camera would not have disproved the relevant fact that the claimant had the opportunity to remove the tools in the relevant 'blackspot' periods of time.

38. The respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case so had reasonable grounds for the decision. If there were any deficiencies in the initial investigation, and the Tribunal is not saying that there were, they were cured in the appeal process. By the time of the decision to dismiss, the respondent had satisfied its obligation to carry out a reasonable investigation.

39. Following the investigation, the respondent reached a genuine belief that the claimant had stolen the Makita drill and charger. This was based on reasonable grounds, including that: only two people accessed the relevant cupboard (one of whom was the claimant, and the other discovered and reported the theft upon her return to the site having been away); the claimant had been the last person to access the relevant cupboard (which was found unlocked); the claimant had moved his car out of the CCTV range for a short period the following day; the claimant's response to being told that the tools had been found missing was again to move his car out of the CCTV range for a short period, and then to find some of the missing tools; and that the limited damage to the cupboard was not consistent with it having been broken into.

40. The respondent followed its disciplinary procedure which was a fair procedure.

41. Despite the strong advocacy of counsel for the claimant, the procedure and the dismissal fall firmly within the range of reasonable responses open to an employer, accordingly the claim of unfair dismissal is dismissed.

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Employment Judge Truscott QC

Date 8 November 2018