Case number: 2201937/2019 (V)

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mr M Kopinski		DSG Retail Limited

AT A FINAL HEARING

Held at: Nottingham **On**: 11 & 12 January 2021, 2 & 3 February 2021

Before: Employment Judge R Clark (sitting alone)

REPRESENTATION
For the Claimant: Mr Kopinski in Person
For the Respondent: Ms Quigley of Counsel

JUDGMENT

The judgment of the Tribunal is: -

1. The claim of unfair dismissal **succeeds** but it is not just and equitable to make order any award of compensation.

2. The claim of unlawful deduction from wages **fails and is dismissed**.

REASONS

1. Introduction

By a claim presented on 15 May 2019, Mr Kopinski brings a claim of unfair dismissal arising from his dismissal on grounds of gross misconduct and a claim of unauthorised deduction from wages in respect of payments made in respect of sick pay. In summary, the respondent alleges it discovered Mr Kopinski asleep at work in a dangerous location after receiving a series of

concerns about his conduct during that shift. Mr Kopinski denies he was asleep or that that was the reason for his dismissal.

2. Preliminary issues

2.1 Mr Kopinski speaks and understands English well but it is not his first language. He had the support of an interpreter throughout the hearing to assist as and when required.

2.2 Two matters in Mr Kopinski's preparation for this hearing caused me to make certain case management decisions during the course of the hearings. Firstly, my intention had been to hear the respondent's case first in the conventional order. We embarked on that course but it quickly became apparent that Mr Kopinski had not prepared any questions for the witnesses. I initially allowed some time for him to prepare questions but became increasingly concerned about his ability to engage in the process. Whilst the preparation for this hearing is a matter for Mr Kopinski and he is not compelled to cross examine witnesses it seemed to me that the fairest thing to do was to invite the claimant to give his evidence first rather than me simply a put questions I understood to arise in his case. Taking the evidence in that order, he not only experienced the process of asking questions and taking a witness to relevant pages in the bundle, his evidence was likely to take at least the rest of the first day and would give him some time to review the respondent's evidence over-night and prepare any questions for the second day. In the event, progress was particularly slow and the case had to be adjourned part heard which itself provided further opportunity for Mr Kopinski to prepare his questions for witnesses which he was able to do. Secondly, Mr Kopinski's witness statement was extremely brief and whilst remaining alert to fairness to both parties, I permitted some expansion and clarification of his case.

2.3 I had timetabled the resumed hearing to allow time for deliberations and a judgment. In the event, that proved even slower and the decision has had to be reserved in circumstances where my other commitments were such that I made clear to the parties would create difficulties in me being able to produce a prompt judgment in the usual timescales.

2.4 Finally, there was CCTV footage of the incident in question which the tribunal could not played by the tribunal. That was played over CVP.

3. Evidence

3.1 I have heard from Mr Kopinski himself.

3.2 For the respondent I have heard from Mr Waechter, an associate operations manager and the disciplinary decision manager; Mr K Baggott, An associate operations manager who discovered the claimants misconduct on the night of 26 September 2018 and Miss Katarina Vdovcova, a Senior Operations Manager who conducted the claimant's grievance process and appeal against dismissal.

3.3 I received an inflated and substantial bundle running to 3 lever arch files. I made clear to the parties that I would consider those documents I was taken to in the evidence.

3.4 Both parties made closing submissions.

4. The Issues

4.1 The issues in the claim can be reduced to these: -

a) The reason for dismissal and whether that is a potentially fair reason. The respondent relies on (mis)conduct.

b) Whether it was reasonable for the employer to rely on that reason as sufficient to justify dismissing the claimant all the circumstances.

c) If the dismissal was unfair, whether any adjustment should be made to compensation.

And,

d) In respect of the unlawful deduction claim, whether the payments made to the claimant (specifically in respect of sick pay) fell below that which was properly payable on each pay date in November and December 2018.

5. Facts

5.1 It is not my role to resolve each and every last dispute of fact between the parties. My purpose is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent is a very large company well known as a high street and internet retailer of electrical goods. The respondent operates a substantial warehouse and distribution centre in Newark, Nottinghamshire.

5.3 The claimant was employed as a warehouse operative and had been so since February 2015. He worked a rotating 4 day on, 4 day off shift pattern. The claimant was generally regarded as a good worker despite some attendance issues in the not too distance past. I reject any contention his previous attendance record and the handling of it had any bearing on the events of 26 September 2018 onwards.

5.4 The claimant's work involved checking orders that had been purchased by customers and picked from the warehouse, prior to preparing them for loading onto lorries at a loading bay. He was assigned to such "checking" duties on the night in question. All loading bays have CCTV cameras trained on the area which is generally known to all staff. The loading bay area is typical of a distribution centre environment with marked loading bays and designated pedestrian walkways. I find it is potentially an extremely hazardous area with heavy bundles of goods being moved by mechanical means ready for despatch. The warehouse uses various forms of manual handling equipment ("MHE") including forklift trucks and similar vehicles known as clamps. Unlike the traditional forklift forks which lift from the base using a pallet, clamps move goods by using hydraulic pincers which apply pressure to opposing sides of large white goods packaging and squeeze them together. They can move a stack of multiple items at the same time. The items in questions are typically fridges or washers or other "tall"

or “under counter” white goods. There can be anything up to 8 such under counter items arranged for handling at one time and they are referred to as “blocks of 8”, configured with four on the bottom, stacked two high.

5.5 I find there is an obvious and serious health and safety risk of a person getting trapped between boxes or packages being moved with such a mechanical process and the obvious risk of very serious physical injury which I find is reflected in repeated references in the various internal policies and procedures and staff training. It follows this is a known risk and various measures are in place to minimise the risk. One is that the MHE vehicles sound their horn at hazards to alert others to their presence. Another is the use of a “checker pole”. This is literally a visible high pole on a small trolly device which has to be kept with the worker when checking the loading lists in the despatch area as the claimant was doing on the night in question. This is a specific control measure to deal with this particular health and safety risk. The purpose of this pole is so to make it more likely that anyone approaching the area in a MHE or loading onto an HGV would become aware of the presence of a worker potentially hidden from view within the stock.

5.6 I find health and safety is treated as a high priority. I do not doubt that the claimant can point to examples where workers have not stuck to the pedestrian walkway or where they may have sat on products in the past, but I am satisfied that that is the exception and not the rule and certainly not in the nature of the serious case that I find occurred on this occasion. I reach that in part by the extensive induction, extensive training, documented safe systems of work, safety briefings and the publicity given to health and safety in newsletters as well as the less formal periodic toolbox talks, all of which the claimant accepted being aware of and involved in.

5.7 On the night shift of 26 September 2018. Mr Kopinski was working on a loading bay as a checker to ensure that the products had been picked correctly from the warehouse and that they matched up to the orders before they were loaded and dispatched onto the delivery trucks ready for delivery to customers. Mr Baggott, the associate operations manager at the site, was undertaking one of his regular walks around the warehouse to ensure the operation was running properly and staff were adequately deployed and working safely. During this he was approached by David Stocks, the operations manager, who informed him that Mr Kopinski had made a seat for himself and one of the loading bays. This was absolutely not permitted for the safety reasons outlined, not to mention productivity and product integrity. He went to investigate.

5.8 Before dealing with what Mr Baggot discovered, it is necessary to make findings about earlier events that evening and how Mr Stocks came to be aware of the make-shift seat.

5.9 Mr Kopinski had been on leave and had travelled to Poland. This was his first shift after returning to work and I find had he not slept properly for some time. I find he was extremely tired that night. I find he did not share the fact that he was, arguably, not fit to be at work with anyone or seek any adjustment to his duties. I suspect that his managers may not have been too happy with that state of affairs but I also accept that this can happen from time to time and, when it does, the manager can make some adjustments to that worker’s duties to

keep them and others safe which might include changing duties. Another measure available would be simply to send the worker home which, unless it was related to ill health, I find would be without pay and may explain why Mr Kopinski may not have wanted to disclose his tiredness. The respondent also operates contractual drug and alcohol testing in certain circumstances. Falling asleep is one such trigger for a test.

5.10 During any night shift, Mr Kopinski was entitled to take set breaks. On this night, I find his colleagues perceived he was taking extra and longer breaks. On one break he was seen to have rearranged chairs and settled down as if to go to sleep. When working on bay 34, he had also been seen to rearrange some polystyrene packaging to fashion a makeshift chair to sit in. Sitting down in that high risk area is not permitted.

5.11 These matters were reported to Dave Stocks who conducted an initial investigation before attempting to confront Mr Kopinski. He spoke with two of Mr Kopinski's colleagues. These interviews took place at some time between around 3:30 and 4am. I will return to the exact timings. It is as a result of one of these interviews that Mr Stocks was told about the makeshift chair.

5.12 The interviews took place in the vicinity of the "corral", which is an area removed from bay 34. As Mr Stocks left the corral on his way to investigate the matter further for himself, I find he bumped into Mr Baggot and shared the issue that had been raised of this makeshift chair. I find their immediate and instinctive reaction to be a reflection of the seriousness of the health and safety breach and not any animosity towards Mr Kopinski nor any desire to catch him out or "set him up". They set off towards bay 34 together. Unbeknown to either of them, or indeed either colleague that Mr Stocks had just interviewed, Mr Kopinski was at the time of the interviews tasked with checking a despatch on the adjoining bay, bay 33 and CCTV would later disclose a much more serious incident.

5.13 I find Mr Baggott and Mr Stocks walked towards bay 34 at about 4am. Literally as they arrived, another colleague was in the process of delivering a block of white goods to the area. He was driving a clamp style MHE. The CCTV shows he stopped in his task having apparently seen something odd. I find it is purely by chance first that he spotted something and secondly that he did so at the same time as the two managers were approaching. He gestured to Mr Baggot as he arrived in the area, indicating towards the direction of what would be found to be Mr Kopinski and gestured again by bringing his hand to the side of his head in a manner reasonably interpreted by Mr Baggot to mean "asleep". The angle from which this colleague had approached bay 33 clearly meant he had been able to catch sight of Mr Kopinski but he was not visible to anyone approaching from any other direction and was not visible to the managers in the direction they were approaching. It follows there was a real risk that an MHE driver loading to this bay may not have been able to see him and may have attempted to pick or move the boxes he was about to be found asleep on. The circumstances of what he had done and how long he had been there would not become clear until the CCTV was later viewed. That would disclose that Mr Kopinski had apparently finished checking those items delivered to his bay which was almost full and awaiting the arrival of an HGV into which the items would then be loaded. He had gone into the centre of the waiting stock and had begun to dismantle the already assembled blocks of 8 items of goods. I find having been

delivered and checked, there was no good reason for them to be dismantled in this way. He removed one of the top items making up one block of 8 under counter products, moving it to the floor and leaving it surrounded by the other, double height, stacks. He then adjusted the position of other goods in the vicinity including some tall white goods in a way that meant they obstructed the view of the now empty space in the block of 8, of him and his checker pole. I find this was something prohibited and the only reason for doing so was so he could shield himself from the view of others whilst he sat down and rested on the lower box in the space previously occupied by the upper box, almost entirely out of site.

5.14 It follows that I find this was the second makeshift "chair" created by Mr Kopinski that night and was not the polystyrene chair on bay 34 that was conveyed to Mr Baggott in the earlier interview.

5.15 It may have been Mr Kopinski's intention merely to take a rest and contemplate the information on the hand held bar code gun he used and he may have intended to jump out as and when he heard any approaching MHE and continue his work. However, whatever his intention, that did not happen. To the extent I need to make a primary finding of fact on this matter, I find that that once he was sat down in his exhausted state, he slumped against the supporting boxes and almost immediately fell asleep. I prefer this explanation based on the circumstances of what he had done immediately before, his earlier actions that night, that the hand in which he was holding the device does not appear to be in a position consistent with reading the device, the circumstances of his discovery and, particularly, his later comments in interview to which I will return.

5.16 On arrival at the scene, I accept Mr Baggot found Mr Kopinski sat in what has been described as a "den". It appeared to Mr Baggott that the claimant was asleep. Contrary to what Mr Kopinski may have intended, he had not been roused by the approaching MHE and he did not stir on Mr Baggot's arrival. So convinced was Mr Baggott of what he saw that he got out his mobile phone and took a photograph of Mr Kopinski asleep. As Mr Stocks approached soon afterwards, I find Mr Kopinski woke up with a start and apologised. Although I do not accept Mr Baggott's recollection of the timings as being entirely accurate, and it seems that those events took place over a shorter timescale than he recalls, I am nevertheless entirely satisfied that the impression he had gained was genuinely one of a colleague asleep on an unusual configuration of white goods and boxes that appeared to have been arranged in a way to keep Mr Kopinski hidden. Of course, in that moment, Mr Baggott had no idea how long he had been asleep in that position. In fact, I find Mr Kopinski had been sat on the box in this "den" only for a matter of minutes but I find it to be no answer to what was discovered to say, as Mr Kopinski argues, that he could not fall asleep in that short space of time.

5.17 The quality of the photograph taken by Mr Baggott and produced in these proceedings is not the best but I do not accept it shows someone apparently looking down at his hand held checking device to the extent that it casts in doubt the conclusion he had fallen asleep.

5.18 Not only was this a serious health and safety incident, but Mr Kopinski should have been working and should not have been sat on the products. One can readily imagine that if a

clamp had been used from the side of the stock from which he and his checker pole were hidden, that could potentially have caused him serious injury. In addition, the mere fact he was sat on boxes is itself an issue for the employer as stacked items have already been purchased by customers and are awaiting delivery and could be damaged. I do not accept Mr Kopinski's argument that he was light and the boxes or products are themselves stacked excuses him sitting on them. I find the packaging is designed with stacking of similar items in mind as opposed to a human being standing or sitting on them. However light he may have been, there is a risk of damage to the packaging or its contents creating an added commercial risk of goods being rejected by customers.

5.19 Mr Kopinski was told to go to the office and Mr Stocks commenced a disciplinary investigation. I did not accept Mr Kopinski's assertion that there was an unreasonable delay in the timing of the investigation which he says should have been immediate. To all intent and purpose it was commenced immediately. I do accept that the claimant was left waiting in the meeting room for 10 or 15 minutes. That is not unreasonable delay, particularly as Mr Stocks undoubtedly had had to obtain the proforma scripts for use in the investigation. Secondly, as was routine in this workplace in such circumstances, Mr Kopinski was subject to a drugs test which had to be administered before the interview could take place. The test results show this was completed and passed at 04:28. The notes of the investigation meeting commenced at 04:35, only 7 minutes later. There is nothing in that sequence of events that undermines the description of an immediate investigation. Nor does it demonstrate any collusion or set up as alleged.

5.20 The initial interview with Mr Kopinski was conducted by Mr Stocks. It was made clear that the investigation was because "you were caught asleep on bay 33". Various significant statements were made by Mr Kopinski in response to questions. They included: -

a) That "*I have not adjusted back to night shift working. On holiday back home in Poland, I have been working 7:30/8:00 am. On my first day back, I'd been awake maybe 24-26 hours*"

b) That he realised the consequences of driving when tired but "*it was only a quick journey here"* (by which I find he was referring to the commute to work).

c) That "*I just leant back against the washers because I felt a bit tired, waiting for my last picks*".

d) That he accepted it was against company policy but "*I just can't help it. I think it's the first time I've fallen asleep on the bays*"

e) In response to a direct question how many times he had fallen asleep that night he answered "*just that once*".

f) When asked if he thought he would be in any danger there he answered "*I think so but I think I'd wake up. There were no loaders on the bay yet*".

g) He declined the opportunity to add anything else.

5.21 The claimant was suspended immediately. The suspension was confirmed in writing on 28 September, two days later. He was interviewed again as part of the ongoing investigation on 1 October 2018. Again he made a number of significant statements to the employer: -

a) He now asserted that he was not asleep but was checking the hand held gun *"but had been day dreaming*".

b) When asked why he said he was asleep in the first interview he said "*it was a misunderstanding. English is not my first language and I couldn't think of the word*".

c) He accepted he was startled when he opened his eyes explaining it was "*because I was scared of the managers*" which he later sought to change to "*because I thought it was somebody else*".

d) That he had moved the block of 8 "*so the loaders could see the post*" (checker pole). But denied this was done for the purpose of sitting on the goods.

e) When pressed on the illogicality of this action he said "*I can't really remember".*

f) When shown the photograph taken of him he said *"I think my eyes are slightly open because I could see what was on the gun"*.

g) He was asked if he had been trained to work like this and confirmed "*No, training has said not to do it*".

5.22 This interview also dealt with the additional or extended unauthorised breaks that had formed the initial concern on the night in question. Other individuals were interviewed and notes taken of their evidence. A decision was taken to proceed with a disciplinary hearing.

5.23 Before dealing with the disciplinary process, I find it is those events solely which lead to the suspension, disciplinary process and ultimately his dismissal. I find there was no improper collusion between those involved in managing and conducting the process or reaching the decisions. I do accept there must be some inaccuracy in the timing of the notes of the initial investigation interviews as there is some overlap between that and the CCTV timings which appear to put Mr Stocks in two places at the same time. They cannot both be correct. I am not satisfied there is anything sinister in this. The difference is a matter of a few minutes and on balance, that is explained either by the various time stamps/clocks not being synchronised and perhaps also a degree of approximation in the time references being noted in the investigation notes. I reject the suggestion that this indicates the earlier investigation notes have been contrived after the event. I accept that it is the fact of those earlier interviews that causes Mr Stocks and Mr Baggott to attend in the vicinity of bay 33 and, by chance, discover the claimant asleep on bay 34.

5.24 Mr Baggott was the manager responsible for the area in which Mr Kopinski worked that night. He would ordinarily be expected to deal with any disciplinary matters arising. However, I find because he was a witness to the events it was agreed with HR that he should

not be the disciplinary decision maker. Mr Waechter was appointed to chair a disciplinary hearing.

5.25 The conspiracy allegations were repeated before me in evidence based on the fact that Mr Waechter had had dealings with Mr Kopinski about a year earlier when having to deal with a period of sickness absence and non-compliance with the sickness absence policy. I can find nothing to support that and accept Mr Wachter's evidence that his previous limited involvement with the claimant, amongst many hundreds of employee contacts at this site, had no bearing on his handling of this matter.

5.26 On 4 October 2018, Mr Waechter wrote to the claimant inviting him to attend a disciplinary hearing to be held on 9 October 2019. He was provided with a copy all the documentation relied on in relation to the allegations against him and his right to be represented together with the fact that the potential could be dismissal. The allegation was that he had taken unauthorised breaks and fallen asleep in the warehouse causing a potential risk to his health and safety. He was told the allegations amounted to gross misconduct and could lead to his dismissal. He was reminded of his right to be accompanied. He was informed that he was required to take all reasonable steps to attend the meeting and must be available during normal working hours.

5.27 Mr Kopinski attended the hearing on 9 October. Mr Waechter was assisted by Ian Watson, an HR adviser. In preparation for the hearing he and Mr Waechter reviewed the documentation. Two matters need noting. Firstly, at this time the investigation pack did not include the CCTV footage, it seems that was because there were still photographs. Secondly, Mr Waechter and Mr Watson appear to have misunderstood the chronology of the investigatory interviews and came to the conclusion that the timing of some of the interviews was wrong, giving the impression that they had been taken ***before*** the event in question.

5.28 The notes of this meeting record little more than Mr Waechter's conclusion that "*I am adjourning this meeting to obtain CCTV footage. We will reconvene on 16 October at 19:30 in the Carlton Room*". This brief hearing was covertly recorded by Mr Kopinski. It is the first of a number of meetings and telephone contacts he had that have been covertly recorded. Not only was the meeting covertly recorded whilst he was in attendance, but so too was part of the meeting held in private between Mr Waechter and the HR adviser. The respondent has not sought to exclude the transcript of this evidence as they might have done.

5.29 The transcript captures Mr Waechter and Mr Watson's understandable concern about what they understood, albeit wrongly, to be the timing of certain witness interviews and the effect it had on the investigation and disciplinary process. In short, they seem to have been concerned not to proceed with the hearing as it seemed to them that the investigation interviews had taken place before the alleged incident. A few choice words were stated. I find that whilst the absent CCTV was potentially a legitimate reason to adjourn, the need to view it was used as a means of justifying the adjournment. Whilst the question of CCTV had arisen, and on balance find I Mr Kopinski is likely to have raised its absence from the proceedings, I also accept he did not request the CCTV nor did he seek an adjournment for that purpose.

5.30 Mr Kopinski suggest that the comments and decision reached during this covert recording shows it was a "setup". I do not find that to be the case. In particular, the concern about the claimant getting another week's pay on suspension apply as much out of genuine frustration that the matter could not be resolved and applies whatever the disciplinary conclusion might have been. Similarly, a concern about a procedural flaw and handing an appeal point would apply whatever the sanction, although I accept that that only bites where there was to be some finding of misconduct although, faced with what they had it is difficult to see why any reasonable employer would not think there was some basis of misconduct on the part of the claimant. I find the desire to obtain the CCTV and have it available at the disciplinary hearing was something that most reasonable employers might do as a matter of course and could be a positive step in this procedure. However, I find the motivation for doing that was simply to justify the postponement whilst the issue over what was wrongly believed to be a defective chronology was resolved. It would not take Mr Waechter and Mr Watson long to realise that they were mistaken about the timing of the statements and whilst the one in question was in fact timed 3:30am, (which they understood to be half an hour before the incident) they had missed the fact that it was not taken on the night in question, but at a later dated on 1 October 2018.

5.31 There were then a series of further problems and difficulties in getting the disciplinary hearing rescheduled. The disciplinary hearing was initially rescheduled for 16 October but as the notice of hearing was not sent until 15 October, it was put back to 17 October to allow Mr Kopinski the necessary 48 hours under the procedure to review the notes of the previous hearing. The reconvened hearing then further postponed to 24 October due to Mr Kopinski's representative being unable to attend. However, 24 October was a date that Mr Waechter was scheduled to be on annual leave. Something appears to have failed in the planning as he attended to deal with the disciplinary hearing not knowing that Mr Kopinski had contacted the employer shortly before to say he couldn't attend. The hearing was again rescheduled to 2 November which was itself further postponed to 10 November due the claimant having a pre-arranged holiday booked to visit Poland on the original date. Shortly before that hearing was due to start, Mr Kopinski emailed Mr Waechter to say he was too unwell to attend and submitted a fit note from his polish doctor. It seems the claimant was still in Poland and had not returned to the UK.

5.32 It is at this part of the chronology that the facts engage with the principal allegation in the claimant's claim of unlawful deductions from wages. The claimant was contractually entitled to company sick pay for certain periods. However, I find the contractual entitlement was subject to a right to withhold it in circumstances where an employee took sick leave whilst being subject to a disciplinary process. In Mr Kopinski's case a decision was taken to withhold company sick pay which was a decision which appears to be one that the respondent was contractually entitled to take. Mr Kopinski was notified of this in a letter dated 19 November 2018.

5.33 On 24 October 2018, Mr Kopinski raised a grievance. He alleged the procedure had been conducted incorrectly; that those involved were colluding to make things worse for him and influencing the investigation and he pointed out the timing discrepancies of the interview

notes. It was acknowledged two days later and I find as a fact that the intention at that time was that the substance of this grievance would be considered as part of the disciplinary hearing process. I find it was not. Similarly, in view of the claimant's ill health advice was sought about whether the disciplinary hearing should go ahead or not. The Employee Relations advice was to get an occupational health view. This advice was not followed.

5.34 On the expiry of Mr Kopinski's fit note, on 30 November 2018, a further letter was sent inviting him to a rescheduled disciplinary hearing to be held on 6 December 2018. He was invited to attend and this time he was explicitly warned that if he did not attend the hearing, a decision would be made in his absence. On the same date, Mr Kopinski submitted a further sick note stating he was unfit for work between 29 November and 12 December 2018 due to stress and chased the progress of his grievance. He telephoned the respondent's employee relations department on 4 December 2018. As with other meetings and contacts, he covertly recorded this telephone call and would rely on a transcript in his later appeal.

5.35 For the purpose of my findings, Mr Kopinski interpreted the content of that phone call on 4 December in terms that the adviser advised him he did not need to attend the hearing on 6 December. Even allowing for his command of English language, and some vagueness at times as to what was being said, I find that is not a reasonable conclusion to draw and it is clear overall that the adviser did not excuse him from attendance. In fact the adviser repeatedly recommends that he did attend and that he deal with the disciplinary matter as a means of dealing with the underlying stress. Added to this, it is clear to me that Mr Kopinski chose to prefer his interpretation of the conversation with the employee relations adviser over the explicit indication in the letter that the hearing would go ahead in his absence.

5.36 I have seen correspondence in which ER appear to have given the same advice to the managers to proceed with the disciplinary hearing. However, in early December another adviser raised the possibility of a referral to occupational health to get an independent view on his fitness to attend and participate in the disciplinary hearing as it was not this employer's usual practice to proceed whilst there was a current fit note. Another senior adviser, Jane Wilson, became involved and between her and the senior manager, Mr Galway, the polish doctor's notes were obtained and a decision taken that the hearing should go ahead.

5.37 On 6 December 2018 the disciplinary hearing went ahead. Some of the prior exchanges seen in emails suggest all involved expected only one outcome to the hearing. Mr Kopinski did not attend the hearing. After waiting approximately 45 minutes, Mr Waechter decided to proceed in his absence, a step he had been given prior authorisation by senior managers should it be necessary. He made a decision on the evidence before him and noted his reasoning. He found that Mr Kopinski had gone into a bay and fallen asleep putting himself at a serious health and safety risk. The CCTV footage showed him apparently setting up an area largely out of sight of the loading bay and camera in which to rest and removing a washing machine from what was already a prepared stack of washing machines and adjusting the boxes in a way that appeared to block the view of colleagues who might see him in and sat down the block got up again to adjust the stock. He relied on the fact that Mr Kopinski had originally accepted he was asleep but changed evidence during the second investigation meeting. He rejected the later alternative explanations.

5.38 Having found that the claimant had deliberately taken the steps to set up a place to sleep, Mr Wachter decided this was a serious health and safety breach. I find he considered whether Mr Kopinski raised any tiredness or unfitness to work with a manager and concluded he had not. The effect of that was that Mr Waechter concluded the actions amounted to gross misconduct warranting summary dismissal.

5.39 The formal letter of dismissal was prepared on 10 but not sent immediately. There are two versions of this letter in the bundle before me dated 10 and 13 December and the explanations offered by the respondent do not convince me anyone knows whether or why one was sent over the other. In any event, the contents are not materially different and on balance I conclude that they exist as the initial draft on 10 December and a further version when the draft was approved to be sent on 13 December although I find for some reason Mr Kopinksi was eventually sent the one dated 10 December as the disclosed version carries his manuscript annotation. The letter states the purpose of the meeting, the decision that he was summarily dismissed and that the dismissal took effect from 6 December 2018. He was given a right to appeal within 7 calendar days.

5.40 The significance of these multiple versions arises from the fact that the claimant's case is that he had no knowledge of the progress of his disciplinary or grievance until he was later sent his P45 on 29 December 2018. He contacted the employer and was sent a copy of the dismissal letter on 3 January 2019. I accept the claimant's evidence that he did not receive the original dismissal letter sent. This failure is compounded, and could have been averted, by the fact that on 12 December Mr Wachter had a curious telephone conversation with the claimant concerning his continued sickness absence and the process for a review meeting. During that conversation he did not mention the fact he had, by then conducted the disciplinary hearing in the claimant's absence and reached a decision to dismiss the claimant. Mr Waechter's vague explanation for that reflected poorly was indicative of inexperience but I accept the reason for not mentioning it was because he knew the letter had not yet gone out and he felt that the news of the decision should come in the form of the formal written notice of dismissal. However, it still doesn't explain why it was felt any communication at all about sickness absence was necessary when a decision to dismiss had already been made. This is a point in the chronology I have had to consider with particular care as to whether it points to something else happening at the time. However, the weight of evidence supporting the fact that the decision was made on the day leads me to reject the claimant's contention that this is indicative of no dismissal decision having been made at that time although I entirely understand why be would question it.

5.41 In his final pay slip whilst an employee of the respondent, the claimant's payments and deductions were shown in the usual manner resulting in an overpayment of £208.37. This sum was notionally recovered the following month. Within the itemisation of payments are various payments for, and adjustments in respect of, SSP payments. The statement is not easy to understand due to the complexity of notionally recovering SSP from a payment of company sick pay and this is complicated further by the fact company sick pay had been withdrawn at an earlier date. However, I find that the claimant's pay statement does in fact credit him with SSP for the period of sick leave whilst still employed. Although the claimant has ended up with

a nil payment for his wages overall, that is due to a recovery of an overpayment of holiday entitlement and it therefore seems what was paid was that which was otherwise properly due to him.

5.42 Mr Kopinski appealed against the dismissal decision by letter dated 9 January 2019. In view of the circumstances of not receiving the outcome letter, the respondent accepted the appeal. He raised a number of matters: -

a) His outstanding grievance and that Mr Waechter should not have been the disciplinary decision maker

b) That he had been told he did not have to attend the hearing as he was off sick yet it had gone ahead without him.

c) That he had been told to wait a call from Mr Wachter which did not happen.

d) That an ER adviser told him they were unable to do anything with the case until an HR adviser came back to them.

e) The call from Mr Wachter on 12 December 2018.

f) Receipt of his P45 on 29 December.

5.43 The appeal was acknowledged and a hearing date set for 21 January 2019. The Respondent also turned its attention to Mr Kopinski's grievance. It was belatedly acknowledged on 9 January and Mr Galway, the Senior Operations Manager, was appointed to hear it. An initial interview took place on 15 January 2019. The claimant attended and was clearly fit enough to do so as he demonstrated not only a command of the issues involved but was able to raise issues subsequently seeking a different manager to conduct his grievance which the respondent accepted. During the process he alleged Mr Baggott was victimising him for previous issues over attendance, collusion between managers, that he had not been asleep, being dismissed in his absence. Within the discussion he acknowledged signing the interview notes as correct but that he did so only as he didn't want to make the situation worse and he didn't think it was going to be such a big deal. He acknowledged his rearrangement of the block of 8 looked bad but asserted he did not do it to go to sleep. I find this indicative of the fact that the issues with the notes do not arise because of any alleged deficiencies in Mr Kopinski's understanding of English. I find he chose the answers he gave at first as they reflected the truth of the situation.

5.44 Following that first interview, Mr Kopinski objected to Mr Galway's involvement because he had been involved in the decision for the disciplinary hearing to go ahead in his absence. This was accepted by the respondent and alternative arrangements made. He also sought a resolution to his grievance before his appeal. The respondent decided that the issues raised were so closely related that the grievance and the appeal should be considered together by a different senior operations manager. This merely confirms my finding that the initial intention was that the two matters would be considered together. Miss Katrina Vdovcova was appointed to deal with both.

5.45 A meeting was scheduled for 6 February 2019 to consider the appeal alongside the issues raised in the grievance. At the meeting, Mr Kopinski set out various challenges to the fairness of the decision and that he believed the decision was made at some point after 12 December based on the fact that Mr Waechter did not mention it and continued to make reference to the need for an absence review meeting. He set out his inability to attend due to sickness and the advice he received.

5.46 Between 6 February 26 February Miss Vdovcova conducted a number of further interviews with others involved in the history to the matter including Mr Baggott, Mr stocks, Mr Green and Mr Wachter. She was unable to speak to Mr Noble. I find she took reasonable steps to explore the points raised by Mr Kopinski including the allegation of collusion.

5.47 On 26 February she received a further letter from Mr Kopinski with more details for consideration albeit I find she considered that the essence of the points now raised had been raised earlier and covered in her subsequent interviews.

5.48 There is then a substantial delay of nearly 3 months to 14 May when the claimant was invited to a meeting to view the CCTV footage. This is explained due to Miss Vdovcova taking 2 weeks annual leave and what is said to be difficulties in coordinating shifts between her 9-to-5 Monday to Friday shift pattern and the witnesses who worked on the rotating shifts pattern. Within that there was a short delay of about a week due to the claimant's availability. Those difficulties do not explain, still less justify, that length of delay.

5.49 At the 14 May 2019 meeting Mr Kopinski disclosed his covert recordings. Mr Kopinski explained why he had not disclosed them before as "not wanting to, but he feels the managers were plotting against him". On viewing the CCTV he again denied being asleep saying it is impossible to fall asleep within 5 minutes.

5.50 On listening to Mr Kopinski's transcripts, Miss Vdovcova was concerned about the language used and unprofessionalism. She adjourned the hearing to consider how to deal with the covert recordings. She further investigated this and the issues disclosed in the covert recordings that the timing of the statements was inconsistent with the allegations. She poke to Mr Waechter about it and recorded a further interview with him. She was satisfied they had misunderstood the dates in the interviews and where they occurred in the chronology.

5.51 Ms Vdovcova provided her decision on the appeal and associated grievance by letter dated 31 May 2019.

5.52 In respect of the appeal outcome she set out her reasons on each of the discrete points raised and the results of any further investigations she had conducted in respect of them. Ultimately she rejected Mr Kopinski's contentions and explained where she felt he was mistaken about the chronology including how she believed he had misunderstood what the ER adviser was saying and that he had not been told he did not need to attend. On the ultimate point of him being found asleep, she confirmed her view of the evidence after hearing his explanations was that she formed the belief he had been asleep. She had the benefit of both still photographs and the CCTV footage showing no movement and being woken by a colleague she also had his initial response that he was sleeping. She also took into account

what she found to be deliberate moving of stock in attempt to make place to sleep out of sight. She had regard to the fact that his job was to make blocks of 8 items ready for loading and what the CCTV showed was him removing an item out of an assembled stack of 8. She found the other witnesses reliable in their accounts of what they saw. She formed the view that the adjournment to the first disciplinary hearing to obtain the CCTV was a legitimate reason to adjourn and rejected the suggestion that the adjournment was an excuse. She had the transcript before her at this time yet took the view that it was legitimate to adjourn in the circumstances. She accepted Mr Waechter's explanation of why he did not mention dismissal in the call on 12 December. She rejected that CCTV should not have been relied on as it was available for viewing at the disciplinary hearing which the claimant had not attended. She investigated but rejected the contention that he was daydreaming and not sleeping and concluded that he had purposely moved the stock to sit where he was found and as these were all intentional acts of the claimant, she rejected the notion that he was set up.

5.53 She then considered the further written submissions Mr Kopinski had sent her. Whilst this includes a range of issues, including a complaint that his manager took a photograph of him, it is principally focused on the decision to go ahead with the disciplinary hearing in his absence rejecting the points and ultimately coming to the conclusion to uphold the decision to dismiss. She could he had been discovered asleep in a place which put him and others at risk and did not recognise the seriousness of his actions. She therefore concluded the disciplinary outcome was correct in the absence of any mitigation or explanation as to why it occurred.

5.54 She did, however, make some recommendations concerning the time that the appeal had taken to conclude and the fact that the grievance issues should have been considered as part of the disciplinary hearing so far as they related to the issues which I find they clearly were as can be seen by the grievance outcome sent in a separate letter of the same date.

5.55 In that outcome letter Ms Vdovcova rejected the contention that the claimant had been set up by Mr Baggot or Mr Stocks. She investigated and explained the timing of the investigatory interviews and concluded the timing was incorrectly concluded in the interview notes which she did not believe was material to the decision. She rejected the claim that Mr Waechter and Mr Watson were not involved in the decision making and someone else must have decided it. She rejected the contention he had not in fact been sleeping and that he should not have been suspended based on the other evidence before her. She rejected his contention that he had not been in a dangerous place. She rejected the contention he should not have been dismissed in his absence. She dealt with the allegation he had not been shown the CCTV on the basis he could have within the process and, in any event, it formed part of their reconvened appeal meeting. She dismissed the contention that a long term sickness review meeting was arranged after his dismissal but does not engage with why Mr Waechter had the call with the claimant on 12 December. Finally, Mr Kopinski raised a valid criticism of the length of time his grievance had taken to resolve. This was acknowledged and explained that it was overlooked by the operation (the local managers) as they also partly believed the some of the matters were related to the ongoing disciplinary matter and would therefore be discussed at the reconvened meeting. She indicated this would form part of her recommendations already referred to above.

5.56 The grievance concluded with a further right of appeal which was not exercised

6. Unfair dismissal

Law

6.1 The law of unfair dismissal is well settled. Neither party has taken me to any particular authorities or seeks to advance any novel argument. Section 98 of the Employment Rights Act 1996 ("the Act") provides: -

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b)relates to the conduct of the employee,

(3)..

(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 reasons 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."

6.2 The legal burden of proving a fair reason for dismissal in fact and law rests with the employer. The true reason for dismissal is a question of fact for me to determine on the evidence. The "reason" referred to in s.98(1) is the set of facts or beliefs operating on the mind of the employer at the time it takes the decision, and causing him, to dismiss. Abernethy v Mott Hay and Anderson [1974] ICR 323. To discharge the legal burden, that factual reason must itself fall into one of the categories of potentially fair legal reasons defined in s.98(1)(b) of the 1996 Act. In this case, the legal label advanced is that of conduct.

6.3 If the employer discharges this burden, I then consider the test within s.98(4) of the 1996 Act on the evidence before me, the burden then being neutral. In applying that test I have had regard to the approach in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 and also Post Office v Foley [2000] IRLR 827. Where an employee is dismissed relying on [mis]conduct, the substantial test remains that identified in British Home Stores Ltd v Burchell [1978] IRLR 314. A reasonable procedure is central to the test of fairness. The final consideration is whether, everything else being within the range of reasonable responses open to a reasonable employer, the reasonableness of the sanction imposed. In other words, was the sanction of dismissal a response that was reasonably open to the hypothetical reasonable employer or not.

Discussion

6.4 The first question is to determine the real reason or, if more than one, the principal reason for the claimant's dismissal. The respondent has asserted that the reason for dismissal was the claimants conduct in respect of his actions during the nightshift of 26 September 2018 culminating in him falling asleep in a self-made den of boxes largely hidden from view. Mr Kopinski has challenged this and has asserted he was not asleep and that it was a "set up", victimisation or conspiracy drawn from various historical factors including Mr Waechter having previously been involved in an attendance management process or Mr Baggott victimising him in respect of a previous complaint and which he says is confirmed by some of the inconsistencies in the timings of the evidence and other actions of the employer.

6.5 In respect of the latter points, it seems to me that there are reasons why Mr Kopinski would be suspicious about the events. There are issues arising with the times recorded in Mr Stocks' interviews and also in respect of Mr Waechter's telephone discussion on 12 December. Against the totality of the evidence, however, they have not displaced my firm conclusion that the events of 26 September 2018 were the sole trigger for the disciplinary action nor that the decisions reached by Mr Wachter were anything other than genuinely and his own. I am satisfied in both cases they were.

6.6 Similarly, the allegations that Mr Waechter or Mr Baggot or indeed Mr Stocks may have had a reason to "set up" Mr Kopinski so as to land him in this situation simply do not get off the ground. Even if he is correct that there was some sense of ill-will towards him, which I do not accept, the events of 26 September 2018 could not have been contrived. They happened as a result of the claimant's actions and his actions alone. They were also discovered in circumstances that largely happened by chance and through the reports of Mr Kopinski's colleagues not said to be part of any conspiracy or set up. Even if the managers involved did in fact feel some satisfaction in discovering Mr Kopinski's misconduct, which again I do not find to be the case, that does not alter my conclusion that it was the misconduct they discovered which was the sole reason for his dismissal. That is a potentially fair reason for dismissal and the question then turns to whether it was reasonable in the circumstances to treat it as sufficient to summarily dismiss.

6.7 The first issue to consider is the procedure. There are two aspects of which that do cause me concern. They are the decision to go ahead with the hearing in the claimant's absence and the failure to combine the points raised by the claimant in his grievance of 24 October 2018 with the disciplinary decision. As Ms Quigley submits, I agree that an employer must be able to address conduct issues at some point even where an employee goes off sick. Similarly, I accept the contention that the raising of a grievance is not, in itself, a bar to the conclusion of a disciplinary process. The effect of those submissions is that had the employer had before it the points raised in the claimant's grievance, it is conceivable that the absence of the claimant would not give rise to any unfairness as the claimants concerns would have been before the decision maker. Conversely, had the employee been present, the absence of the written grievance being before the disciplinary decision maker would similarly not give rise to unfairness as the claimant would be present to raise the points or potentially seek the adjournment on that basis. In both cases, therefore, were they to arise in isolation it is likely

that the steps that were taken would then fall within the range of reasonable responses of a reasonable employer. Where I have concluded there is some unfairness in this case, however, is in the convergence of these two matters which had the result that not only did the hearing go ahead in the absence of the claimant but, through the respondent's system error the decision maker did not have before him the matters raised in the grievance which were directly relevant to the issues in hand.

6.8 The fact that those omissions may not have made any difference to the outcome is not a reason not to consider them in their own right in respect of the question of fairness.

6.9 I am reinforced in this conclusion by two matters that the employer itself determined was an appropriate step to take. First, that there was at least some consideration of the need for medical evidence on the question of whether the claimant was fit to attend a hearing. Secondly, its intention that the grievance points should form part of the determination of the disciplinary allegations as was later confirmed by Ms Vdovcova.

6.10 It seems to me that I am bound to conclude that not then taking those steps in these circumstances must fall outside range of reasonable responses of a reasonable employer rendering the dismissal unfair.

6.11 Before concluding this analysis, I have considered whether the appeal itself remedied that sufficiently to remove the unfairness. I have concluded it does not in the particular circumstances of this case. Although, there is by then consideration of all matters in the round and in most respects Ms Vdovcova's analysis is thorough and complete, the decision is some 6 months after the dismissal which is itself a factor to be considered in the question of reasonable responses. There may, in any case, be reasons for delay but I was not satisfied that the reasons advanced in this case justified or even particularly explained the time to respond. That is particularly so when set against the employer's desire to get on with the disciplinary hearing at the first stage of the procedure without it facing any further delay.

6.12 The other factors advanced by Mr Kopinksi do not take matters outside the range of reasonable responses. I am satisfied a reasonable employer would be acting well within the range of reasonable responses to appoint someone with Mr Waechter's past connection to the claimant to determine the issues and the contention that there was collusion or a set up simply does not arise on the facts.

6.13 Had I not reached that conclusion on the procedural aspects of the decision making the substantive question would have been found to fall firmly within the range of reasonable responses. The authorities identity essentially three elements of a conduct based dismissal decision, once it is established the conduct is the genuine reason for dismissal, which I have concluded it is. The first and second are closely related. Was there a reasonable belief in that misconduct based on a reasonable investigation of the facts. I am satisfied there was. There was a concern about Mr Kopinski's behaviour that night from his colleagues, they were spoken to. The managers went to investigate and caught the claimant asleep. The CCTV corroborated the lengths to which Mr Kopinski had gone to conceal himself albeit it also showed he had been asleep only for a short period of time. Whether an employee is asleep

for hours or minutes is nothing to the point and it may be said that it was only minutes because he was discovered when he was. The alternative scenario for later discovery could have involved a serious health and safety incident.

6.14 All that is then supported by Mr Kopinski's admissions in the first investigatory interview. I am further satisfied that Mr Waechter, and again Ms Vdovcova, then reasonably weighed the alternative explanations subsequently given by Mr Kopinski for that conduct and their conclusion to reject it was a conclusion reasonably open to the reasonable employer

6.15 The third and final question is whether the sanction of summary dismissal fell within the range of reasonable responses. This is a serious matter. Falling asleep at work is serious in the context of productivity, sitting on the products is serious in the context of the potential damage but, overall, these events are serious because the circumstances in which this took place amounted to a deliberate and significant health and safety breach. The importance of this is something which this employer impresses on its staff at all opportunities. The circumstance were rightly identified as gross misconduct and I have no hesitation in concluding that dismissal fell within the range of reasonable responses open to a reasonable employer.

6.16 But for the specific issues with the procedure, the dismissal would have been fair.

7. Remedy

7.1 It is incumbent on me to consider any basis for just and equitable adjustments to any losses that flow from the dismissal often referred to as Polkey and contributory conduct. They arise under s.123(1) of the Act, as informed by ("Polkey") and contributory conduct, so far as it relates to the conduct of the employee prior to dismissal under section 122(2) of the Act.

7.2 The "Polkey" principles derive from the case of Polkey v A E Dayton Services Ltd [1988] ICR 142 which itself is based on the just and equitable principles of compensation in section 123(1). That provides: -

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

7.3 There can be various manifestations of this just and equitable principal. The narrow approach, considers the prospects of whether this employer, acting fairly, could have fairly dismissed. In Hill v Governing Body of Great Tey Primary School [2013] IRLR 274, EAT the EAT explained the features of a 'Polkey' reduction as: -

"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

7.4 A wider approach derived from s.123(1) requires consideration of the employment relationship and whether it would have continued in any event during the period for which losses are being considered or whether other factors may have independently brought the relationship to an end. The various elements of the test under 123(1) were brought together by the EAT in Software 2000 Ltd v Andrews [2007] IRLR 568. Although arising from the consequences of the then applicable dispute resolution procedures, it remains applicable to the general approach to assessing compensatory loss and explicitly requires consideration of how long the employee would have been employed but for the dismissal.

7.5 It seems to me that that the prospect of the employment coming to an end in any event does not arise in this case. For the purpose of any reasonable period of loss that might arise in this case, there is nothing in the evidence before me to reach a proper conclusion that the claimant's employment would have come to an end independently of this dismissal, either by him moving on or his employment otherwise being terminated for unrelated reasons. I then have to consider the chances that this employer could have fairly dismissed? It is the circumstances of the particular employer that has to be considered and not the hypothetical reasonable employer. This will often have a limiting effect on the scope to consider an alternative fair outcome as, by definition, the tribunal would have just reached a conclusion of unfairness. In this case, however, the employer acknowledged a significant aspect of what I find formed the unfairness in respect of the relationship between his grievance and the initial decision maker. In assessing the prospects of a fair dismissal, it seems to me this is a conclusion I can be satisfied this particular employer could have reached and is measured in the circumstances of this case in how long it would have taken either to obtain any medical input to reasonably assess Mr Kopinski's fitness to attend a hearing or when it could have proceeded without it. I know Mr Kopinski was able to engage in the appeal and grievance process on 15 January 2019 and I have concluded that that date marks the time when a fair dismissal could have taken place and at which point I can be confident that all of Mr Kopinski's concerns would have been before the decision maker. If that were the only issue, there would therefore be some losses flowing in the intervening period but as Mr Kopinski would have remained subject to SSP only, the losses would appear limited.

7.6 I then turn to the question of his prior and/or contributory conduct. Section 122(2) of the Act provides: -

"122(2) Where the tribunal considers that any conduct of the complainant before the dismissal….was such that it would be just and equitable to reduce …..the amount of the basic award to any extent, the tribunal shall reduce…that amount accordingly.

7.7 Section 123(6) provides: -

Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

7.8 The two sections are subtly different. The latter calls for a finding of causation which the former does not. Both involve a consideration of what is just and equitable. In Steen v ASP Packaging Ltd [2014] ICR 56 the EAT set out the following four stage approach to the questions posed by both sections: -

a) First, identify the conduct which is said to give rise to possible contributory fault;

b) Second, consider whether that conduct is blameworthy.

c) Third, the tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question,

d) Fourth, is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

7.9 As to what conduct can properly be characterised as culpable, this is illustrated in the observations of Brandon LJ in Nelson v BBC(No 2) [1979] IRLR 346, at paragraph 44: -

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded."

7.10 In Steen, the EAT also offered guidance on the assessment of the conduct and its relationship to the reason for dismissal: -

It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.

7.11 My first task is to identify whether there was conduct which could potentially give rise to conduct engaging either or both provisions. I have no hesitation in concluding there was. This is more than a question of attending work unfit through lack of sleep. Mr Kopinski had gone out of his way to create opportunities to rest which increased in gravity and culminated in what I conclude was an extremely serious health and safety issue in flagrant breach of all the training and policies adopted by the employer. It is one thing to put chairs together in the rest room to catch a few moments with eyes shut and exceed the allotted break time or to fashion a seating area on bay 34 or take additional breaks. Those are culpable matters of conduct that could properly be taken into account under s.122 but how those events weigh in assessing the percentage contribution changes completely with the culmination of the events in the creation

of a hidden seat which required Mr Kopinski to dismantle a completed block of 8 and to adjust the surrounding products to shield him from view. Those actions fall within the classification of culpable or blameworthy. They are the reason that he was dismissed. It seems to me this is one of those infrequent cases where I can properly say that the claimant brought about his own dismissal. He was otherwise generally well regarded. I did not find his previous attendance issues had led to any desire to remove him from the business and I did not find Mr Waechter, despite his other deficiencies in the process, had anything in mind other than the seriousness of the claimant's conduct that night. I therefore conclude that it is just and equitable to reduce any compensatory award by 100%. That also marks the starting point for any adjustment to the basic award. The difference is I do not need to find the same causal link as I did with the compensatory award and there may be factors in the case which give rise to a different consideration of the just and equitable question. I have considered whether there are factors which would render the answer to that question different but have not been able to identify any.

8. Unlawful deduction from wages.

Law

8.1 A worker has a right not to suffer an unauthorised deduction from wages as provided by s.13(1) of the Act. It states:-

"An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction".

8.2 Claims may arise from a discrete deduction from an agreed gross starting point or from a dispute about what that gross starting point should be. Paying an employee on an incorrect, lower starting point is as much a deduction from pay as taking too much in explicit deductions. The key is determining what is "properly payable". Section 13 provides, in part:-

"(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion."

8.3 Whether a payment is properly payable is to be resolved by considering the ordinary contractual principals. (Greg May (Carpet fitters and contractors) Ltd v Dring 1990 ICR 188 EAT). To be properly payable, a payment must have some legal basis, usually contractual but not necessarily so. (New Century Cleaning v Church 2000 IRLR 27 CA). Thus, as Nicholls L.J. put simply in Delaney v Staples (trading as DE MONTFORT RECRUITMENT) [1991] ICR 331 a complete failure to pay that which is due also amounts to a deduction for the purpose of s.13.

"If, come his "pay day", a worker is in law entitled to a particular amount as wages and he receives nothing then, whatever be the reason for non-payment, that amount is to be treated as a deduction from his wages on that occasion."

Discussion

8.4 This claim can be dealt with briefly. It is answered by my principal findings of fact. The issue was originally that the claimant was entitled to company sick pay. In fact, I have found he was not entitled to it in the particular circumstances applicable at the time. As a result of the way that issue evolved during the hearing, the claim was clarified somewhat to evolve into a broader issue of receiving no pay at all. In other words, that he did not receive SSP. There is no dispute SSP was due. It does not, therefore fall within the restriction on jurisdiction set out in Taylor Gordon & Co Ltd V Timmons UKEAT /0159/03. However, SSP was paid, at least notionally in the itemised statement of payments made. The fact that the claimant received nil payment is not as a result of his entitlement to SSP not being paid to him, but because of other overpayments being recovered. The conclusion, as I set out in the findings of fact, is that the claimant has not established that the amount paid was less than that which was properly due. This claim also fails.

9. Conclusions

9.1 In summary therefore, I have found the dismissal to be procedurally unfair but that the circumstances of the claimant's conduct it is not just or equitable to order any compensation. There has been no unlawful deduction from wages.

EMPLOYMENT JUDGE R Clark
DATE 14 May 2021