EMPLOYMENT TRIBUNALS

Claimant: Mr O Omolorun

Respondent: Corps Security (UK) Limited

Heard at: London Central (via CVP) **On:** 25th and 26th February 2021

Before: Employment Judge Nicklin

Representation
Claimant: Mr Adio (Lay Representative)
Respondent: Mr Kohanzad (Counsel)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

1. The claim for holiday pay is dismissed on withdrawal by the Claimant.

2. The claim of unfair dismissal is not well-founded and is dismissed.

3. The provisional remedy hearing listed on 26th April 2021 is vacated.

REASONS

Introduction

1. By a claim form presented on 31 August 2020, the Claimant brought a claim of unfair dismissal within section 98 of the Employment Rights Act 1996 ("the ERA"). The Claimant also brought a claim for holiday pay but it was confirmed on the first day of the hearing that this was withdrawn.

2. The Claimant was employed as a security officer by Dan House Security from 2014 and, following a TUPE transfer in 2017, was employed by the Respondent until his dismissal without notice on 6 June 2020. The Claimant was dismissed

for gross misconduct for leaving the site at which he was on duty as a security officer before the end of his shift on 7th April 2020, without having cover in place.

3. The Claimant attended the hearing and gave sworn evidence. He was represented by Mr Adio, a friend who informed the tribunal that he is also a trainee solicitor (though not appearing in that capacity). The Respondent was represented by Mr Kohanzad of counsel, who called sworn evidence from Mr John Kavanagh, Security Manager at the site where the Claimant worked; Mr Akram Muyanja, Contracts Manager who conducted the investigation; Mr James (Jimmy) Flynn, Regional Manager who chaired the disciplinary hearing; and, Mr Seetan Varsani, Regional Director, who heard the Claimant's appeal against the dismissal decision.

4. I was provided with a 286-page bundle and witness statements for each of the witnesses. I also watched around 5 minutes of CCTV footage provided by the Respondent concerning an incident on 13th May 2020, which was shown on screen during the hearing.

Issues

5. At the beginning of the hearing, Mr Adio confirmed that the Claimant accepted that the Respondent's reason for dismissal was gross misconduct and that conduct was a potentially fair reason for dismissal under section 98(2) of the ERA.

6. The issues which needed to be determined in this case were:

   6.1. Whether the Respondent had a genuine belief in the Claimant's guilt, held on reasonable grounds. In particular, I needed to determine the following questions of fact in order to consider the reasonableness of the Respondent's belief:
      6.1.1. How many security officers must the Respondent provide on-site at one time?
      6.1.2. Did the Respondent operate a flexible shift system at this site enabling security officers to leave site early if they had arrived for their shift early?
      6.1.3. If so, was it a condition of the system that the relieving security officer must have arrived on site to cover before the duty officer could depart?
      6.1.4. Had the Respondent instructed the Claimant as to the minimum number of security officers to be present on site at any one time?

   6.2. Whether the Respondent carried out a reasonable investigation. In particular, the Claimant says:
      6.2.1. The investigation meeting conducted by Mr Muyanja was not a reasonable investigation;
      6.2.2. The Respondent did not follow up all reasonable lines of enquiry regarding the circumstances of the Claimant leaving site on 7th April; and
      6.2.3. Some of the matters taken to disciplinary were not investigated at all.

   6.3. Whether the Respondent followed a reasonably fair procedure, considering, in particular:

6.3.1. The disciplinary process undertaken by Mr Flynn. The Claimant says that Mr Flynn ignored the previous lack of investigation and the hearing was conducted in an unreasonable manner; and

6.3.2. The appeal process undertaken by Mr Varsani. The Claimant says Mr Varsani conducted a retrospective investigation which was unreasonable because the questioning of other staff was carried out in an unfair manner. The Respondent says the appeal remedied any previous defects.

6.4. Whether the decision to dismiss for gross misconduct was within the band of reasonable responses open to the Respondent;

6.5. If the dismissal is procedurally unfair, what, if any, adjustment should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed (*Polkey*)?

6.6. Would it be just and equitable to reduce the basic and/or compensatory award because of blameworthy or culpable conduct, pursuant to sections 122 and 123 of the ERA?

6.7. Should there be any adjustment to the compensatory award because of any failure by either party to follow the ACAS Code of Practice?

Findings of Fact

7. I make the following findings of fact.

8. The Respondent is a large security operations provider, delivering security to its clients' sites across the United Kingdom. It employs around 2,900 staff, has an in-house Human Resources manager and operates a company handbook with policies.

9. The Claimant worked on a security contract site known as 77 Fulham Road, London ("the site"), for the Respondent's client, a facilities management company called CBRE. The site is a set of large offices, separated into three buildings: Blocks A, B and C. Blocks A and B required a continuous security presence. The Claimant, along with other officers working at the site, was supervised by John Kavanagh.

10. The ordinary security arrangements at the site were that three officers were deployed to cover the two blocks. On 25th March 2020, Mr Kavanagh wrote to his officers (page 44 of the bundle) advising that, owing to the COVID-19 pandemic, there would only be a 'skeleton crew' of two officers: one officer in Block A and the second in Block B to reduce contact. The email advised that when patrols were carried out, one officer would remain and keep an eye on the other block and the same arrangement would operate for any breaks or toilet breaks. There was no dispute this email was sent to the Claimant.

11. The Respondent was under a contractual duty on and after 25th March 2020 to provide minimum security cover of two officers for Blocks A and B at all times, 24 hours per day. I find this because:

11.1. By an email dated 7th May 2020 (page 45 of the bundle), Mr Kavanagh, having reviewed security CCTV, wrote to the officers

working on the site alerting them to the fact that "*Block B was being left unattended for long periods of time during the night*". He said that "*the client is paying for security on these positions so why is there no cover for such long periods*?". Mr Kavanagh identified a period of three days where there was no cover in Block B for periods of between 3-4 hours on each night. This demonstrates that the Respondent was concerned that it was not meeting its contractual obligations if officers were not in their assigned block throughout their shift.

11.2. The Claimant did not accept that this was the contractual position for the Respondent because he said it was simply an email from Mr Kavanagh who was not the contracts manager. I find that it is more likely than not that Mr Kavanagh was directing his officers in accordance with the Respondent's security contract with its client. There was no evidence to contradict Mr Kavanagh's understanding that the Respondent was obliged to provide continuous security with two officers on site at all times.

12. In any event, the Claimant was aware of and duly instructed to observe the two persons on site rule from the memo of 25th March 2020.

13. An officer's shift was usually 12 hours: 6.30 – 6.30, being either a day or night shift. Mr Kavanagh operated a flexible shift system for his officers, whereby an officer could begin their shift at a different time by agreement with the officer they were to relieve. This could mean, for example, that the night shift officer could begin work an hour or two early with the day shift officer returning earlier the following morning to relieve them after 12 hours. At all times, the two officers must ensure their block is covered and they must not leave without cover having arrived. I accept Mr Kavanagh's evidence about this arrangement because:

13.1. He told me that this created 'harmony' for his team, enabling them to fit their shifts around family and other commitments. Mr Kavanagh gave evidence in an open and straightforward manner. I accept that he allowed this practice because he genuinely believed it was good for his team;

13.2. The terms of the arrangement are consistent with the Respondent's contractual obligations to its client;

13.3. Whilst there was no written record of the arrangement, there is an email from Muhammad Imran dated 22 July 2020 (page 118 of the bundle), another officer from the site who provided evidence as part of the appeal process, which says: "[The Claimant] *used to work with another officer. But I don't know if they have any agreement. There is no instructions to anyone by site manager to let him or her to leave early* (sic)". This refers to the scope for officers to reach agreements as to their shift patterns;

13.4. Whilst not set out to the extent of my findings above, the Claimant accepts in his witness statement at paragraph 3 that Mr Kavanagh had agreed that "*anyone who comes into work early shall be allowed to leave early [insofar as the site isn't left unmanned]*"; and

13.5. I do not accept the Claimant's oral evidence that he could leave as long as there was at least one officer remaining on the site as whole. The memo of 25th March 2020 makes clear that there must be two

officers on site and the email of 7th May 2020 emphasises Mr Kavanagh's concerns when he identified long periods of shifts where Block B was not guarded. This shows the continuing expectation for both blocks to be covered at all times.

14. At some time in or around April 2020, Mr Kavanagh was told that the Claimant had been sleeping on duty. I accept Mr Kavanagh's evidence that he had no proof of this so did not take any further action with the Claimant at the time. However, he did review CCTV footage which led him to send the email of 7th May 2020.

15. Acting on his concerns, Mr Kavanagh visited the site at 2am on 13 May 2020, during the Claimant's night shift. Mr Kavanagh found the Claimant in the basement car park carrying a pillow and a quilt or sleeping bag, looking bleary eyed. Mr Kavanagh says that the Claimant admitted he had been sleeping. The Claimant denies he made this admission or that he was bleary eyed. I do not have to resolve this issue because it was not an allegation which founded the decision to dismiss. However, these events led to the Claimant being suspended pending an investigation.

16. Mr Kavanagh later checked the CCTV records and discovered that, on 7th April 2020, the Claimant had left the site at 4.56am by car, whereas his shift was not due to end until 6.30am. He found that only a cleaning operative was present in Block B. The Claimant accepts this.

17. Mr Kavanagh therefore reported to his line manager, James Mayes, later the same morning. The email to Mr Mayes (page 47 of the bundle) identifies the following concerns:

    17.1. The sleeping allegation occurring that morning;
    17.2. That the Claimant had allegedly been forwarding emails from the site to his personal email address; and
    17.3. The allegation regarding leaving site early (although he does not set out the detail or date of this incident).

18. The Respondent conducted an investigation led by Mr Muyanja, a contracts manager, into the sleeping allegation and the allegation that the Claimant left the site early on 7th April 2020. The Respondent accepts that no details of the complaints or issues were provided to the Claimant prior to the investigation meeting which took place on 14th May 2020 by video.

19. Only Mr Muyanja and the Claimant attended the meeting. The meeting lasted for 1 hour 20 minutes, according to the Respondent's meeting notes at page 48-51 of the bundle. The vast majority of the questions by Mr Muyanja concerned the Claimant's account of the sleeping allegation on 13th May. Mr Muyanja asked only one question at the end concerning the allegation regarding leaving site early. The exchange was as follows:

Mr Muyanja	*Did you leave site on the 7th of this month?*
Claimant	*NO, I only leave site when I am supposed to leave and nobody has brought this to my attention before*

20. Mr Muyanja concluded:

Ok, on that note I will conclude my investigation by suspending you with pay for sleeping on duty and leaving site, which are both gross misconducts.
I will gather more evidence from the CCTV on site, smart task and the DOB in the meantime and you will be invited for a disciplinary meeting with one of the senior managers.
You are entitled to be accompanied by a colleague or member of your trade union.

21. I find that Mr Muyanja did ask the Claimant expressly about leaving site on the 7th April at the close of the meeting, despite the note referring to the "7th of this month". This is because:
    21.1. Mr Muyanja confirmed in his oral evidence that, whilst the notes say that he asked about the "7th of this month", he confirmed on oath that in the meeting it was clear that he had been asking about 7th April;

    21.2. I accept Mr Muyanja's evidence because it is clear that the notes are not a verbatim note of the entire meeting. There was no note taker present. It is more likely than not that more words were said that Mr Muyanja did not manage to record. The question itself does not ask whether he left site 'early', it simply asks if he left site. The Claimant's recorded answer clearly responds to a question about whether he left early or not;

    21.3. In his letter of appeal against dismissal dated 8th June 2020, the Claimant says (at page 94 of the bundle) that he was asked at this meeting if he had left site on 7th April. In his oral evidence, the Claimant suggested that he referred to this date simply because, at the time of appeal, he knew of the correct date but that he was actually asked about 7th May. I do not accept that. His letter expressly says "*I was asked if I had left site on the 7th April 2020*". If the Claimant believed that there was a procedural error in the investigation about the dates, he would have stated in his appeal letter what he alleged was said to him.

22. Mr Muyanja also reviewed a report provided by Mr Kavanagh dated 14th May 2020, which refers to the two allegations and included CCTV image stills concerning both incidents.

23. On 22 May 2020, Mr Muyanja sent an email to Mr Flynn, Regional Manager, advising that there was not sufficient evidence to prove that the Claimant was sleeping on duty on 13th May but there was evidence of his vehicle leaving site on *'7th May'* before the end of his shift.

24. The Claimant was invited by Mr Flynn to a disciplinary hearing by a letter of 27th May 2020 (page 77-78 of the bundle). The reasons for the disciplinary hearing were given as:

- *Sleeping whilst on duty at CBRE Fulham Palace Road on 13th (night shift of 12th May) May 2020.*
- *Breach of GDPR and confidentiality by sending work related emails to your private email address*
- *Leaving site unsecured and without authorization on Thursday 7th May 2020*
- *Failure to carry out duties to the required and expected standards.*
- *Fundamental breach of trust and confidence between you, the Company and the Client due to the above incidents.*

as previously discussed with you at the Investigatory Meeting held on 13th May 2020.

25. I accept Mr Flynn's evidence that it was an error in his letter to say 7th May rather than 7th April regarding the allegation of leaving site early and that by the time of the disciplinary hearing, both parties were very clear that the date of 7th April was being considered. This is because:

    25.1. the email from Mr Muyanja on 22 May 2020 reporting on the investigation gave Mr Flynn the wrong date. This was an error made by Mr Muyanja and Mr Flynn confirmed that he then realised it was a typographical error in his letter;

    25.2. As above, I have found that the Claimant was being asked about 7th April in the investigatory meeting and therefore knew of the correct date of the allegation; and

    25.3. The notes of the disciplinary hearing (at page 84 of the bundle) clearly show the Claimant being asked about having left site on 7th April.

26. The Claimant was advised that this was deemed to be a potential gross misconduct and may lead to his dismissal from the Respondent. He was signposted in the letter to the disciplinary procedure and advised of his right to be accompanied at the hearing by a work colleague or trade union representative.

27. The Claimant was provided with the evidence which had been considered in the investigatory process by email on 28th May 2020.

28. The disciplinary hearing took place on 1st June 2020 by video. The notes confirm that the Claimant declined to have a representative present.

29. The Claimant was asked a number of questions about the sleeping on duty allegation and was then asked about the 7th April. The Claimant admitted he left at 4.53am and went home. He confirmed his finish time was 6.30am and said:

> *…Who comes first, leaves first, the other officer is in charge until the next one comes. We have been doing it for the past years…*
>
> *I started 5 o'clock on that day. If john* [Mr Kavanagh] *felt I've done something wrong, all officers do it for the past years…*
>
> *Imran was on site. Cleaning in block A, Imran stayed outside., He then moved into block A.*

Mr Flynn	*Outside where?*
Claimant	*Outside block A. In the middle of Block A and B - open space.*
Mr Flynn	*So nobody in reception?*
Claimant	*The cleaner. It's the site arrangements.*
Mr Flynn	*Is it written down?*
Claimant	*John wrote it down in the diary that an officer can leaver. Yes, early when the other comes, around 3 years ago. John knows that officer leave.*

When you come early- you can leave early. That's what he wrote, as long as someone is on site. There used to be 3 off us, when one goes go, 2 are there. When Mario comes, the others go.

Mr Flynn *So John says that when day shift comes you can go.*

Claimant *No, when you come in early and go early as long as there is an officer on site* (sic).

30. The Claimant was also asked about having sent a work email to his personal email address, which he accepted.

31. The Respondent's disciplinary policy provides (at page 136 of the bundle) that "*leaving the site unmanned/undermanned when on duty without prior authorisation*" is an example of an offence normally regarded as gross misconduct.

32. On 5th June 2020, Mr Flynn wrote to the Claimant advising that he was summarily dismissed on the ground of gross misconduct for all of the allegations raised in the hearing invitation letter save for the sleeping on duty allegation, which he decided was not established on the evidence.

33. As regards the decision to dismiss the Claimant for gross misconduct:

    33.1. Mr Flynn had regard to the length of the Claimant's service and his HR record. It is agreed that the Claimant did not have any previous disciplinary matters recorded against him. Mr Flynn concluded that the Claimant had refused to accept any responsibility for his actions and had shown no contrition and that it was essential that security officers can be trusted.

    33.2. There was no evidence that the second allegation (breach of GDPR) had been investigated prior to the disciplinary hearing, but I accept Mr Flynn's evidence that he followed this up before making a decision. It is recorded in his outcome letter that the "*emails were work related and they did contain confidential information on Security Operations for the tasks at 77 Fulham Palace Road, and if were used criminally, could have had consequences*".

    33.3. The third allegation (leaving site early) was found to be proven by Mr Flynn. He investigated the Claimant's account of the flexible shift arrangement by speaking with Mr Kavanagh and confirmed his finding. Mr Flynn also referred to the memo sent by Mr Kavanagh on 25th March 2020, which makes plain that there must be one officer in Block A and one officer in Block B at all times unless on patrol, break or toilet break.

    33.4. Mr Flynn concluded that the Claimant would have known that leaving the site without cover in place was putting the security of the site at risk and that he had knowingly breached the rules.

    33.5. The fourth allegation (failure to carry out duties to the required and expected standards) was found proved based on the Claimant having left site early and the fifth allegation (breach of trust and confidence)

was established based on the conduct as a whole. This is clear from Mr Flynn's conclusions in his outcome letter.

33.6. The Claimant was also advised of his right to appeal, which he exercised by letter of 8th June 2020.

34. By a letter dated 10th June 2020, Mr Varsani, Regional Director, invited the Claimant to a virtual appeal hearing on 24th June 2020, again offering him a right to be accompanied.

35. The Claimant attended the hearing and confirmed he was happy to proceed without any representative. Mr Varsani and the Claimant agreed that the focus of the appeal was to review the procedure leading to dismissal and whether the sanction was fair.

36. I make the following findings as regards the appeal:

36.1. Mr Varsani proceeded to conduct his own investigation into the allegations as follows:

36.1.1. He wrote to Mr Muyanja asking about the investigation (page 106 of the bundle). Mr Varsani challenged Mr Muyanja as to the absence of questions about the GDPR breach and leaving site early allegations.

36.1.2. He wrote to Mr Flynn, who replied confirming that the Claimant's answers about the GDPR breach and leaving site early provided sufficient evidence for him to make his finding. Mr Flynn told Mr Varsani that the GDPR breach was not a reason for the dismissal. It was put to Mr Flynn that this was a lie but I accept his evidence that this was an error when responding to Mr Varsani's email. His outcome letter clearly shows this was one of the grounds of gross misconduct.

36.1.3. After the appeal hearing Mr Varsani arranged for the Claimant to review the CCTV footage at Head Office on 13th July 2020 as he had complained he had not seen this. It is agreed that this shows the Claimant's car leaving the site at 4.56am and a cleaning operative can be seen with no sign of another security officer.

36.1.4. On 16th July 2020, Mr Varsani sent an email to the Claimant attaching the responses from Mr Muyanja and Mr Flynn, giving him 7 days to comment. The Claimant replied on 19th July 2020 again criticising the investigation, contending it could not be conducted retrospectively and claiming that Mr Flynn was guilty of a "*cut and shut inside job*" by effectively closing his eyes to the lack of investigation (page 113 of the bundle).

36.1.5. Mr Varsani wrote to the cleaning operative (not an employee of the Respondent) asking him questions about the 7th April incident. He did not reply;

36.1.6. He also wrote to Mr Kavanagh who provided his account of the evidence of 7th April;

36.1.7. He sent a list of queries to Mr Imran, including questions about his understanding of the flexible shift policy, who replied as above at paragraph 13.3.

36.1.8. In response to the Claimant's claim that he had been treated differently to others, Mr Varsani viewed other CCTV footage but could find no evidence of other staff leaving the site unattended.

36.1.9. In response to the Claimant's request to question other staff, Mr Kavanagh obtained an account from another officer, Mario Johnson, and passed this on to Mr Varsani. By an email on 22 July 2020, Mr Johnson confirmed his account that he had been told by Mr Imran that the Claimant left the site early on 7th April. Mr Johnson was not asked about the flexible shift policy.

36.1.10. Mr Varsani also checked the Respondent's records on its SmartTask app (a log of activities) which showed that the Claimant's last recorded activity on 7th April was at 4.36am.

36.2. Mr Varsani accordingly determined there was sufficient evidence, even without a response from the cleaning operative, to prove that the Claimant had left site early without any security cover and without permission. He did not accept the Claimant's defence that he could leave in circumstances where the site would not have full security cover.

36.3. He also concluded that the sanction was not too severe, having regard to the Claimant's record and the conduct.

37. Mr Varsani wrote to the Claimant with the appeal outcome on 21st July 2020 addressing the investigatory steps he had undertaken. The GDPR breach allegation was formally disregarded by Mr Varsani because it was first put to the Claimant in the disciplinary invitation letter without any prior investigation.

38. Mr Varsani upheld the decision to summarily dismiss because the Claimant left the site early on 7th April, had failed to carry out duties to the required and expected standards and for a fundamental breach of trust and confidence accordingly.

Law

39. I must have regard to the test in section 98 of the ERA. There are two stages. First, the Respondent must show that it had a potentially fair reason for the dismissal within section 98(2). If the Respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

40. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, 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 shall be determined in accordance with equity and the substantial merits of the case.

41. In misconduct cases, the tribunal must have regard to the test in BHS v Burchell [1978] IRLR 379 and Post Office v Foley [2000] IRLR 827. The tribunal must decide:

    41.1. whether the employer had a genuine belief in the employee's guilt;
    41.2. whether the employer held such a genuine belief on reasonable grounds; and,
    41.3. after carrying out an investigation into the matter that was reasonable in all the circumstances of the case.

42. In deciding whether the employer acted reasonably or unreasonably within section 98(4), having regard to all aspects of the case including the investigation, the grounds for belief, the penalty imposed and the procedure followed, the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.

43. It is immaterial how the tribunal would have handled the events or what decision it would have made and the tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563).

44. The tribunal must consider whether the disciplinary process as a whole was fair. In a case where there are deficiencies at an early stage of the process, the tribunal should ask itself whether the overall process was fair, including the appeal, notwithstanding any earlier deficiencies (Taylor v OCS Group [2006] IRLR 613).

Conclusions

45. As agreed in this case, the Respondent's reason for dismissal was gross misconduct and this is a potentially fair reason for dismissal within section 98(2) of the ERA.

Whether the Respondent had a genuine belief in the Claimant's guilt, held on reasonable grounds

46. In my judgment, the Respondent did have a genuine belief in the Claimant's guilt in respect of the incident on 7th April and that belief was held on reasonable grounds because:

    46.1. The Claimant accepts he drove out of the site at 4.56am on 7th April 2020 when his shift did not end until 6.30am;
    46.2. Only a cleaning operative was in his block when he left. No security officer had arrived to cover his shift pursuant to any arrangement the Claimant may have had;
    46.3. The flexible shift system only allowed the Claimant to depart once the relieving security officer had arrived;
    46.4. The Claimant knew that there was to be two officers onsite. Leaving the site with only Mr Imran in the other block will have placed the Respondent in breach of contract with its client (to provide two officers at all times) and the Claimant had been given a clear instruction on 25th March 2020 as to this arrangement. He knew that

his block should only be left unguarded for patrols, breaks and toilet breaks with observation from the other officer during those limited times;

46.5. It was reasonable for the Respondent to reject the Claimant's defence that he could leave with only one other officer present in the other block. A reasonable employer would not tolerate a situation where its officers knowingly place it in breach of contract with its client and act contrary to instructions provided.

Whether the Respondent conducted an investigation which was reasonable in all the circumstances of the case

47. I conclude that, in respect of the leaving site early allegation (which is the only factual matter constituting summary dismissal following the appeal), the Respondent had conducted a very limited investigation prior to the disciplinary hearing by asking the Claimant a single question about the 7th April.

48. Mr Adio submitted that there was no reasonable investigation and referred me to paragraph 5 of the ACAS Code of Practice on disciplinary and grievance procedures, which says:

> *It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. 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.*

49. In respect of the leaving site early allegation, the Respondent had collated clear evidence from CCTV images which showed the Claimant leaving site without cover. It also had the report from Mr Kavanagh and the Claimant accepted he left as shown on CCTV. It was not obliged to provide advance warning or documentation to the Claimant ahead of the investigatory meeting. In the circumstances, the Respondent did not need to carry out any further investigation into the incident to satisfy itself as to whether the events happened.

50. However, in my judgment, a reasonable employer would have put the issue to the Claimant sufficiently to enable him to provide his account in response. The single question asked by Mr Muyanja, though putting the correct date of the incident to the Claimant, did not allow for an early investigation to take place as to any defence the Claimant may have.

51. Notwithstanding, I conclude that the Respondent cured any defect in this procedure during the disciplinary hearing itself. This is because:

51.1. Mr Flynn asked detailed questions of the Claimant about the arrangements on 7th April and then investigated his account by speaking to Mr Kavanagh before making a decision.

51.2. A reasonable employer is entitled to make a judgment between the account given by the Claimant and that of his supervisor in these circumstances. In this case, the memo from Mr Kavanagh sent to the security officers on 25th March 2020 provided a reasonable basis on which to conclude that the Claimant knew that two security officers must be on site at all times. On that basis, it was reasonable of Mr Flynn to reject the Claimant's defence following those enquiries.

52. At the appeal, Mr Varsani then reviewed a more extensive range of evidence procured by his own investigation which confirmed to him that the Claimant did leave early without cover being in place; that to do so was contrary to his supervisor's instructions and that the evidence did not support the Claimant's account. In my judgment, looking at the investigation as a whole, there is little more that a reasonable employer could be expected to do before making a decision on this issue.

53. Whilst there was no reasonable investigation into the GDPR breach concerning the use of personal email, Mr Varsani accepted this and, in my judgment, reasonably disregarded it when reviewing Mr Flynn's decision. The original failure to investigate that matter did not infect the fairness of the Respondent's later investigation into the incident on 7th April. The issues were not related.

Whether the Respondent conducted a reasonably fair procedure

54. The Respondent followed a fair procedure as follows:

54.1. There was advance notice of the allegations to be considered at the disciplinary hearing. Whilst Mr Flynn's invitation letter refers to the incident being on 7th May, I have found that the Claimant knew the incident was on 7th April because it was put to him as such in the investigatory meeting. He was also sent evidence on 28th May 2020 by Mr Flynn which provided details about the allegation.

54.2. The Claimant was given the right to be accompanied at both the disciplinary and appeal hearings, which he declined.

54.3. There were two different decision makers of different levels of seniority within the Respondent's undertaking handling the disciplinary and appeal.

54.4. Both Mr Flynn and Mr Varsani took further steps to investigate the Claimant's account after their respective hearings.

54.5. I reject the Claimant's argument that Mr Flynn and Mr Varsani acted unreasonably in dealing with the 7th April incident:

54.5.1. Mr Flynn had resolved any conflict of evidence by referring to Mr Kavanagh and considering the documentary evidence. In my judgment, it was unnecessary for Mr Flynn to conduct interviews with other security officers. Such officers were not to be questioned as key witnesses of fact to a particular incident but to be asked about the flexible shift system. Mr Flynn had a reasonable amount of information on which to make a reasonable decision.

54.5.2. However, even if a fair process did require such questioning, I conclude that the steps taken by Mr Varsani to examine the Claimant's account were reasonable in the circumstances, having regard to the range of enquiries made.

54.5.3. I do not accept that the manner of such questioning by Mr Varsani was unreasonable when considered alongside all

the other items of evidence collated. The Claimant's complaint is that Mr Kavanagh was the person who obtained Mr Johnson's evidence, which was sent on to Mr Varsani. Mr Varsani then put what he was told directly to Mr Johnson in an email (effectively leading him in his evidence). Whilst the Claimant says this is an unreasonable way to question a witness, it does not advance the case further. The information supplied by Mr Johnson concerns his own knowledge that the Claimant left early on 7th April. That issue is not in dispute and Mr Varsani had separately put questions to Mr Imran about the flexible shift policy, who had provided answers in reply.

Was the decision within the band of reasonable responses?

55. I have had regard to the size and administrative resources of the Respondent. It is a large business which employs around 2,900 people. The Respondent has an established disciplinary procedure and is able to deploy a number of senior individuals into the investigatory, disciplinary and appeal stage processes.

56. I remind myself that it is immaterial what decision I would have made. I am considering whether the Respondent acted reasonably having regard to the band of reasonable responses test.

57. The decision to summarily dismiss for the offence of knowingly leaving the site early without a security officer being in place to cover was within the band of reasonable responses open to the Respondent. The incident is covered as an express example of gross misconduct in the Respondent's disciplinary procedure. The Claimant's previous clean record was taken into account. It is reasonable for the Respondent to conclude that this is a serious disciplinary matter, especially having regard to the security function being performed and the position of trust into which the Claimant was placed.

58. Whilst the Respondent conducted only a limited initial investigation into this incident, the evidence established that the Claimant did leave site early with only a cleaning operative in his place. Through the investigation and enquiries followed up by both Mr Flynn and Mr Varsani, the Respondent remedied any initial shortcomings such that it followed a reasonable procedure commensurate with its size and resources. Accordingly, in my judgment, assessing the process as a whole, the Respondent acted within the band of reasonable responses.

Outcome

59. For the above reasons, I find that the claim is not well-founded and is accordingly dismissed. It is therefore unnecessary for me to consider the *Polkey*, contribution and ACAS issues going to remedy.

60. The provisional remedy hearing listed on 26th April 2021 is therefore vacated.

Employment Judge Nicklin

Date 15th March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 16/03/2021.

FOR EMPLOYMENT TRIBUNALS