EMPLOYMENT TRIBUNALS

Claimant: Mr A Entwistle

Respondent: Wallwork Heat Treatment Limited

Heard at: Manchester **On:** 18 to 19 July 2022, 8 August 2022 (in chambers)

Before: Employment Judge Slater

REPRESENTATION:

Claimant: Ms Parry, Friend
Respondent: Ms A Shortman, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well founded.

2. The remedy hearing provisionally arranged for 22 November 2022 is cancelled.

REASONS

Claims and Issues

1. This was a claim of unfair dismissal. The issues were discussed and agreed to be as follows.

1.1. Has the respondent shown a potentially fair reason for dismissal? The respondent relied on conduct. The Tribunal had to consider whether the respondent had a genuine belief in the claimant's guilt. The claimant asserted that there were ulterior motives for the respondent's decision to dismiss.

1.2. If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)? In accordance with the case of **BHS -v- Burchell**, the Tribunal had to consider whether the belief in the claimant's guilt was:-

1.2.1. based on reasonable grounds; and

1.2.2. formed after a reasonable investigation.

The Tribunal would consider whether the procedure and penalty of dismissal were within the band of reasonable responses. The Tribunal would take into account whether the ACAS code of practice on disciplinary matters was followed.

1.3. If the dismissal was unfair, in a case where such an assessment may be made, what are the chances the claimant would have been fairly dismissed had a fair procedure been followed? (a "Polkey" type reduction).

1.4. If the dismissal was unfair, has the claimant contributed to the dismissal by his conduct?

2. We agreed that I would hear evidence and submissions relating to whether or not the claimant had been unfairly dismissed and the two issues of principle relating to remedy (the Polkey type reduction and contributory fault) and then, if I decided in Mr Entwistle's favour, I would go on to hear further evidence and submissions relating to remedy. We did not have sufficient time within the time allocated for the parties to make oral submissions and for me to reach a decision and deliver judgment. In accordance with the preference of the parties, we agreed that the respondent would rely on written submissions already prepared, and Ms Parry would provide written submissions on behalf of the claimant, to which the respondent would have a right of reply, rather than the parties returning on another day to make oral submissions.

Preliminary Matters

2. The claimant had made an application for witness orders on 28 January 2022. Unfortunately, it appeared that this had been overlooked at the time. Ms Parry said that the claimant wished to pursue the application for witness orders for the attendance of Helen Ellis and Vinny Pye although, if the witness orders were granted, this would lead to the postponement of the hearing. The claimant wanted Helen Ellis to attend because she is responsible for quality control and the claimant wanted to establish through questions to her whether jobs were tested randomly or whether all were tested. The claimant wanted Vinny Pye to attend to confirm that he was on holiday and acted as a spare set of hands to the claimant when there was a busy period on shift. The claimant had approached both potential witnesses who, in the case of Mr Pye, did not respond and in Ms Ellis's case said she did not wish to attend. In each case, Ms Parry confirmed that the claimant could give his own evidence in relation to the matters they hoped these witnesses would give evidence about and that the respondent's witnesses could be questioned about these matters. I refused the application for witness orders. I was not persuaded that the evidence of Ms Ellis or Mr Pye was of sufficient relevance to grant the witness orders. The issues the claimant

hoped they would address could be dealt with by the claimant's own evidence and the cross examination of those giving evidence for the respondent. Making witness orders would also result in the postponement of the hearing. I did not consider it in the interests of justice to postpone the hearing and make witness orders for witnesses to attend whose evidence would be of limited relevance and where the evidence could be given by other means.

3. There were various matters relating to documents to add to or exclude from the bundle. Both parties were content that I dealt with these matters even if it meant looking at documents which might then not be included in the bundle, on the basis that I would put them out of my mind if I excluded the documents. In the event, after discussion, documents were added, and a privileged document excluded, by agreement.

4. I agreed to view brief CCTV footage of alarms on machines going off and the claimant attending to those machines.

Evidence

5. I heard evidence for the respondent from Luke Collins, the claimant's manager; Craig Richards, the Dismissing Officer; and Simeon Collins, the Appeals Officer. I heard evidence from the claimant from the claimant only. There were written witness statements for all the witnesses who gave oral evidence. There were also witness statements for M and D Entwistle (the claimant's parents), Ms Parry (the claimant's representative) and Jill Heslop. Ms Parry had not been involved in events at the time and so could give no evidence of fact, so I did not need to hear evidence from her. M and D Entwistle and Jill Heslop did not attend to give evidence. The respondent said the statements were not of relevance to the issues the Tribunal needed to decide but the respondent had no objection to the Tribunal reading them and giving them such weight as the Tribunal considered appropriate. M and D Entwistle and Ms Heslop were not witnesses to any relevant events and they gave what was, in effect, character evidence for the claimant. This did not assist me in making my decision on the issues before me.

6. There was a bundle originally of 223 pages but with various documents which had been inserted and further documents which were added at the start of the hearing.

Facts

7. I make the following findings of fact based on the evidence before me. I make findings of fact only on matters which I consider relevant to the issues on which I need to decide. Where I do not refer to evidence, it is because I did not consider it of any material relevance to the issues in the case.

8. The claimant began the relevant period of work with the respondent on 28 April 2008. He had previously worked for the respondent between 1985 and 2001, being made redundant in 2001. At relevant times for this case, he was a Vacuum Shop Operator. His contract of employment gave the respondent the right to require the claimant to work any shift pattern on day or night shifts.

9. It was common ground that the claimant had no adverse disciplinary record prior to the events leading to his dismissal. His good character prior to these events is not in issue.

10. The claimant has caring responsibilities for his children. He is not living with the children's mother. With help from his mother-in-law, he cares for his children. Working nightshifts has allowed him to take his children to their various activities and provide a stable routine for them. The claimant was working weekday nightshifts prior to the events leading to his dismissal.

11. Another Vacuum Shop Operator, Mark Dalley, usually worked weekend night shifts in the vacuum department. Mr Dalley was absent from work on sick leave from 2 April to 9 July 2021. Scott Braithwaite was also a Vacuum Department Operative. He has a medical condition which meant he was particularly vulnerable to the Covid virus. Mr Braithwaite was put on weekend night shifts in Mark Dalley's absence, after returning from furlough. The respondent put him onto night shifts to reduce the number of people he was in contact with because of his medical condition. Mark Dalley has caring responsibilities for his parents in law which meant he needed to work weekend night shifts. The claimant was not aware of the reasons why Mark Dalley and Scott Braithwaite needed to work nightshifts.

12. In April 2021, the claimant had a dispute with his manager, Luke Collins, about working overtime. However, on the claimant's own evidence, they had moved on from this.

13. Mark Dalley informed the respondent in May 2021 that he would be fit to return to work in early July 2021.

14. In a What's App message on 25 May 2021 Luke Collins raised with the claimant the possibility of the claimant moving shifts to accommodate Mark Dalley's return to work.

15. The claimant asserted in his claim form that Luke Collins told him, in a telephone call on 10 June 2021, that there had been an incident on the night of 7 to 8 June 2021. Luke Collins denied that he phoned the claimant on 10 June 2021 to discuss any conduct allegations. However, in oral evidence, he said he could not recall a conversation on 10 June but could not say that there was not a conversation on that day. I find, for reasons set out in paragraph 20, that there was a conversation on 10 June 2021 in which Luke Collins asked the claimant questions about the shift of 7/8 June and during which the claimant said no alarms sounded. It may be that the conversation occurred because there was a known issue with the thermocouple on the V10 furnace at the time. I find that, having no reason to doubt what the claimant said at the time about no alarms having gone off, Luke Collins did not tell the claimant on 10 June 2021 that there was any disciplinary allegation against the claimant in relation to what he had said. I find that Luke Collins raised the allegation of the claimant, incorrectly, telling him no alarms had sounded on the night of 7/8 June 2021 on 15 June, together with the second allegation about the prospective and incorrect completion of document 67 on the night of 11 June 2021. I reject the assertion in the claimant's submissions that Luke Collins lied under oath about speaking to the claimant about the alarms prior to 15 June 2021.

16. On 14 June 2021, Luke Collins heard Steve Dutton reporting to Mike Jarvis, the Engineering Director that he had reviewed the furnace charts for the week commencing 7 June 2021 for the vacuum department and he believed there was an issue with the thermo couple on an Aerospace Vacuum Furnace not having reached the correct temperature, affecting its integrity. Mr Dutton asked Luke Collins to check the Furnace Alarm Log. This showed that the alarm had sounded on 7 and 8 June 2021 and had been acknowledged and reset.

17. On 14 June 2021, at around 12 noon, the claimant and Luke Collins had a meeting about shift changes. The claimant, reading from a prepared statement, set out his personal reasons for needing to stay on weekday night shifts and put forward proposals which he suggested would enable him to remain on weekday night shifts. Luke Collins did not believe that the claimant's proposals would have been efficient and cost-effective. He explained to the claimant that Mark Dalley needed to stay on the weekend night shift and Scott Braithwaite needed to go on midweek nights and that the company aimed to make the changes from 16 July 2021. It is common ground that Luke Collins mentioned, during this meeting, a possibility of voluntary redundancy but the context in which this was mentioned is in dispute. Luke Collins says it was in response to the claimant saying he might as well leave and go on benefits if he could not stay on night shifts. The claimant disputes he said he would resign, although he said in oral evidence that he did say he might as well be on benefits before Luke Collins mentioned the possibility of voluntary redundancy. It is common ground that Luke Collins told the claimant to go and speak to his mother-in-law to see if they could sort out something about the shifts and they agreed to meet again on 16 June. It is also common ground that there was no mention in this meeting of performance issues or the incidents for which the claimant was subsequently disciplined.

18. Luke Collins checked CCTV footage which showed that the alarm went off twice at 10.21 pm on 7 June and 2.21 am on 8 June and showed that the claimant had attended the V10 furnace each time the alarm was sounded.

19. On 15 June 2021, Luke Collins received an email from Steve Dutton about the furnace not reaching the required temperature. This had been discovered after hardness testing found the material too hard and the furnace charts were checked. Steve Dutton suggested the possibility that form 67, which was completed and stamped by the claimant, could have been fabricated; this showed that the furnace reached a temperature which, in fact, had not been reached. He attached the relevant furnace chart and document 67. Document 67 had been completed and signed by the claimant on 11 June 2021. Steve Dutton wrote: "I can't think of any other explanation for this other than the readings have been completely fabricated. Can't be 100% sure until this has been investigated thoroughly and discussed with the operator. But if this is the case then it is absolutely unacceptable". This email from Steve Dutton triggered the investigation about what has been described as incident two.

20. It is agreed that, on 15 June 2021, there was a conversation between Luke Collins and the claimant about two allegations. I accept Luke Collins' evidence that he told the claimant that there were two allegations he needed to speak to the claimant about. Luke Collins says this was the first time both allegations were mentioned; the claimant says that the matter about alarms had been raised in a conversation on 10 June. I find it more likely than not that Luke Collins had asked the claimant in an earlier conversation whether any alarms had gone off on the night of 7/8 June 2021 and the claimant had said they had not. If there had not been an earlier conversation, Luke

Collins would not have known, prior to the conversation on 15 June 2021, that the claimant was denying any alarms had gone off on that night, and there would have been no disciplinary allegation in relation to saying no alarms had gone off to be raised. Luke Collins' answers in the investigatory interview on 23 June 2021 (see paragraph 30) are consistent with him having asked the claimant earlier than the date of suspension whether alarms had gone off. However, I consider it more likely than not that the conversation about alarms on 10 June was in the nature of an enquiry from Luke Collins and, at this time, he had no reason to doubt the word of the claimant, so he did not make any disciplinary allegation on 10 June 2021. It was only following Mr Dutton's request to Luke Collins on 14 June 2021 and Luke Collins checking the CCTV footage, that Luke Collins had reason to doubt what the claimant had told him about no alarms sounding.

21. The claimant says that Luke Collins did not state, in the conversation on 15 June 2021, the days on which the incidents occurred. Luke Collins said he did make the dates clear, saying there were two incidents on two separate nights in the same week, relating to 7/8 June and 10/11 June 2021. I find it more likely than not that Luke Collins did specify the dates, having telephoned the claimant specifically to speak to him about the two allegations.

22. In relation to the first allegation, it is common ground that the claimant was asked whether alarms had gone off and the claimant said that they did not. Luke Collins did not specify the type of alarm he was asking about and the claimant did not seek any clarification of what type of alarm Luke Collins was referring to.

23. The claimant's submissions assert that, in cross examination, Luke Collins admitted that it was probable that there was a misunderstanding about the alarms. My notes of evidence do not support this submission and I make no finding that this was said by Luke Collins.

24. When the completion of document 67 was raised with the claimant in the call on 15 June 2021, he said "why have I done that? I can't think why I have done that?", Luke Collins told the claimant that he was suspended, Luke Collins then told the claimant that it had nothing to do with the request from the claimant not to move to day shifts. Luke Collins gave evidence that he made the comment because they had had the conversation about changing shifts only the day before; he could not recall if this was in response to anything said by the claimant. I find this explanation plausible. I return to this comment in my conclusions.

25. The suspension letter dated 15 June 2021 did not give the date of the relevant incidents. The allegations were described as follows:-

> "Material solutions – JBU575282
>
> - Process should have been 980°C for 52 mins
> - Parts had 980°C for 6 hours
> - You stated that the furnace did not alarm with a *Temperature Timeout* which would have alerted you to this issue earlier, despite the furnace *Historical Alarms* page stating the alarms went off twice, and that both

were acknowledged by the operator. This is also confirmed with review of CCTV.

"Aerospace metallic – JBU575755

- Process should have been a pre-soak at 400°C, then a ramp up to 593° C for 4 hours 15 minutes.

- Parts only had 400°C, then the furnace started to cool – you have filled in Document 67 (Furnace Check Document) and signed it to say that you checked both the datalogger and the furnace and that both had reached 593° C when they hadn't. This has been confirmed by the furnace charts from the datalogger".

26. The letter informed the claimant that these matters appeared to fall within the category of gross misconduct for which the claimant could be summarily dismissed.

27. James Bailey, Operations Manager, was appointed to carry out the investigation.

28. A few days after the claimant's suspension, the claimant phoned Luke Collins to say he had sorted out his childcare issues with his mother-in-law and that he could go on to day shifts. Luke Collins told him that they needed to deal with the disciplinary allegations.

29. The investigation included Mr Bailey interviewing the claimant on 23 June 2021. The claimant handed Mr Bailey two letters and either read the contents to Mr Bailey or the letters were read by Mr Bailey. One letter was a copy of the letter he had given to Luke Collins about the shift issue and a second was a letter to James Bailey. The letter did not address why the claimant had told Luke Collins no alarm had sounded. In the interview, Mr Bailey outlined the first incident as being the furnace running longer than it was supposed to, rather than being about what the claimant said to Luke Collins about alarms not going off. The claimant accepted he had signed document 67 but wrote that he had done this by mistake and had no idea why he filled it out. He wrote that he only defence was the pressure he felt under. He wrote that he felt under pressure on his own and that he should have asked his supervisor to help that night. The claimant did not express any confusion in his letter or in the investigatory interview about which nights the investigation related to.

30. James Bailey also interviewed Luke Collins and Phil Moore, who took over from the claimant on the day shift, on 23 June 2021. Luke Collins said that, when he spoke to the claimant on the phone and asked if there was any alarm, the claimant said there was no alarm; he asked twice and both times the claimant said no alarm. He said, when he suspended the claimant, he asked about the alarms again and the claimant said no alarms went off.

31. By letter dated 28 June 2021, the claimant was invited to attend a disciplinary hearing with Craig Richards on 6 July 2021. Craig Richards is based at the Birmingham factory and not at the Bury site where the claimant was based. He did not know the claimant. The invitation letter did not date the allegations; these were repeated as set out in the letter of suspension. The claimant was reminded that he was entitled to be accompanied at the meeting by a work colleague or trade union representative. The letter stated that various items were enclosed and that further

items, including the CCTV footage, would be available on request at the hearing. The items stated to be included included the alarm history of the V10 for 7 to 8 June 2021 and the Steve Dutton email. It is not clear from the letter whether or not document 67 was included with the Steve Dutton email, although this had been an attachment to the email. However, from the discussion at the disciplinary hearing, it appears that the claimant has seen the form 67, however this had been provided. The claimant said at this Tribunal hearing that he did not receive any of these documents. However, this was the first time the claimant had said this and I consider it more likely than not that the claimant did receive the documents stated to be enclosed before the disciplinary hearing since he did not raise an issue about this previously. It may be that the claimant's recollection so long after the event is not accurate.

32. Craig Richards did not send the claimant copies of the items stated to be available on request at the disciplinary hearing because he deemed the information as sensitive, having regard to the respondent's need to protect clients' data and information regarding their work.

33. The disciplinary hearing took place on 6 July 2021. The claimant was aware of his right to be accompanied to the meeting but did not exercise that right. Craig Richards had said that he would send the claimant the minutes of the meeting to be agreed but he failed to do this. Minutes were taken by a note taker. The minutes were later sent with the outcome letter. The claimant at this Tribunal hearing challenged the minutes generally but did not put to Mr Richards, despite an invitation from the Judge to do so, what of substance the claimant asserted was wrong with the minutes. The claimant's witness statement does not identify anything that has been incorrectly recorded, or omitted, but suggests the minutes are misleading as the claimant's responses were based on incorrect information provided to him by the company about the incidents. I find that the minutes are likely to be an accurate reflection, although not a verbatim account, of what was said at the disciplinary hearing. The claimant handed Mr Richards a letter which the claimant read aloud at the start of the hearing.

34. The disciplinary hearing took about an hour. The claimant spoke about being on his own and under pressure and said he would not have made mistakes if there had been two people in. The claimant said he should have gone to his supervisor for support but he was too proud.

35. When it was put to the claimant that a director asked him if he acknowledged any alarms and he had said no, the claimant said: "I've apologised I shouldn't have said no." Mr Richards said "What you said raises concerns. Not particularly what you did." The claimant said later in the disciplinary hearing that he had not realised it was that alarm which Luke Collins meant.

36. The claimant accepted that he had filled in form 67 and said " I shouldn't have done it, I hold my hands up." He said it was a mistake and he knew it was serious. He said he did not need more training on how to complete form 67; he knew how to do it.

37. At the disciplinary hearing the claimant did not suggest that Luke Collins had had any ulterior motive for referring matters to investigation.

38. The claimant said he could go on days that Friday.

39. By letter dated 14 July 2021, Mr Richards informed the claimant of his decision which was that both allegations were upheld, he considered this to be gross misconduct and the claimant was summarily dismissed. In relation to the first allegation he wrote:-

> "There may have been issues/a malfunction with the furnace thermocouples that caused the program to freeze/not time out. That is why we insist and train our operators to carry out surveillance of all their furnaces during processing so that this can be eliminated/highlighted and corrected at the earliest point. You were alerted to this furnace twice during the evening (due to the guaranteed time out alarm), giving you the opportunity to interrogate/assess that there may have been an issue. This did not occur and the furnace still over ran.
>
> "It is clear that you were asked a direct question (more than once) regarding the alarm going off on 2 occasions and you remember answering that question. On each occasion you denied that the alarm triggered, you explained in the hearing that you thought you were being asked about a different alarm. However, you never questioned which alarm was being discussed or did you mention that other alarms were triggered. It was evident by the Alarm Data Log that the V10 alarm triggered twice and on each occasion you were recorded as responding to the alarm. Your answer in my opinion was to deceive or detract any blame that may have attributed to your negligence. It is here there is a breach of trust and loss in confidence".

40. In relation to the second allegation, Mr Richards did not accept that one could accidentally/mistakenly complete a document confirming that something had been checked and recording the temperature checked when they had not completed the check and that this was a deliberate and intentional action. Mr Richards wrote that he was led to believe it was the time saving and fraudulent completing of the document that had occurred. He classed this as an attempt to deceive/defraud the company and a breach of trust and loss of confidence. Mr Richards wrote that, in his failings to take action, inform and cover up, these malfunctions could have resulted in compromised parts being sent out to clients and used in aircrafts where they would have posed a real and serious risk to life.

41. The incorrect completion of form 67 by the claimant did not, in fact, result in any serious consequences, since the fault with the product was picked up by later checks. I find that the respondent has a number of checks in its systems to try to ensure that faulty products are not sent to customers. I find that Mr Richards held a genuine belief, as expressed in the outcome letter, that the claimant's actions could potentially have caused a real and serious risk to life. Although there were later checks in the system, faulty product could have been sent out, if there had been any failures with later checks in the system.

42. Mr Richards wrote:

> "In conclusion I believe that your actions are completely inexcusable and have led to an irrevocable breakdown in the trust and confidence we place in you as an Operator. You are therefore dismissed with immediate effect by reason of Gross Misconduct and forfeit the right to notice (statutory, contractual or payment in lieu)."

43. Mr Richards advised the claimant of his right to appeal.

44. The claimant submitted grounds of appeal on 17 July 2021 and additional grounds of appeal dated 28 July 2021 and read at the appeal hearing. The grounds of appeal included no allegation of an ulterior motive for his investigation and/or dismissal. The claimant asserted that, when he answered that alarms had not gone off, he thought that Luke Collins had meant heating failure alarm and not temperature timeout alarm. The claimant said he had filled out the form 67 by mistake. He asserted that it was an honest mistake by him feeling under pressure at that time of night. He wrote that he had not received minutes of the disciplinary hearing to check and only received these with the outcome letter. He referred to several points where he said the minutes were wrong, but these points did not relate to what he had said to Luke Collins about alarms or the filling in of form 67. He wrote that he knew he had made a bad mistake filling out and stamping the whole of the form 67 and he would expect to receive a warning for this, but it was an honest genuine mistake made by him feeling under pressure at that time and not gross misconduct.

45. By letter dated 20 July 2021, the claimant was invited to an appeal hearing on 28 July with Simeon Collins, Director. Simeon Collins had not worked at the Bury site for ten years and had not worked with the claimant.

46. Simeon Collins checked with the relevant client prior to the appeal hearing whether he could release to the claimant information which had been available to review at the disciplinary hearing but not provided in advance to the claimant. Having received authority to do so, Simeon Collins shared the documents with the claimant before the start of the appeal hearing.

47. The appeal hearing took place on 28 July 2021 with Simeon Collins. The hearing lasted one hour and a quarter. The claimant was accompanied by a work colleague.

48. The claimant presented a letter which Mr Collins read aloud. The claimant said that family issues were not restricting his duties. The claimant said he was confused about the alarms, he thought Luke Collins meant a furnace alarm, a malfunction, not a temperature timeout. Mr Collins summarised that the breach of trust, which was the accusation, was that the claimant was asked if an alarm went off and he said no, but clearly an alarm did go off.

49. In relation to the second allegation, the claimant said he had filled in form 67 and stamped it by mistake, as he was under pressure. The claimant said he had done it before with form 67 and that everyone does it. The claimant suggested that it should have been checked by the day shift as the furnace was still running. Mr Collins summarised the allegation as being that the form was filled in at the start of the run and it was falsifying information. The claimant restated that it was a mistake. Mr Collins said that something like this could shut the business down; directors have responsibility and corporate manslaughter filters down to staff if catastrophic. He said that what happened after this incident was irrelevant. He said the system was there to protect them and everyone else.

50. There was a discussion about how busy the claimant was. Mr Collins asserted that this was the quietest week of the year. The claimant said he was busy for one person at night. He did not have Vinnie.

51. The claimant agreed that he had been trained in the completion of form 67 and did not need re-training.

52. Following the hearing, Simeon Collins asked Luke Collins to investigate the claimant's allegation that all staff were competing form 67 incorrectly. Luke Collins reported back that he could find no evidence of this. The respondent's submissions in reply to the claimant's submissions assert that the evidence collected substantiated that the claimant had completed document 67 prospectively in the past as well as substantiating that other operatives did not appear to have done this. I heard no evidence that there was evidence given to Simeon Collins that the claimant had completed document 67 prospectively in the past, other than the claimant saying in the appeal hearing that he had done this before. The witness statement of Luke Collins refers only to investigating, during the appeal process, whether other shift staff had falsified document 67 and reporting that he found no evidence of this.

53. Simeon Collins spoke to Craig Richards about the setting of the temperature on the T32 Furnace. Mr Richards also maintained that the minutes of the disciplinary hearing were accurate.

54. By letter dated 29 July 2021, Mr Collins informed the claimant of the outcome of the appeal which was that the dismissal was upheld. Mr Collins upheld both allegations, although in evidence to this Tribunal he said he considered that the second allegation about the completion of form 67 was by far the most serious allegation and he would have dismissed for this matter alone. Mr Collins found the claimant's explanations unsatisfactory. He wrote that he could see no justifying evidence to explain the claimant's responses to the allegations; as a time served operator, the claimant was well aware of the processes and procedures and his actions, due to the nature of these critical parts, could have resulted in a disastrous outcome. He wrote that the claimant admitted filling in the data on form 67 at the beginning of the process and did not verify the documented temperatures at any time during the process. In relation to the claimant saying no alarms had gone off, Mr Collins was satisfied that the claimant was well aware of the alarm system in place and found it difficult to understand that if a director asked if an alarm went off, he would have answered no.

55. Mr Collins wrote that he had investigated the workload for a 12 week period covering the date of the allegations and that this was one of the quietest periods of 2021. He wrote that he did not believe the claimant's explanation of a high work load contributing to towards the allegations.

56. The claimant notified ACAS under the early conciliation process of a potential claim on 12 August 2021 and the Early Conciliation Certificate was issued on 1 September 2021. The claim was presented to the Tribunal on 30 September 2021.

57. It was not until after the claimant's dismissal and appeal that he alleged that there were ulterior motives for his dismissal. The claimant asserted in his claim form that the company had an ulterior motive to dismiss him, writing: "They intended to change my contract and move me onto day shifts to allow them to move another colleague to my shifts."

58. The claimant accepted in evidence that the respondent had the right to change his shifts.

59. In the claimant's witness statement (paragraph 37), the claimant wrote that "Having had time to reflect on the course of events and review all the documents leading up to my suspension, it is my honest view that Luke Collins set out to find a reason or reasons to accuse me of Gross Misconduct as a means to get rid of me because I had annoyed him, and he wanted me to move to days. The events leading up to my being suspended are too coincidental and I believe corroborate my view that I was dismissed for other reasons."

60. In her written submissions for the claimant, Ms Parry sought to introduce expert evidence from herself about whether organisations would allow "random testing" of safety critical equipment. I take no account of this evidence. It is new evidence which the claimant seeks to introduce after evidence has closed; it was not contained in Ms Parry's witness statement. It is also "expert" evidence and, if it was to be used as such, the permission of the Tribunal would need to have been sought in advance; it was not. In any event, I do not consider the evidence to be of any material relevance to the issues I need to decide. For these reasons, I make no findings of fact based on the evidence of Ms Parry contained in her written submissions.

Submissions

61. By agreement, the parties relied on written submissions. The respondent relied on written submissions provided to the Tribunal and the claimant on 19 July 2022. Ms Parry sent written submissions to the Tribunal and the respondent on 2 August 2022 and the respondent sent a reply to these submissions on 5 August 2022, in accordance with the agreed timetable.

62. Since the submissions are in writing and can be read, if required, I do not seek to summarise the submissions. I seek to address the principal arguments in my conclusions.

Law

63. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

64. In the great majority of cases, the Tribunal looks at the reason of the dismissing officer in determining the fairness of a dismissal. However, the decision of the Supreme Court in **Royal Mail Group Ltd v Jhuti** [2020] ICR 731, is authority for there being some very limited circumstances where a Tribunal must look behind the reason of the decision maker in deciding whether a dismissal is fair or unfair. This is where a manager above the employee in the hierarchy hides the real reason for dismissal from the decision-maker behind an invented reason. The Supreme Court said it is then a court's duty to penetrate through the invention rather than to allow it also to infect its own determination.

65. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

66. In relation to a conduct dismissal, the Tribunal is guided by the authority of ***British Home Stores v Burchell*** *[1979] IRLR 379*. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In considering the fairness or otherwise of the dismissal, the tribunal must consider the other parts of the ***Burchell*** test: was this belief was based on reasonable grounds and formed after a reasonable investigation?

Conclusions

67. I conclude that the claimant was dismissed because the respondent genuinely believed that the claimant had falsely told Luke Collins that alarms had not gone off on the night of 7/8 June 2021 and that the claimant had filled in form 67, in advance, without verifying the temperatures shown on that form. I conclude that the respondent has shown that the dismissal was for the potentially fair reason of conduct. I reject the claimant's argument that there was an ulterior motive for making the allegations and/or dismissing him. This was asserted to be Luke Collins wanting to get rid of him because he was annoyed with the claimant and wanted to move him to days. The claimant accepted in evidence that they had moved on from a dispute about overtime. He also accepted that the respondent had the right to change his shifts. The respondent could have instructed the claimant to change to day shifts, but discussions were continuing at the stage when the disciplinary matters arose, with the claimant and Luke Collins due to meet again on 16 June, after the claimant had discussed with his mother-in-law whether, with her support, he could make satisfactory arrangements for his children if he moved to working days. The claimant was a valued and skilled worker. It would have made no sense for Luke Collins to seek to get rid of the claimant, when he could have been moved, with or without his agreement, to the day shift. In fact, prior to the disciplinary hearing, the claimant informed the respondent that he could go on to day shifts.

68. I do not consider the evidence supports the allegation that Luke Collins had an ulterior motive for initiating disciplinary action against the claimant. The only evidence from which the claimant could invite the Tribunal to draw an inference of such a motive is the coincidence of timing; the discussion about the shift change taking place the day before the claimant was informed of the disciplinary allegations and suspension and Luke Collins saying to the claimant on 15 June 2021 when suspending him that this had nothing to do with the proposed shift changes. The evidence does not suggest this was more than a coincidence of timing. Luke Collins' evidence about the instruction from Mr Dutton to check the furnace alarm log on 14 June 2021 and Mr

Dutton's email about form 67 dated 15 June 2021 explain why a disciplinary investigation was started when it was. Luke Collins has a plausible explanation for his comment that the suspension has nothing to do with the proposed shift changes. I conclude that the suggested strangeness of the comment is not sufficient, set against the other evidence, to lead to a conclusion that there was a link between the initiation of a disciplinary investigation and the claimant's reluctance to change to day shifts.

69. I do not find any evidence to support the assertion made in the claimant's submissions that there was a foregone decision to dismiss the claimant from 15 June 2021.

70. There is no evidence to suggest that the decision to dismiss the claimant was made by Luke Collins, rather than being made by Craig Richards and upheld on appeal by Simeon Collins. Even if Luke Collins had an ulterior motive for initiating the disciplinary investigation (and I do not find the evidence supports that), there is no evidence which suggests that the decisions of Craig Richards and Simeon Collins were made other than on the basis of the evidence before them. There is no evidence to suggest this is a **Jhuti** situation. There is no evidence that Luke Collins hid a different real reason for dismissal from the decision makers behind invented evidence leading Craig Richards and Simeon Collins to dismiss, and uphold the dismissal, for the reasons outlined in their outcome letters.

71. I conclude that Craig Richards had a genuine belief that the claimant was guilty of the misconduct referred to in paragraph 67. Although the allegation in relation to incident one had included elements about what the claimant did, or failed to do, in response to the alarms on the night of 7/8 June 2021, it is clear from the outcome letter, supported by Mr Richards' evidence at this hearing, that his concern was about the claimant's response to the question about whether alarms had gone off. The outcome letter identifies that it is this matter which is considered to be a breach of trust and loss of confidence. Mr Richards considers the completion in advance of form 67 to be an attempt to deceive/defraud the company and a breach of trust and loss of confidence.

72. I conclude that Simeon Collins upheld the dismissal on appeal because he genuinely believed, on the evidence before him, that the decision to dismiss had been correctly reached.

73. I conclude that the decision of Craig Richards, upheld by Simeon Collins, was based on reasonable grounds after a reasonable investigation. The allegations were put to the claimant. It would have been better if the letters of suspension and invitation to the disciplinary hearing had identified the dates to which the allegations related, but I found that Luke Collins had informed the claimant of the dates in the phone call on 15 June 2021 and the claimant did not, at any time during the disciplinary process, suggest he did not know the relevant dates. I do not find that this amounted to a breach of the ACAS Code of Practice on Discipline and Grievance or was outside the range of a reasonable procedure. The claimant admitted that he had told Luke Collins no alarms had gone off and admitted filling in form 67 in advance, without checking the relevant temperatures. Given the concessions, and the relevant issues, a reasonable investigation was carried out; there were no obviously relevant lines of enquiry which were not followed.

74. I conclude that the procedure followed fell within the range of a reasonable procedure. The allegations were put to the claimant and he had a full opportunity to address these. He was provided with relevant evidence in advance or had an opportunity to see it at the disciplinary hearing. I do not consider that a reasonable procedure required the claimant to be given copies of all the material before the disciplinary hearing. The ACAS Code of Practice (paragraph 9) states that it would normally be appropriate to provide copies of any written evidence with the notification of the disciplinary case to answer. It does not require this in all cases, and Craig Richards had reasons of sensitive data for not making some of it available in advance of the disciplinary hearing. If I am wrong on this, this matter was corrected on appeal, with Simeon Collins making copies available to the claimant before the start of the appeal hearing. The claimant was given a right of appeal.

75. The claimant seemed to suggest that it was unfair that the disciplinary hearing was conducted by someone who did not know him and that it should have been conducted by Luke Collins, the claimant's manager. I conclude that the decision to have an independent manager conduct the disciplinary hearing, rather than Luke Collins, who was a witness in relation to incident one, falls well within the band of a reasonable procedure. Indeed, I consider a decision to have an independent manager conduct the disciplinary hearing, where this is possible, to be desirable in the interests of fairness.

76. Craig Richards and Simeon Collins considered the claimant's explanations, that he was confused as to which alarm was referred to, that he was busy and made a mistake about the filling in of the form but dismissed these explanations. I conclude that it was within the range of reasonable responses to reach the conclusions which they did.

77. I conclude that the decision to dismiss the claimant fell within the band of reasonable responses. The offences were of a serious nature. The completion of form 67 in advance, in particular, could have led to very serious consequences. The fact that there are further checks in the system designed to pick up an earlier errors in the process which worked in this case, does not reduce the importance of each person involved in the process carrying out their duties properly. Having decided, as they were entitled to do on the evidence, that the completion of form 67 in advance was a deliberate act and, therefore, not an innocent mistake, the offence in relation to form 67 was an offence of deception/defrauding the company and a breach of trust and confidence. The denial that alarms had gone off was arguably a lesser offence, but still serious, leading to a loss of trust and confidence. In view of the seriousness of the offences, I conclude that the respondent's decision to summarily dismiss the claimant fell within the band of reasonable responses, despite the claimant's length of service and previous unblemished disciplinary record. It is possible that another employer might have taken a more lenient view and issued the claimant with a final written warning, but this does not mean that the respondent's decision fell outside the band of reasonable responses.

78. I conclude, for these reasons, that the complaint of unfair dismissal is not well founded.

Employment Judge Slater
Date: 11 August 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 August 2022

FOR THE TRIBUNAL OFFICE

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