EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4109967/2021

Final Hearing Held remotely by Cloud Video Platform on 23 - 26 November 2021

Employment Judge A Kemp
Tribunal Member W Canning
Tribunal Member A Shanahan

Mr Ronald Keir	**Claimant** **In person**
Securitas Security Services (UK) Ltd	**Respondent** **Represented by:** **Ms J Young** **In house Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the claimant was not unfairly dismissed by the respondent under section 98 of the Employment Rights Act 1996, or section 103A of the Employment Rights Act 1996, and the Claim is therefore dismissed.

REASONS

Introduction

1. This was a Final Hearing into the claims made by the claimant. The claims were for unfair dismissal and that the dismissal was automatically unfair

as the reason or principal reason for it was alleged to be for having made protected disclosures.

2. All claims were defended. The respondent did not accept that any qualifying disclosures had been made, or that if made they were the sole or principal reason for dismissal, which they alleged was either conduct or some other substantial reason.

3. The Final Hearing was conducted remotely by Cloud Video Platform in accordance with the arrangements made in orders issued after an earlier Preliminary Hearing.

Issues

4. The Tribunal identified the following issues for determination, and raised them with the parties at the commencement of the hearing. They confirmed their agreement. The list of issues is:

(i) What was the reason, or principal reason, for the claimant's dismissal?
(ii) If the reason was potentially fair under section 98(2) of the Employment Rights Act 1996 ("the Act") was it fair or unfair under section 98(4) of the Act?
(iii) Did the claimant make qualifying and protected disclosures to the respondent under section 43 of the Act?
(iv) If so was that the sole or principal reason for his dismissal under section 103A of the Act?
(v) If any claim is successful, to what remedy is the claimant entitled? The claimant sought compensation as his principal remedy, but also financial awards which included issues of losses sustained, mitigation, any ***Polkey*** deduction and contribution.

Preliminary Issues

5. The Tribunal had made an order for production of the CCTV footage referred to in the case. That was in due course tendered by Aviva the

haver of the same, but with a comment that they had a concern over the privacy rights of a third party shown in it, were not aware of the terms of the case as they were not a party to it, and left it to the Tribunal to determine that issue. The Tribunal invited comments from parties, noted that the respondent objected as it was argued not to be relevant to the issues before the Tribunal, with the claimant arguing that it was, and then decided that it was in accordance with the interests of justice to receive that CCTV footage into evidence as it was potentially relevant to issues before the Tribunal, including in particular matters as to fairness and any contribution. After hearing submissions from the respondent on the same it was agreed that the Tribunal would view the footage only when referred to by a witness in evidence. When that stage was reached it proved impossible to view, but was played to the Tribunal by Mrs Young on a shared screen. It did not have audio, and was not continuously recorded footage but a series of frames about two seconds apart.

6. The respondent had tendered late a number of documents for inclusion in the documentation before the Tribunal. They were received.

7. At the commencement of the hearing the Judge explained how it would be conducted as the claimant represented himself and did not have experience of such hearings. He explained that the respondent would give its evidence first with the evidence in chief initially, that the claimant would then cross examine each of the witnesses and in doing so should firstly challenge any matters of fact spoken to that he did not consider to be correct, and raise any matters he would give evidence about himself, or through his witness, which was likely to be within the knowledge of the person being cross-examined, then about the process of re-examination and the evidence in chief for his own evidence and that of his witness. The judge explained that documents that had been produced would be considered only if raised during the oral evidence. He also explained that once evidence had been concluded for that party it would be possible to lead further evidence only in exceptional circumstances, and that after the evidence had been heard from the parties each of them could then make submissions in relation to the evidence that had been given and the facts

that the Tribunal should find established, the law that applied, and the application of the law to the facts.

8. During the hearing the claimant raised an issue as to an argument he wished to make that the respondent had breached its own policy, that had it followed that policy it would have led to different circumstances and the incident that led to dismissal may not have happened. There was no pleading for such an argument, and it was not within the issues identified. When that was pointed out to the claimant it was explained that an argument as to breach of a duty of care may be a claim in delict or as breach of contract but, if a personal injury claim, was not one in the jurisdiction of the Tribunal in any event. If it were to be raised as a claim of detriment under section 47 of the Employment Rights Act 1996 it was confirmed that that required an application to amend setting out what was the basis of such claim, but that that amendment was made very late in the day, and raised issues as to time-bar and otherwise. Reference was made to the authorities on such amendment. The claimant was given overnight to consider his position. The following day, 25 November 2021, there was a further discussion with him, after which he stated that he did not seek to amend and would continue to argue matters on the basis of the issues identified.

Evidence

9. Amy Hughes, then Mr James Coulter, Mr Richard Gabriel (the dismissing officer) and finally Mr Gregg Adam (the appeal officer). The claimant then gave evidence and called Mr Grant Carcary as a witness.

10. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. The respondent sought to add to it to confirm the enclosures in an email dated 20 January 2020 during the hearing, which was permitted and not opposed.

Facts

11. The Tribunal found the following facts, material to the case before it, to have been established:

12. The claimant is Mr Ronald Keir. His date of birth is 23 June 1964.

13. The respondent is Securitas Security Services (UK) Ltd. It is a very large employer in the UK and beyond, although evidence on the number of staff in the UK was not provided.

14. The claimant was employed by the respondent as a Security Officer with effect from 6 May 2018 as the result of a TUPE transfer. He was previously employed on the same site by another security firm from May 2017.

15. No written contract of employment for the claimant existed.

16. The respondent has various policies including those for Fairness and Respect at Work, Whistleblowing, Mediation and Disciplinary matters. It has a grievance policy but that was not before the Tribunal.

17. The terms of the Disciplinary Policy and Procedure included as examples of gross misconduct, which was not exhaustive, the following:

> "Breaches of confidentiality (subject to the Data Protection Act 1998…..
> Mishandling and/or misuse of electronically stored information is an offence under the provision of the Data Protection Act [no date was given]…..
> Taking, using or misusing, or permitting another person to use or misuse, customers' or Securitas equipment, property, vehicles, goods or services without express permission…."

18. One of the respondent's customers is the Aviva group of companies, ("Aviva") which has premises in Perth. The claimant worked at those premises. As a part of the systems at that site there are a number of

closed-circuit television (CCTV) cameras. They include fixed and movable cameras. They record images which are stored on a hard drive outwith those premises and are under the control of Aviva, not the respondent.

19. On 17 June 2019 the claimant and other staff were sent a memo about the IT User Policy, which required customer computers to be used only "to complete Aviva/Securitas related activities" and not for non-work-related access or for playing games. The claimant acknowledged that he had read and understood that, on a form dated 26 June 2019.

20. The claimant signed a form on 19 July 2019 which was an "Acknowledgement Sheet" headed "CCTV Code of Practice". It had logos for the respondent and Aviva. Aviva had a CCTV Code of Practice. It referred to "GDPR legislation" and had links to government websites. It set out data protection principles for the management of data. It stated that the CCTV images were the property of Aviva, and that there could be requests for reviews of stored images, which were otherwise destroyed after 31 days. It stated that "the CCTV Code of Practice contains a confidentiality clause and disciplinary action will be taken against any individual found to be in breach of this." It stated that "at all times and without exception all colleagues will comply with the relevant sections of the following legislation…..Data Protection Act 1998…..GDPR 2018".

21. On 21 January 2020 the claimant emailed James Coulter, the respondent's Service Delivery Manager, to make a complaint about Mr Jim Watt, one of the claimant's Supervisors. He alleged that Mr Watt had said that another member of staff had better site knowledge than the claimant and should be in charge on a particular day. The claimant felt that that was derogatory, and alleged bullying by Mr Watt including swearing at him.

22. Mr Coulter met the claimant on 23 January 2020. He did not keep any note of their conversation. The claimant said that he told Mr Coulter that Mr Watt had shouted and sworn at a colleague, Brian Glen, in December 2019, and treated him like a five-year-old child. He alleged that Mr Watt spoke to others inappropriately, and was a bully. Mr Coulter then spoke

to Mr Watt and to Margaret Lamb, Des McCreadie, David Thompson, Grant Carcary and David Smith (employees of the respondent). Mr Watt denied that he had been bullying anyone. The other staff said that they had not been bullied or words to that effect. Mr Coulter did not identify the claimant as the source of the allegation.

23. Mr Coulter informed the claimant by email on 13 February 2020 that he had concluded his investigation. He did not state that he had met others, and had not found evidence to support the allegation. The claimant acknowledged that by email on the same day. In that he complained that the reply mentioned nothing of the serious matters that he had raised, relating to bullying and the incident in December 2019. Mr Coulter replied that no one had provided any evidence, "by yourself or anyone else" to allow him to take it further. He mentioned that he had taken over the site on 6 January 2020 and that earlier matters should have been raised with the previous manager. The claimant responded that day and said that "we will leave it there for now" but asked for the company policy which Mr Coulter stated he would have sent to the claimant on the following day, and did so. That was the Fairness and Respect at Work policy.

24. On 25 July 2020 the claimant emailed Mr Coulter with concerns about a decision to isolate the oven in Mess Room 1, which he thought had been taken by Mr Watt. He referred to his earlier email, gave two examples of what he alleged was bullying by Mr Watt and expressed his "strong concern" over the issue, stating that "what you choose to do with this information is up to you", and added that he was concerned lest Mr Watt "sets me up". Mr Coulter replied on 26 July 2020 to state that the decision about the matters the claimant raised had been taken not by Mr Watt, but by the customer Aviva. He did not directly address the two examples referred to.

25. In an email to Liam Kearney of the respondent on 29 July 2020 the claimant quoted from a policy of the respondent, and attached the emails earlier sent stating that he wondered if Mr Coulter had done anything with the earlier emails and whether he had contacted Aviva about his request. In a response that day, Mr Kearney asked if the claimant was making a

complaint against either of the people mentioned in his earlier email. The claimant replied to state that he was not making a "complaint as such" and referred to matters as a "cause for concern". In a further email dated 31 July 2020, Mr Kearney suggested mediation as the best way forward. There is no record of the claimant accepting that offer of mediation or saying why that was.

26. On 23 December 2020 the claimant and Mr Watt were both on shift together. The shift started at around 7pm and was scheduled to last for 12 hours. At about 11pm the claimant was looking at the computer in the security room as he was bored, looking at the weather report. Mr Watt came in and said that he should not be doing so. The claimant apologised at that time. About 00.41 on 24 December 2020 Mr Watt returned to the security room and told the claimant that he would be removing his access to the internet as he had abused it or words to that effect. The claimant responded by criticising Mr Watt, saying that he was a bully, that he had bullied Mr Thompson, and that he was the only golfer in Scotland with no friends, or words to that effect. Mr Watt responded by moving around a work table to stand very close to the claimant, who was sitting down. The claimant stood up and moved closer to Mr Watt, such that their faces were about an inch apart. He put his hands on Mr Watt's shoulders, and moved him backwards a little. The two of them had an argument. The incident then ended. About three hours later the claimant accessed the CCTV system operated by Aviva. He did so without permission. He found the recording of the incident involving Mr Watt, and replayed it on the monitor whilst at the same time recording it onto his mobile telephone. His doing so was itself recorded on the CCV system.

27. On 24 December 2020 the claimant emailed Mr Coulter with a copy to Mr Kearney. He admitted that late on 23 December 2020 (at about 11pm) he had been "on the computer looking up the weather or something more so out of boredom." The claimant alleged that later on that night, around 00.41 on 24 December 2020 there were then comments made by each of them, that the claimant referred to Mr Watt as a bully, and "gave him a few more home truths", and that Mr Watt had run around the table the claimant was sitting at, and threatened to "do me in". The claimant stated that he

thought that he was about to be punched or headbutted and stood up, claiming that Mr Watt was "right in my face, swearing and calling me all sorts saying to me go on hit me and even offering to fight outside later once we were finished." He said that the CCTV showed who the aggressor was.

28. The claimant did not state that he had himself taken a copy of the CCTV footage some hours after the incident.

29. Mr Kearney asked colleagues if Aviva should be requested for the CCTV footage. It was confirmed that he should, and it was requested under the CCTV Code of Practice procedure, and later obtained.

30. The claimant emailed the respondent on 24 December 2020 to confirm that he would work with Mr Watt that night as Mr Coulter had requested. Mr Coulter had reassured him that Mr Watt had no knowledge of the claimant's complaint.

31. The claimant's complaint was acknowledged on 29 December 2020. On 31 December 2020 Ms Hughes met the claimant. Ms Hughes had viewed the CCTV footage with a number of others that morning (those doing so were neither Mr Gabriel nor Mr Adam to whom reference is made below) and noted that it showed the claimant recording it on his phone. She raised that with him. She noted that in the conversation there had been a reference by the claimant to Mr Watt bullying David Thompson, and that the claimant had said that Mr Watt had no friends. The claimant said that he had thought that Mr Watt was going to headbutt him. Ms Hughes asked him about the taking of a copy of the CCTV on his mobile telephone. The claimant said that he "wanted it for proof." Ms Hughes said that it was "one of the biggest GDPR breaches" and told him to delete it, which the claimant agreed to do. The claimant said that he was not aware of the rules as to GDPR. The claimant was told that he was suspended and that a letter would be sent to him. A written record of the meeting is a reasonable record of it.

32. On 3 January 2021 Ms Amy Hughes of the respondent spoke to David Thompson an employee of the respondent working at the Aviva premises in Perth. A note she kept of the conversation is a reasonably accurate record of it, although it was wrongly dated 2020. She asked him whether he had been subject to bullying behaviours there, and said that he had "not really, its just the usual moans but nothing serious. Nothing that I would feel I need to make a complaint about." He did accept that he had been made to sit on a cushion at work.

33. On 6 January 2021 Mr Watt was also spoken to by Ms Hughes, at which meeting he was told that he was suspended. That day was the first occasion Ms Hughes could speak to Mr Watt.

34. On 14 January 2021 the claimant wrote a letter about his suspension from work and referred to the fact that he was told that he would receive a letter, which he had not. He sent that to Mr Coulter who raised it with Ms Hughes. That day Ms Hughes emailed the claimant to apologise that the letter had not been sent, explained that she thought someone else was doing that, by which she meant someone in HR, and attached it. The letter confirmed that the claimant was suspended, that that was in relation to a serious breach of GDPR, and that suspension was not a disciplinary sanction nor did it predetermine the outcome of the investigation.

35. On 19 January 2021 the respondent wrote to the claimant to require him to attend a disciplinary hearing before Gregg Adam on 27 January 2021. It referred to two allegations being

> "1. Serious breach of GDPR whereby you recorded CCTV footage and stored on an external hard drive for your own personal use on 23 December 2020 whilst working at Aviva Perth
> 2. Failure to comply with policies, procedures, or regulations affecting the safety of others and/or property and/ or equipment in relation to using the Computer for non-work-related issues, specifically watching TV on the Customers Computer whilst at Aviva Perth on 23 December 2020."

36. Attached to the same were the notes of the meeting on 31 December 2020 and "evidence from AIS that show GDPR breach and signed sheets." It was stated that the footage from the CCTV was available to view at the meeting. The attachments included a copy of the CCTV Code of Practice issued by Aviva, and the claimant's acknowledgement sheets for that Code, and an IT User Memo.

37. A further letter was then sent in the same terms but stating that the manager hearing the meeting was to be Richard Gabriel and that it would be on 3 February 2021.

38. The disciplinary meeting took place on 3 February 2021. The claimant attended alone. Mr Gabriel was accompanied by Ms Christine Drum of the respondent to take notes. The notes of that meeting are a reasonably accurate record of it. It was held remotely on Zoom. The claimant asked to record it, but was told that that was not permitted. He did so nevertheless. The claimant referred to his earlier allegations against Mr Watt, and the incident when Mr Watt approached him and said that he was going to "do you in". On the CCTV footage being recorded on his telephone he said "I recorded it for evidence, previously I've been told by James Coulter that you need evidence…..I don't know if he would wipe that evidence I would never do it again now I'm aware of ggpr {sic] I was just trying to get evidence….I've not shared it with anyone…." He was asked if he had deleted if from his phone and said that he had. He was asked if it could end up on social media, and said that he would not do that.

39. After the hearing Mr Gabriel obtained the emails from the claimant sent on 21 January 2020 and 25 July 2020. He also wrote to two supervisors of the claimant and Mr Watt, being Mr Grant Carcary and Mr Kevin Smith, asking them for a statement about "overall conduct".

40. Mr Smith replied by email on 3 February 2021. He stated that the claimant carried out his duties with professionalism and had always been a vigilant officer. He said that the claimant could be very opinionated, leading to "an air of rebelling against what he's been told whether that be from the client

or supervisors." He gave as examples Covid-19 rules and use of personal devices and the internet while on shift not being allowed. He said that it could be wearing for the team to have someone as opinionated.

41. Mr Carcary replied by email on 4 February 2021 stating that in general the claimant was a good officer but "let himself down by aliening [sic] himself from the team with his forthright views. He could be intimidating to other members of the team because of this. He had a very bad attitude towards of those in a higher position than him and his vitriol would cause him to rebel against all instructions given to him." He referred to the claimant using racist terms, and that "his attitude towards covid was also again ignorant and embarrassing."

42. On 3 February 2021 Mr Gabriel also held a disciplinary hearing with Mr Watt.

43. On 8 February 2021 Mr Gabriel wrote by email to the claimant to state that he had found that both allegations had been established, that there had been a "GDPR breach and breaching of the CCTV Code of Practice." He referred to the incident on 23 and 24 December 2020 and stated that the claimant was "equally showing the same amount of confrontation, in fact you actually physically touch and push James in an aggressive manner and it could be argued that you at that point become the aggressor." He held that the probability was that the claimant was watching TV earlier. He concluded that "there was no alternative but to summarily dismiss you". He set out a right of appeal.

44. Mr Gabriel dismissed Mr Watt by letter of 8 February 2021 for breaching Covid-19 guidelines in the incident with the claimant on 24 December 2020 and health and safety issues from the same incident.

45. The claimant appealed by email on 8 February 2021. He also in doing so raised a Grievance against Mr John Scott of Aviva. His email was sent approximately two hours after the email from Mr Gabriel informing him that he had been dismissed.

46. The claimant sought documents by email on 24 February 2021. Mr Gregg Adam who had been appointed to hear the appeal wrote to the claimant to confirm arrangements for that appeal hearing on 2 March 2021. He also replied to the request for documents on 5 March 2021.

47. The appeal hearing took place on 8 March 2021. The claimant attended alone. Mr Adam was accompanied by Jack Linden as a note taker. The notes of that meeting are a reasonably accurate record of it, the claimant having been sent the notes and being given an opportunity to comment on them. The claimant claimed that he had spoken to the Information Commissioner's Office and that they had stated that "because of the low nature of the matter they would not charge anyone", and that it was not gross misconduct which he had confirmed with the ICO, Mr Adam asked who the ICO were, and stated that taking a copy of the CCTV was gross misconduct. The claimant suggested that Mr Adam call the ICO.

48. On 29 March 2021 Mr Adam wrote to the claimant to confirm that his appeal was refused. He dismissed the allegation as to watching TV, but upheld that he had "seriously breached GDPR" when recording CCTV footage on his phone. He confirmed that he agreed with the sanction of dismissal. He took that decision as he believed that the claimant had committed an act of gross misconduct in accessing the CCTV system of Aviva without authority, taking images which showed their premises and another person, being Mr Watt, and recording it to another device then taking that device out of those premises, He considered that that involved a risk of such material being seen by others such that it was a breach of confidentiality, a breach of the CCTV Code of Practice, and breach of procedures set in place as a result of the General Data Protection Regulation regime referred to in that Code of Practice.

49. The claimant did not have any prior disciplinary record with the respondent. He had monthly one to one meetings with supervisors which were on record, and did not contain any substantial criticism of his performance at work.

50. When employed by the respondent the claimant had net earnings of £342.55 per week, he made pension contributions from salary of £14.96 per week, and had employer pension contributions made of £24.07 per week.

51. The claimant found new employment which commenced on 22 February 2021. In the intervening period he received benefits. His pay after commencing that new employment was no less than that with the respondent, save that he could not join the pension scheme until July 2021.

52. The claimant commenced early conciliation on 7 April 2021. The Certificate was issued on 19 May 2021. The present claim was presented to the Tribunal on 14 June 2021.

Submissions for respondent

53. The following is a very basic summary of the submissions made, which were both oral and by written skeleton argument. The respondent argued that the reason for the dismissal was conduct and not in respect of any alleged disclosures. It was argued that there were no disclosures sufficient to amount to qualifying disclosures, as information was not given. The allegations were unspecific, most did not relate to the claimant, and involved matters he had not witnessed. The conduct was related to the admission that the claimant had recorded CCTV footage. Mr Gabriel believed from what the claimant said at the hearing that the claimant believed that his actions were “neither here nor there” and that on the issue they would have to “agree to disagree”, so there was a risk of the claimant doing the same again. The claimant did not read notes or documents, but could not argue that even though he had signed the form for the Code as he had not read it he was not bound by it. Mrs Young argued that citing breach of GDPR, which was the allegation, referred to matters colloquially and it was understood as such. The respondent had been entitled to find that there was a breach of trust in relation to the CCTV footage. The claimant’s argument that he was justified was not right, and his position that Mr Watt might delete it, or that Aviva may, was

unsustainable. Both Mr Gabriel and Mr Adam had been independent managers. Mr Gabriel had considered emails from two supervisors giving their view of the claimant's character, and it was accepted that the claimant should have seen these, but during the Tribunal the claimant did not challenge anything in them on which Mr Gabriel relied. (Mr Gabriel did not refer to the allegation of racist language, which the claimant did challenge).

Submissions for claimant

54. The following again is a basic summary of the submission. He argued that he had made disclosures to Mr Coulter, and criticised Mr Coulter for not taking them seriously and not investigating them as he should. He argued that Mr Coulter wanted to avoid dealing with bullying, and had said that he could not investigate before his own appointment to the role on 6 January 2020. The claimant had responded to him when told that the investigation was concluded. It was clear that he was not happy. The claimant had sent a further email in July 2020 with further details, which were also disclosures. He believed that it was because he had done so that the respondent wanted to remove him. He was being ignored. On 24 December 2020 the incident with Mr Watt happened. He reported it that day, and Mr Watt should have been suspended then as there was an allegation of aggression or violence. Mr Watt was not suspended until 6 January 2021. The claimant was suspended on 31 December 2020, but no suspension letter sent, and the duty of care to him was breached. Neither Mr Gabriel nor Mr Adam were independent managers. At the disciplinary hearing the claimant mentioned the treatment of Mr Glen, which Mr Carcary had explained in his evidence. That showed that it was likely that the claimant had told Mr Coulter this at their meeting about a month after the incident. A proper investigation should have taken place. On the issue of the GDPR breach he had never had it explained to him why any breach was serious. He had had no training on it. No business or person had been impacted in any way as a result of his actions. The claimant had wanted to preserve evidence. Procedurally the process was a shambles. The allegation about TV should have been dropped. The records of his 1:1 meetings shows that it was unlikely that there would be

any repeat of the issue. Mr Adam had a conflict of interest, as he had been aware of the July 2020 email at the time. A warning should have been issued. Dismissal was not fair or just. The claimant was offered an opportunity to read and comment on by later email the written submission of the respondent which had been sent to him by Mrs Young, but said that he did not wish to do so. After the conclusion of the hearing, however, he sent in a detailed email with written submissions of his own. The Tribunal considered that in the circumstances it was in the interests of justice to receive and consider those submissions, and did so.

Law

(i) The reason for dismissal

55. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"), which provides as follows:

Section 98 of the Act provides, so far as material for this case, as follows:

> **"98 General**
>
> (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—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

56. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the reason for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

57. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Potentially fair reasons include conduct and some other substantial reason.

(ii) Fairness

58. The fairness of a dismissal where the reason is potentially fair is determined under sub-section (4) of that section, which provides as follows:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."……..

59. The terms of sub-section (4) were examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

60. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?

(ii) Was that belief reasonable?

(iii) Was it based on a reasonable investigation?

61. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

"in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

62. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***.

63. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

64. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497,*** that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase."

65. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to

> the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

66. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

67. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

68. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

> "4. Employers should carry out any necessary investigations to establish the facts of the case…..
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence….

69. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428.*** The question is whether it was

reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13.*** If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. But a finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

(iii) Appeal

70. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that employers must act fairly in relation to the whole of the dismissal procedures***.*** The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** being a conduct dismissal case, in which it was held that a fairly heard and conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall.

(iv) Protected disclosures

71. The relevant section of the Employment Rights Act 1996 are as follows:

> **"43A Meaning of 'protected disclosure'.**
> In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Section 43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . . –

(a) to his employer…..

Section 103A Protected disclosures

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for his dismissal is that the employee made a protected disclosure."

72. The onus remains on the respondent to prove the reason or principal reason for dismissal, where the claimant has the service for an unfair dismissal claim, ***Kuzel v Roche Products Ltd [2008] IRLR 530***.

73. The words "in the public interest" in s 43B(1) were introduced by amendment with effect from June 2013. In ***Chesterton Global Ltd v Nurmohamed [2018] ICR 731,*** the Court of Appeal held that the question for the tribunal where that provision applied was whether the worker believed, at the time he was making it, that the disclosure was in the public interest; whether, if so, that belief was reasonable; and that, while the worker must have a genuine and reasonable belief that a disclosure is in the public interest, this does not have to be his or her predominant motivation in making it. Lord Justice Underhill said this on the issue of what was meant by "in the public interest"

> "Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression."

74. The issue of what amounts to a "disclosure of information", was addressed in ***Kilraine v Wandsworth London Borough Council [2018] ICR 1850***, in which it was confirmed that there was no rigid distinction between information and allegations, and that the full context required to be considered. What was necessary was the disclosure of sufficient information. That issue was also addressed in ***Simpson v Cantor Fitzgerald [2021] IRLR 238*** at the Court of Appeal.

75. The question of what was the reason or principal reason for dismissal in such a claim was addressed in ***Eiger Securities LLP v Korshunova 2017 IRLR 115.*** The test is not the same as for detriment under section 47B, or in discrimination law, but is to apply the statutory language and ascertain the reason or principal reason for the dismissal. That was later confirmed in ***Secure Care UK Ltd v Mott EA- 2019-000977.*** It was held in ***Beatt v Croydon Health Services NHS*** **Trust** ***[2017] IRLR 748***, that although establishing the reason requires the tribunal to consider the employer's state of mind when dismissing, the question whether the disclosures were or were not protected is an objective one, to be determined solely by the tribunal.

76. The law in this area was reviewed by the EAT in ***Watson v Hilary Meredith Solicitors UKEAT/0090/20,*** and in ***Dobbie v Felton [2021] IRLR 679.*** A Tribunal must be careful that arguments as to the reason or principal reason for dismissal being other than for making any protected disclosures are not abused. But there may be a distinction between the making of a disclosure, and how the employee handled matters, as demonstrated in ***Bolton School v Evans [2007] IRLR 140*****,** in which an IT teacher, whose initial complaint to the school about computer insecurity had been rejected, "hacked" into the school's computer system to try and demonstrate the insecurity and was disciplined, leading to him leaving and claiming constructive and unfair dismissal under section 103A. The EAT rejected his claim because he had been disciplined for the specific misconduct of the hacking, not the act of whistleblowing. The Court of Appeal refused his appeal, partly adopting the EAT's reasoning but also holding that neither the physical act of the hacking nor telling the headmaster about it afterwards was a "disclosure".

77. The Tribunal must also be alive to the possibility of a procedure being misused so as to cause a dismissal by someone not in possession of the full facts because of manipulation by others who were: ***Royal Mail Group v Jhuti [2020] IRLR 129***

(v) Remedy

78. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116 as follows:

> "(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

79. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "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". The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Awards are calculated initially on the basis of net earnings, but if the award exceeds £30,000 may require to be grossed up to account for the incidence of tax. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

80. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.*** In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would

have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed. A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).*** There are limits to the compensatory award under section 124, which are applied after any appropriate adjustments and grossing up of an award in relation to tax – ***Hardie Grant London Ltd v Aspden UKEAT/0242/11.***

Observations on the evidence

81. The Tribunal's assessment of each of the witnesses who gave oral evidence is that all sought to do so honestly**. Ms Hughes** was clearly unwell, and gave evidence from her bed. The Tribunal was grateful for her doing so in such circumstances. Her evidence was generally considered to be reliable. She stated that although her name appears on the letters calling the claimant to the disciplinary hearing she had not in fact authored them, but she could not recall who had done so.

82. **Mr Coulter** gave evidence as to the matters raised by the claimant in January and July 2020. There was a conflict with the claimant as to what the latter told him at a meeting on 23 January 2020. Mr Coulter's initial position was in effect that nothing more was said beyond the email, but we did not find that likely to have been the case. On 13 January 2020 the claimant wrote to him and referred to what he had told him being an event in December 2019, which appeared to the Tribunal more likely to be correct. The claimant was not someone who was liable to pass up an opportunity to complain about Mr Watt, and to provide further detail.

83. We did however accept Mr Coulter's evidence that he had spoken to staff in Perth, and that none told him anything that supported the claim that Mr Watt had bullied them or anyone else. Although Mr Carcary did not recall such a meeting his evidence was of not recalling it rather than that it did not happen, and it appeared to us that Mr Coulter was likely to have done so given the manner in which he gave evidence. It is nevertheless

very surprising that Mr Coulter did not note down anything said by the claimant or those staff when such an allegation was made. What he asked the staff concerned is not clear, nor is it clear what they said in reply save a general position that there had been no bullying. We did conclude that it was likely that Mr Watt had spoken to Mr Glen in about December 2019 as the claimant suggested, although the claimant had not been a witness to that, as it was spoken to by Mr Carcary whose evidence on that point was accepted. It was some support for the claimant's claims as to behaviour by Mr Watt that was not appropriate. Whether or not it was bullying depends on the precise circumstances, and the perception of the person involved. Mr Thompson, for example, was spoken to by Ms Hughes in January 2021, and although he denied that he had been bullied did say that he was required to sit on a cushion which others were not. That may or may not have been an inappropriate requirement by Mr Watt, but it is significant that Mr Thompson did not say that it was. The claimant's views appear not therefore to have been shared by others.

84. **Mr Gabriel** gave clear, candid and convincing evidence. We accepted that he was credible and reliable in what he said. There are some issues in relation to the decision made as we shall come to, but we accepted that he had been independent, considered matters himself, sought to find out about the events and background in a manner that supported those views as to his independence, and came to a decision on valid grounds.

85. **Mr Adam** also gave clear, candid and convincing evidence. We also accepted that he was credible and reliable in what he said. Similar issues on some matters also arise.

86. The **claimant** clearly feels very strongly about the series of events that happened, had a very strong dislike of Mr Watt, and believed that there had been bullying of him and others. He was however someone who did not appear to listen to instructions well. On very many occasions he sought to make points rather than ask questions in cross examination despite being told that that was not appropriate. He on many occasions interrupted witnesses, even after being told that that was not appropriate. That tended to support the evidence Mr Gabriel gave of a concern of the risk of the

claimant acting in breach of the rules again if not dismissed, which was a view he formed from the disciplinary hearing he held and the claimant's comments at that hearing.

87. In his own evidence he did not always characterise matters as he had at the time. He had not made a complaint in July 2020, as he said specifically in an email to Mr Kearney that he did not make "a complaint as such", but proceeded as if he had, and tried to argue in his evidence that he had made a complaint which should have been investigated even though his email was to the contrary. He had on the face of his own email accepted that there was no further action to be taken in January 2020, although he did not know the extent of Mr Coulter's investigation as that was kept from him. But he did not seek to raise that further at that time for example with HR, or to seek to appeal Mr Coulter's decision not to take action, for example.

88. In so far as the incident on 24 December 2020 is concerned, he accepted that he had recorded CCTV footage as was alleged. His position was that that was justified given the need for evidence, and that he did not know about GDPR or related rules, including the CCTV Code of Practice, such that the breach he accepted took place was minor. The Tribunal did not accept that position. He had signed a form to acknowledge the CCTV policy. Whilst it did not state in terms that he had read it, as another form did, it is clearly a form to acknowledge that there is such a policy. The Tribunal considered it likely that he had seen it and was, or clearly ought to have been, aware of its contents. In any event it is, in the Tribunal's assessment, obvious that a CCTV system in a customer set of premises is there for particular purposes, and has data now controlled very carefully indeed by a regime that has become known colloquially as GDPR. The Tribunal did not accept the claimant's professed ignorance. Whilst there were procedural issues as we shall come to, the Tribunal preferred the respondent's evidence that the claimant did know that there was a policy, that it was important to follow it, and that recording CCTV in such circumstances, to a private phone taken outwith the premises, was a serious breach of confidentiality and of the policy.

89. Mr **Carcary** gave brief evidence, and we accepted that he was both credible and reliable. He stood by the email he sent with his views of the claimant. He explained the incident involving Mr Glen and Mr Watt, which he had witnessed.

Discussion

90. We noted firstly that no issue was taken as to jurisdiction, and that the Claim had been commenced timeously. We shall deal with the issues in the order set out above

What was the reason, or principal reason, for the claimant's dismissal?

91. Mr Gabriel spoke to his belief that the claimant had committed an act of gross misconduct, principally by his recording of the CCTV footage of the incident with Mr Watt onto his mobile telephone, but also by using the customer's computer to watch TV, which was not permitted. We were satisfied that his evidence was credible and reliable on that matter, and that those were the sole and genuine reasons for the dismissal. We did not consider that they were solely or principally because the claimant had made any disclosures as the claimant alleged, and as is addressed further below. Mr Gabriel was clear in his evidence on that, and it was supported by the timing of the process, held after the 24 December 2020 incident, and not after either of the emails in January and July 2020, the claimant not disputing that he had breached the provisions but arguing that he did not know of them and that the breach was minor, as was discussed at the disciplinary hearing. The claimant did refer to the earlier emails, but appeared to us to have done so to set the context in which he had acted with Mr Watt. Mr Gabriel's position was fortified by the evidence of Mr Adam, who came independently to the same conclusion on the GDPR breach allegation, but not for the watching TV allegation. So far as the watching TV allegation was concerned Mr Gabriel came to that view from the evidence as a whole, which led him to the belief that the claimant had done so, as the claimant at times ignored instruction if he did not agree with it. There was evidence, including the claimant's own comments in the disciplinary hearing, but also his email messages, for example in the email

dated 25 July 2020 he referred to bracelets that required to be worn to confirm that staff had been temperature checked, which he said there was no point to do on night shift and that Mr Watt had been "determined to get me to comply". That is indicative of the claimant having not followed a Covid safety measure. In short, there was supporting evidence for Mr Gabriel to have come to his decision as to conduct, and we were easily satisfied that the respondent had discharged the onus on it. Conduct is a potentially fair reason for dismissal.

If potentially fair under section 98(2) of the Employment Rights Act 1996 ("the 1996 Act") was it fair or unfair under section 98(4) of that Act?

92. This issue caused the Tribunal greater concern. The allegation made against the claimant was not breach of the CCTV Code of Practice per se, but "breach of GDPR". What was meant by GDPR was not entirely clear initially. There is an EU Directive titled the General Data Protection Regulation, 2016/679/EU, which has been brought into effect in the UK by the Data Protection Act 2018. That was in force as at 24 December 2020. From 1 January 2021 amending regulations largely continued its effect within UK law after Brexit. Although what precisely was meant by those initials in the letter calling the claimant to the disciplinary hearing was not clear from the letter, evidence was heard as to this, and the Tribunal concluded that it was meant to be, and understood to be, a reference to the regime to control data including the CCTV images of the incident on 24 December 2020 under that Act, and was a form of shorthand for that. At times the respondent treated GDPR and the Code of Practice as one and the same. They are related, as the Code is the procedure at least partly by which Aviva seeks to comply with its obligations under the GDPR regime, but they are not identical.

93. What was also relevant for our purposes was that that the Code was not considered in any detail at all in the disciplinary hearing or appeal. That was also contrary to best practice, as one would normally expect the terms of the policy in such a situation to be gone through. Against that, however, is that the claimant did not challenge that there was a breach of GDPR, he did not raise such an issue in cross-examination and his arguments

came down to three key aspects, firstly that he did not know the terms of the GDPR rules in general or CCTV Code of Practice specifically, secondly that the breach was not a serious matter which amounted to gross misconduct, and thirdly that he was justified in doing as he did as he was seeking to preserve evidence of what Mr Watt had done. He argued that he was the victim of threats of assault, part of bullying by Mr Watt about which he had complained earlier.

94. Looking at all the evidence in the round whilst what the respondent did was far from best practice, following best practice is not the test. We require to assess matters against the band of reasonable responses. We cannot substitute our decision on what to do for that of the respondent, provided that they acted as a reasonable employer could act. There was no dispute that the claimant had accessed the CCTV footage and recorded it onto his phone as alleged. The issues were whether or not it was a breach of GDPR in the sense that it was understood (being a breach of the rules related to processing data and especially the Code of Practice), was gross misconduct, and merited dismissal. We were impressed by both Mr Gabriel and Mr Adam as witnesses. They each looked at matters independently. The suggestion that they just did what Aviva wanted was patently untrue. They reached their own views. They were independent, and we rejected the claimant's arguments that they were not. Mr Gabriel had recently become involved in the North area including Scotland as a colleague had left the business suddenly and he was providing temporary cover. He did not know the claimant, Mr Watt, or others such as Mr Scott, at that time. Mr Adam seeing emails in July 2020 is not a basis to conclude that he was not independent. He was Mr Coulter's line manager, but not so involved in matters as to lead to real questions of his impartiality. We accepted that he had not viewed the CCTV footage with Ms Hughes and others on 31 December 2020 as he was off work at that stage because his wife was ill.

95. Mr Gabriel and Mr Adam did not accept the claimant's justification for recording the footage as adequate nor did they accept his argument that he did not know that doing as he did was a breach of GDPR. Whilst the claimant thought that he was justified in doing as he did, that is not the

focus. The focus is on what the respondent thought, and whether a reasonable employer could have done so. We concluded that that test was met. We also concluded that the respondent had a reasonable basis for the belief that the claimant was aware of the Code of Practice, as he had signed an acknowledgement sheet for it. He worked with CCTV as part of his daily duties. He had over three years' experience with the respondent. At the investigation meeting when asked if he wanted to add anything he said, "I was simply just trying to protect myself and now I feel very stupid." It is also well known in general terms that data must be protected, and that there are procedures in place to allow it to be processed. Someone in the claimant's position as a security officer of long experience especially would, we conclude, have known that. His argument that staff just sign documents without reading them was not accepted by the respondent, and we did not consider it likely to be correct for those working in security.

96. Separately the claimant argued that no one had explained why the incident was a serious breach. He thought that as he had done so for a good reason, and that no one in fact was prejudiced or harmed, that it was minor. That ignores, however, the context. This was a customer's CCTV. It had substantial control mechanisms in place. The claimant knew that they existed at least to some extent, as he had signed the acknowledgement form. The claimant breached them. That of itself is, or at least could be viewed by a reasonable employer as being, a serious matter. It was regarded by the respondent as a matter of trust. Trust and confidence between employer and employee lies at the heart of the employment relationship. We formed the impression that the claimant did not have any real appreciation of the significance of control of data at any stage, and certainly did not express such an understanding at the disciplinary or appeal hearings. In the former he did use phrases such as that breaching the rules was neither here nor there, and he did give the impression that he did not follow rules he did not agree with. He also referred to the need to have evidence if he reported Mr Watt to the police. Whilst in evidence he claimed that that was not something he intended to do and was an empty threat, those were the words he used. Mr Gabriel was entitled to have regard to them, and to have a concern that there was a risk of the footage being used by the claimant in some way other than

purely a back up to the CCTV evidence to show the respondent, as he claimed. Mr Gabriel was entitled to have the concern that he did from the claimant's comments, and not to restrict his concerns to the footage potentially being shown to the police but more widely, given those comments and the other concerns that the claimant did not follow instructions or rules he did not agree with. There were suggestions for example of the claimant not following rules in his reference in documentation to how he responded to using Covid bracelets, which he appeared to consider were rules that did not apply to him because he worked on night shift, or the use of equipment for non-work-related matters. He said in his 24 December 2020 email that he had accessed the weather report not because of work but out of "boredom". That was contrary to the IT User Memo he had signed for, as it was not work-related, though he tried to argue that it was in his evidence before us and contradicted his own words in that email. These facts all supported the conclusion that Mr Gabriel did have a basis to conclude that there was a risk if the claimant were not dismissed.

97. Mr Gabriel had not taken an immediate decision as he wished to conduct further enquiries. That is indicative of someone acting independently. He sought the views of supervisors as he did not know either the claimant or Mr Watt. He accepted that he should have given the claimant an opportunity to comment on them, but importantly those views were not the only reason for his decision, rather that was made primarily on the basis of what the claimant told him at the hearing. What he took from the supervisors' comments was that they confirmed the views that he had formed of the claimant, particularly that he did not tend to follow instructions or procedures if he did not agree with them. In forming that view Mr Gabriel did not include the allegation of racist language made in Mr Carcary's email. For the remainder, when the claimant was asked about them in cross examination, he did not seriously dispute what was said, and when Mr Carcary gave his evidence the claimant did not suggest that the comments in his email to Mr Gabriel were wrong save for the reference to racist language (which in fact Mr Carcary stood by).

98. Mr Gabriel also obtained the earlier emails, and spoke to Mr Coulter who told him that mediation had been offered and not accepted. The claimant considered that mediation was not appropriate as there were wider issues than just Mr Watt and him, but there was nothing improper in suggesting that, when the claimant himself was not making a formal complaint. There is no record of the claimant replying to that suggestion by email, or making any other proposal himself. He did not raise a grievance, nor did he say that he was making a complaint.

99. Mr Gabriel noted that the claimant did not have any prior disciplinary record. That background was part of his attempt to understand the context of what had occurred. Whilst not sending the emails from the supervisors to the claimant for comment was not best practice, doing so was not essential for a fair process given all the circumstances, but particularly so as Mr Gabriel placed reliance on the claimant's own comments in reaching his conclusion that there was a risk of the claimant repeating what had happened, or something similar to that.

100. Mr Gabriel also considered the claimant's suggestion that he was a victim, part of his argument in mitigation, not to be entirely correct. His conclusion was that the claimant had initially been approached by Mr Watt when the claimant was sitting down, but that the claimant had then stood up, placed his hands on Mr Watt, moved his head towards Mr Watt's such that he was about an inch away, and did so in what appeared to him to be an aggressive manner at least to an extent. Mr Gabriel referred to training the respondent's staff had on de-escalating matters, and that he himself would not have stood up or moved towards Mr Watt, and would not have placed his hands on him, in such circumstances. The Tribunal accepted that that was Mr Gabriel's genuine belief.

101. The claimant was not alleged to have been aggressive but he had himself raised the issue of what had happened in mitigation, and Mr Gabriel was entitled to form the view he did. It was supported by our own assessment of the CCTV evidence, limited though that was in the absence of a clear stream of images and with no audio. It appeared to us that the claimant was less than entirely the victim as he claimed, and that earlier he had

spoken to Mr Watt in a manner that aggravated matters, for example by what the claimant called giving him some “home truths”. Those included an allegation that Mr Watt was the only golfer in Scotland who did not have friends, as he played with his son or alone. The claimant alleged that the comments he had made were all true. That comment in relation to golfers was obviously untrue, as many do as Mr Watt did in playing golf alone or with their son, as the claimant latterly accepted, and he accepted also that he could not possibly know all the golfers in Scotland. It was a somewhat puerile allegation and was, we concluded, said to provoke Mr Watt. Mr Gabriel concluded that the overall circumstances were not simply of the claimant being the victim of a threatened assault, and that they did not justify the act of recording CCTV onto a private telephone, and we consider that that conclusion was within the range of reasonable responses. That meant that Mr Gabriel was entitled to reject the claimant’s argument that he was justified in what he did as he was solely a victim. It may not have been quite the 50/50 division of fault that Mr Gabriel spoke to, but we remind ourselves that we cannot substitute our view for that of the respondent, provided that the respondent’s view falls within the range of reasonable responses. We considered that it was.

102. We therefore concluded that the respondent had a belief that the claimant was guilty of gross misconduct, that that was a reasonable belief, and that it had been formed on the basis of a reasonable investigation. We took into account in that that the respondent is a very large employer with substantial resources, and the terms of the ACAS Code of Practice, in that regard.

103. We also consider that it was sufficiently serious a matter to warrant being considered gross misconduct, with summary dismissal also within the range of reasonable responses. It was for the respondent to assess the severity of the action, and its potential risks for them and their customer, provided that they did so as a reasonable employer could. Their view was that the claimant was not at all justified in taking his own copy of the CCTV footage. They were entitled to come to that view. It is supported by basic principles applicable to the processing of data, the most fundamental of which is that it be necessary. It was not necessary for the claimant to have

taken his own private copy. There was a closed CCTV system regulated and managed by Aviva. Even if the claimant did not know where the images were stored, he would or should have known that Mr Watt could not access them to delete them, and even if he had there would be a record of his doing so. The claimant's position on that issue is not we concluded a reasonable one, and the respondent was entirely justified in rejecting it.

104. Whilst the reference in the hearing to the very maximum penalty for breaching GDPR provisions in the disciplinary hearing, which Mr Gabriel explained was 2% of global turnover, that was not realistic in the circumstances, and whilst the claimant said that he had spoken to the Information Commissioner's Office (ICO) and was told that this was in effect a more minor matter, those are not determinative matters by any means. The disciplinary outcome is not a matter for the ICO, but for the respondent. The respondent was entitled to take the view it did given the circumstances. Protecting data is in general a serious issue, both for reasons deriving from the GDPR but also more widely. It was not the respondent's data, but that of their customer, a very major insurer. The claimant's suggestion that he was concerned Mr Watt could access the CCTV to delete it was not credible. The images were not on site, but elsewhere and under strict controls, as would be expected in such circumstances. The claimant may not have known where the images were stored but would very likely have known that someone in Mr Watt's position could not access them to do so. Even if that had been done, it would have been obvious as the recordings are time-stamped. The claimant did not refer to his own recording of the images in the email he sent on 24 December 2020. If he did not know about the procedure for obtaining CCTV images he could have accessed it at work that day, as it was a work-related issue. He would have accessed the document on the internal system where it was stored. His email dated 24 December 2020 triggered a process whereby the CCTV images were recovered properly, in accordance with the appropriate process under the Code of Practice issued by Aviva. That process should have been allowed to take place. In short, there was no need, or justification, for the claimant doing what he did, and the respondent was entitled to form such an opinion.

105. Finally in this respect it appeared to the Tribunal from the material that was before us that neither the claimant nor Mr Watt were without fault for the way that the incident on 24 December 2020 arose. Each behaved in a manner that one would not expect from two mature people with long experience in the security industry. Both were dismissed, for different reasons. The claimant in his own evidence said that "I had hung myself" in his act of recording the footage. That was not consistent with his other argument that he had been entirely justified in doing so. But he admitted, before Mr Gabriel in particular, to what was in effect a general disdain for following instructions or procedures if he did not agree with them. He showed a complete lack of contrition, or remorse, or understanding, in relation to the duties that arose for the recording and management of data, including CCTV footage. That all brought his dismissal within the range of conduct of a reasonable employer, in our view.

106. We considered the procedure that was followed. As stated in respects it was not best practice. It was at the lower end of the scale of what a reasonable employer could do. The allegation made as to breach of GDPR was vague. What the respondent meant by GDPR was in essence the terms of the Code of Practice. The respondent provided it to the claimant with the documents sent in advance of the disciplinary hearing. It was not referred to in detail during the hearing by either side. We considered that it was clear from the letter of decision that it was a matter referred to as the basis for breach of GDPR. At no stage did he challenge that there was a breach of GDPR. In his appeal hearing he did not ask about or raise the precise terms of the Code in any way. We concluded that he did not do so as he was aware that he had breached its terms, and his argument was in reality that the breach he believed was not a serious one. In all the circumstances we concluded that Mr Adam considered matters independently, and in a manner such that the issue over the fairness of the disciplinary hearing was remedied in the appeal. The appeal was successful in relation to the second allegation of watching TV. That issue therefore fell away. What was left was sufficiently serious to warrant summary dismissal in Mr Adam's view. He was entitled to have that view

which we held to be within the band of reasonable responses. The dismissal was fair overall in light of that.

107. The claimant argued that there was a conflict of interest for Mr Gabriel in dealing with both the hearing for the claimant, and for Mr Watt. We did not accept that. There was no conflict of interest as such. The allegations were different. There was no unfairness in acting as Mr Gabriel did, which was within the band of reasonable responses. The claimant also alleged that neither Mr Gabriel nor Mr Adam were independent, but we did not agree. Mr Gabriel had no prior involvement in these issues to any extent, and his contact with the customer was all in a different region of the country. Mr Adam knew of the July 2020 matter, but that was not a complaint as we discussed above, and was not a basis to state that he was not independent. He did share an office with Mr Coulter but we did not consider that that affected his independence either. It was not Mr Coulter's decision to dismiss.

108. The claimant also complained that his complaint in January 2020 was not adequately dealt with. There is some truth in that, to an extent. It is not clear why Mr Coulter took no notes of his meeting with the claimant or the others he spoke to. He said that he sought to preserve the claimant's confidentiality, but the allegation made was of bullying by Mr Watt of the claimant and other staff. One would expect such an allegation to be investigated and a record of that maintained. It was not. There was a dispute over what the claimant said at the meeting on 23 January 2020, which would have been resolved had notes been kept. The claimant was not properly informed of the outcome – he was told that the investigation had concluded but no more than that, nor what the investigation was. In fact there had been an investigation, but the claimant had the perspective that nothing had been done, and one can see why he thought that. His own emails however did say that he would leave the matter at that stage. He did not raise any grievance formally, or an appeal. In July he raised firstly an issue over the oven, and later on two incidents for two other staff, but did not say that that was a complaint. Mr Coulter did not seem to appreciate that the claimant added to his January email, but the method

of raising the issue was informal. The claimant cannot be surprised if it is treated on the same basis.

109. The claimant further complained that he had been forced to work with Mr Watt on a shift later on 24 December 2020. We did not accept that. The email from the claimant supports Mr Coulter's evidence that he asked the claimant to work that shift, and that the claimant could have refused, but agreed to do so. There may have been some element of persuasion, but not such as to be inappropriate or coercive. The claimant did not give the impression of someone easily persuaded to act against his wishes.

110. There was, we concluded, overall a fair procedure. There was no breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. We accordingly concluded that the dismissal was not unfair under section 98(4) of the 1996 Act.

Did the claimant make protected disclosures to the respondent, and if so was that the sole or principal reason for his dismissal under section 103A of the 1996 Act?

111. We did not find that the claimant had made protected disclosures as although they were made to his employer they were not qualifying disclosures. That was because firstly insufficient detail was given to amount to the disclosure of information within the terms of section 43B, and secondly that the claimant did not have a reasonable belief that they were in the public interest. Whilst he did believe that, his belief was not reasonable in all the circumstances. The issues he raised in 2020 both in January and July were of what he termed bullying, but involving few individuals, at a level not specified but not being particularly substantial, with no apparent support from others including those alleged to have been bullied, who told Mr Coulter that in about January and February 2020. Mr Thompson also told Ms Hughes that in January 2021. In July 2020 the claimant had said specifically that it was "not a complaint as such", and used the term "cause for concern". That these were largely not allegations that the claimant himself was being bullied were relevant. He did not set out his allegations clearly, nor did he seek details from those he said had

been bullied or who had witnessed that. His July 2020 email initially raised a matter of restricted use of a mess room with an oven, which he claimed was a decision taken by Mr Watt, but he was wrong in that, it was a decision by Aviva. These matters raised by the claimant appeared to the Tribunal to be matters essentially of a private interest, principally involving the claimant and Mr Watt, who he disliked intensely, and not the kind of wider public interest referred to in authority. The claimant had a tendency to exaggerate matters to try to elevate it to bullying, as we noted. His written submissions did not show an understanding of the tests in law in this regard. He had also not shown that understanding when giving evidence. That was understandable in a sense as he is not legally qualified, but what he thought was whistleblowing was akin to a complaint that someone had done something wrong, which is not the statutory test.

112. Even if we had found that it was a protected disclosure we did not consider that the reason or principal reason for dismissal was the making of that disclosure. There was a long gap in time between the initial matter in January 2020 and the dismissal on 8 February 2021. The issue in July 2020 was not raised as a formal complaint, but there was in any event a long gap until the suspension which followed on the events on 24 December 2020. What did commence the investigation that led to the dismissal was the discovery on a CCTV recording of the 24 December 2020 incident (that the claimant had complained about by email) that he had himself recorded that footage. He was suspended on that basis on the same day that that footage had been viewed showing him recording CCTV footage on his mobile telephone. That was the primary allegation made against him. He admitted to doing so.

113. The Tribunal was entirely satisfied that that belief in his misconduct in taking such an unauthorised copy of CCTV footage was the principal reason for the dismissal. There was no hidden agenda or similar manoeuvrings either by the respondent, or by pressure on them by their customer Aviva, for which there was any reliable evidence. It was denied by both Mr Gabriel and Mr Adam entirely convincingly. Mr Adam considered matters independently, and did not agree about the issue of watching TV. He did however agree on the unauthorised recording issue,

which is why he refused the appeal. Both Mr Gabriel and Mr Adam were firm and clear in their evidence that the breach was a serious one, and as explained above they were entitled to that belief. It was genuinely held. That was the reason for the dismissal, not to any extent concern over making protected disclosures.

If any claim is successful, to what remedy is the claimant entitled?

114. This issue does not now arise.

Conclusion

115. In light of the findings made above, the Tribunal dismisses the Claim.

116. In doing so it does not however wish to give the impression that it considers that the respondent handled these matters well. When an allegation of bullying or similar behaviours is made to an organisation of the size of the respondent, the Tribunal would expect that it would involve its HR department, and that when an investigation was undertaken written records of that would be taken. The Tribunal would also expect that the outcome of that investigation be communicated to the complainer, and consideration be given to how to address the position in light of the outcome of that investigation. These steps were not taken. Secondly, the manner in which the claimant's alleged gross misconduct was investigated was not best practice. He did not receive a letter confirming his suspension as he should have done, although the respondent did apologise for that when their error was brought to their attention by the claimant. Thirdly there was not a clear consideration of what the allegation itself was, there was a form of conflation of GDPR issues with those of the Code of Practice, and the documentation sent to the claimant was not clearly articulated such that Ms Hughes did not recall what it was accurately, and that only became clear on the morning of the final day of the hearing when her email and attachments was accepted into evidence. Fourthly the acknowledgement form for the CCTV Code of Practice did not have the wording as to having seen and understood that Code. Fifthly the disciplinary hearing did not address the terms of the CCTV Code of

Practice. Not all of the written documentation considered as part of the process was shown to the claimant for comment during the hearing, as referred to above. These issues were matters that the Tribunal considered carefully, and took the case to the low end of the band of reasonable responses, but for the reasons given above we concluded that the respondent remained within it.

117. We should also state that the claimant appeared at the hearing entirely to reject the possibility that his recording of the CCTV footage onto his mobile phone was in any sense wrong. But it clearly and obviously was, by virtue of data protection legislation, the terms of the Code of Practice he had acknowledged in writing, common sense for someone with his long service as a security officer, and as the footage was the property of Aviva not of him. It seemed to us that he was so determined to have evidence with which to challenge Mr Watt, and seek his dismissal, that such a possibility was not one he was prepared to countenance in his evidence. For the reasons we give above however we consider that he was aware that doing so was not permitted, otherwise he could have referred to that footage, or attached it, to his 24 December 2020 email. That he did not is we consider indicative of his knowledge that taking such footage was not permitted.

118. There was, we considered, likely to have been at least some truth in his suggestion of inappropriate behaviour by Mr Watt, particularly in relation to the incident involving Mr Glen which Mr Carcary witnessed and spoke to, which we accepted and also in relation to the incident on 24 December 2020 itself. A full investigation into the allegations in January 2020, conducted well and recorded in writing, may have found evidence of inappropriate behaviour of some kind, and it may possibly have amounted to what could be termed bullying. But that must be seen in the context firstly that Mr Glen did not formally report the matter, and was not a witness before us, secondly that Mr Carcary did not formally report the matter either, thirdly that Mr Coulter asked Mr Thompson, Mr Glen and others about bullying in general and it was denied by all of them, fourthly that although the claimant made allegations of bullying involving others including Mr Thompson and Ms Lamb it was generally from what he had

been told by others not seen himself, and did not involve himself mostly, fifthly that Mr Thompson denied being bullied to Ms Hughes, and finally that the claimant's belief that Mr Thompson had been bullied is far from sufficient. It is not clear that requiring someone to sit on a cushion if others made complaints in relation to hygiene is in fact bullying, particularly if the alleged victim does not believe it to be so, and said that when asked by Ms Hughes. The claimant alleged that in July 2020 that Mr Watt had bullied him by preventing access to the mess room, but that decision was not taken by Mr Watt at all. That led the Tribunal to the view that the claimant had a tendency to exaggerate matters in his attempt to have material with which to seek Mr Watt's removal. The claimant also alleged two further matters that occurred involving others in the same email, but although there was no evidence that they were investigated that was most likely as the claimant himself said that he was not making a complaint. Mr Kearney, to whom he referred matters, had left the employment of the respondent and did not give evidence. Mr Watt did not give evidence. It cannot be concluded on the evidence we heard that there had been bullying as the claimant alleged, at least to the extent that he alleged. An allegation of bullying raises nevertheless a serious matter, and we would expect it to be fully and effectively investigated in the manner we refer to above.

Employment Judge:	**A Kemp**
Date of Judgment:	**13 December 2021**
Date sent to parties:	**13 December 2021**