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EMPLOYMENT TRIBUNALS

Claimant: **Mr E Addai**

Respondent: **TC Facilities Management Ltd**

Heard at: **East London Hearing Centre**

On: **17 August 2017**

Before: **Employment Judge Russell (sitting alone)**

Representation
Claimant: **Mr C Payne (Counsel)**
Respondent: **Mr G Underwood (Consultant)**

JUDGMENT

The judgment of the Employment Tribunal is that the claims of unfair and wrongful dismissal fail and are dismissed.

REASONS

1 By a claim form presented on 13 January 2017, the Claimant brings complaints of unfair and wrongful dismissal from his job as Area Manager with the Respondent. Dismissal is admitted and it is agreed that the reason for dismissal was conduct. The question is whether there was a reasonable belief based upon reasonable investigation and whether dismissal was fair in all the circumstances of the case, particularly having regard to the sanction, procedure adopted and consistency.

2 I heard evidence from the Claimant on his own behalf and for the Respondent I heard evidence from Mr Lloyd-Jones. I was provided with a statement signed by Ms Jen Welland. Ms Welland did not attend as she was taken ill. I admitted her statement and attached appropriate weight in the circumstances.

Findings of Fact

3 The Respondent is a Facilities Management contractor providing cleaning services to corporate clients, including Tesco.

4 The Claimant was employed by the Respondent from 10 December 2010 initially as an in-store cleaning manager and then promoted on 14 March 2016 to Area Manager. As Area Manager, the Claimant was responsible for managing in-store cleaners for approximately 50-60 Tesco sites, principally High Wycombe, Milton Keynes, Stevenage and Hatfield. As an in-store manager, the Claimant was provided with a tablet providing access to the intranet in which all policies are available.

5 The Respondent is a large employer with approximately 8,000 employees, the vast majority of whom are cleaners. The nature of the industry poses two major employment issues to the Respondent. The first is very high staff turnover, typically 30 to 40% in any given year. The second is that historically the cleaning sector has experienced large numbers of people looking to gain employment without the right to work in the UK. As a result the Respondent has implemented strict policies to ensure that they comply with Border Agency rules and ensure that all of its employees are legally entitled to work. A particular problem is that of substitute workers, where an individual with the right to work and correct documentation is employed but then sends a substitute who may not have a right to work to actually do the cleaning. As a result, the Respondent requires all of its cleaners to wear photographic identification cards which must be worn at all times whilst on site. Should an employee not have their identification card, the manager should not permit them to work. I accept Mr Lloyd-Jones' evidence that the policies are strictly enforced by the Respondent.

6 In July 2013, the Respondent introduced a strict process in respect of new employees working for it in any capacity. The policy was introduced at an annual conference and confirmed in writing, with a memo addressed to in-store managers, area managers and regional managers. The Claimant therefore received a copy of the memo which was marked as a mandatory read and stated as follows:

> "**REVISED NEW STARTER PROCESS JULY 2013**
>
> **Please take time to read this update and <u>ensure you understand the changes</u>.**
>
> **I am writing to highlight my concerns over a number of breaches of the new starter process that have been bought to my attention.**
>
> **Failure to follow this process leaves the Company exposed to a number of risks, including but not exhausting; fines from the UK Home Office and in some cases imprisonment, individuals working in the business without authorisation or having been correctly screened and delays in individuals pay.**
>
> **It is critical everyone complies with our policy and no-one is allowed to start without a payroll number. This is integral to our strategic commitment of 'Managing our People Brilliantly Well'.**
>
> **It is your responsibility to understand and follow this process in <u>all cases</u> of recruitment. Any failure to follow the process will be deemed gross misconduct and will lead to dismissal.**
>
> **If you have any questions or queries with this process or need further clarification on how to implement it, please speak to your Manager, HRBP or the New Starter team in the first instance."**

7 The policy was updated and re-issued in August 2016, with the memo starting and concluding as follows:

> **"This process must be adhered to at all times. If anyone is found to be working without following this process the Hiring manager may be liable for disciplinary action which may result in dismissal."**
>
> **…**
>
> **"<u>If anyone is found to be working without following the above process the Hiring manager may be liable for disciplinary action which may result in dismissal."</u>**

8 The Claimant's area was defined as at high risk, which required him to check the identity and right to work of every employee in his area twice a year. As Area Manager, the Claimant was also required personally to carry out unannounced checks of employees' identity throughout the year. Senior members of management when attending site also automatically check employees' identity and require them to show their photographic ID. No employee is permitted to be on site without a current payroll number.

9 A list of gross misconduct dismissals since 2011, record dismissals of 15 in-store managers and area managers for allowing employees to work without authorisation, a payroll number or invalid ID. The Claimant's case is that he is aware of a manager at Ponders End called Mohammed who was not dismissed despite committing similar acts of misconduct. I accept Mr Lloyd-Jones' evidence that he does not know about Mohammed, whether or not he did commit the same acts of misconduct, whether he was dismissed and, if not, why not. As far as Mr Lloyd-Jones is aware, every manager who allowed an employee to work in breach of the rules was dismissed.

10 On 1 September 2016, Mr James Hogg (Operation Director) attended a meeting at the Hatfield store. He observed a man in the Respondent's uniform cleaning the car park, who gave his name as Kofi but who was not wearing photographic ID. In a statement made that day, Mr Hogg recorded that Kofi claimed initially to have been working for the Respondent for nearly a month but later stated that he had started on 15 August 2016 and told him that the Claimant had given him a lift to the store that morning. Mr Hogg spoke to the Claimant who confirmed that he had given Kofi a lift to the store, but that it was the previous evening. When challenged about the lack of ID, the Claimant told Mr Hogg that he had been in a rush and had not been able to check if Kofi had an employee number but that he had planned to sort it out before he needed paying on Friday.

11 Mr Hogg's statement then records that upon entering the store he came across another man in the Respondent's uniform cleaning the customer toilets, again without an ID badge or employee number. Mr Hogg stated that this man gave his name as "Nana" and claimed to be doing the work without expectation of payment as he was a friend of the Claimant. Mr Hogg asked Nana to accompany him to have his photograph taken but he disappeared as they were on their way. Mr Hogg spoke to the Claimant who denied that Nana was his friend, although he did have his mobile telephone number, and stated that he had been given Nana's details by the housekeeper at the weekend as a good person to cover gaps in resource at the store. Mr Hogg was concerned that the Claimant was using cleaners who had neither

photographic ID nor employee numbers and caused the Claimant to be suspended with immediate effect. A disciplinary process was commenced.

12 The Claimant attended an investigation meeting on 8 September 2016. He said he did not know Kofi's full name but believed his name was in fact Thomas. He accepted that he had not checked that Kofi had an ID badge and payroll number but explained that they were under pressure with a big meeting at the store. He believed that Kofi worked at another Tesco store. The Claimant again denied that Nana was a friend, suggesting that a mutual friend had given him Nana's telephone number. The Claimant's case was that he had told Nana that he was not allowed to work because he was not in the system, that he had allocated the toilet cleaning to another employee (Sandra) and had not been aware that Nana was doing the work.

13 The Respondent decided that the Claimant should attend a disciplinary hearing to face an allegation of gross misconduct in that he had failed to follow the recruitment process which had resulted in unregistered workers in the Hatfield store. The Claimant was warned that if the allegation were proven, it may be considered gross misconduct which could result in summary dismissal.

14 The Claimant attended a disciplinary meeting chaired by Mr Lloyd-Jones on 13 September 2016. The Claimant maintained his explanation that he had brought Kofi to clean due to pressure of work, having been given his details by another member of staff, believing that he was approved to work for the Respondent, albeit at another store, and only later realising that he did not have a payroll number. The Claimant confirmed that he understood that ID checks were paramount to an Area Manager's role, that he had not checked Thomas' ID due to pressure of work but had intended to do so before paying him. The Claimant accepted that Nana was not permitted to work but maintained that he had neither requested nor known that Nana was cleaning the customer toilets. He could not explain why Nana was wearing company uniform when seen by Mr Hogg nor how Nana would know where to obtain the cleaning materials which he was seen using.

15 Mr Lloyd-Jones did not obtain CCTV footage nor seek witness statements from either Kofi or Nana, considering that the statement from Mr Hogg recording his conversations with them on the day was sufficient. The Claimant did not request that CCTV be viewed nor did provide evidence from either Kofi or Nana on his own behalf.

16 Mr Lloyd-Jones was not satisfied with the Claimant's explanations which he regarded as not credible and inconsistent. He concluded that the Claimant had organised for both men to be present cleaning in the store, that ID checks had not been carried out and that there had been an act of gross misconduct. Mr Lloyd-Jones accepted that the Claimant was short staffed but did not consider this adequate mitigation to warrant a lesser sanction. Accordingly he decided that summary dismissal was the appropriate sanction. The decision was confirmed in a detailed letter of 16 September 2016 setting out why he had not accepted the Claimant's explanations.

17 The Claimant appealed against his dismissal asserting, amongst other things, that he had not received sufficient training, did not have a job description and that the contract of employment did not adequately identify what may be regarded as gross

misconduct. He maintained he had used Kofi genuinely believing that he was an individual referred to as Thomas who previously worked for the Respondent; this and pressure of work were why he had not checked ID at the time. As for Nana, the Claimant again maintained that he was an acquaintance whom he had not asked or instructed to clean the toilets, not least as he had instructed Sandra to do the work. He was wrongly being held accountable for a member of the public acting without authority. The Claimant accepted that he may have lapsed in his checking procedures in terms of Kofi, but that was based on an honest assumption and misunderstanding. He submitted that there were two similar incidents where other workers were not dismissed. The procedure was unfair as a copy of the disciplinary procedure had not been included with the investigation and disciplinary meeting information. Finally, the Claimant asked that the appeal take into account his six years of unblemished service.

18 The appeal was heard on 20 October 2016 by Ms Welland, the Regional Director. The Claimant set out his reasons for appeal which were explored in detail by Ms Welland. The Claimant accepted that the disciplinary policy was contained within the employee handbook which was accessible on the intranet but he maintained that he had not been trained on use of the intranet. The Claimant accepted that he had not asked for a copy of the same prior to the investigation or disciplinary meetings. The Claimant did not give Ms Welland the names of the other in-store managers whom he claimed had been treated less harshly.

19 The Claimant's appeal was not successful, the outcome being confirmed to him in a letter of 10 November 2016. Ms Welland was satisfied that the Claimant had proper access to the disciplinary process and policies through the employee handbook on the intranet; that he had been appropriately trained in recruitment policies in his previous role of in-store manager, the same policy applying in his capacity as Area Manager and that he had received email updates about the importance of identity checks. Ms Welland concluded that, by his own admission, the Claimant had not checked the identity of Kofi and that he had allowed both Kofi and Nana to work without a payroll number. She considered this conduct tantamount to negligence, a serious breach of company policy and of the implied term of trust and confidence. She concluded that the company disciplinary policies were followed, that the Claimant was fully trained on recruitment and ID checking policies and that the decision to dismiss was fair and reasonable.

20 The Claimant presented the same explanations at this hearing. Given the Claimant's managerial position and the provision of a tablet including access to the intranet, which he had used since his time as an in-store manager, I do not find it credible that the Claimant did not know how to access the intranet. I found Mr Lloyd-Jones to be an impressive witness genuinely concerned to investigate the Claimant's points being made in the course of the disciplinary hearing, such as the circumstances in which he brought Kofi to work and the vehicle tracker, nevertheless he was genuinely concerned by the number of discrepancies within the Claimant's account.

21 I find on balance of probabilities that both Kofi and Nana were wearing the Respondent's uniform and undertaking cleaning duties when seen by Mr Hogg. The Claimant's account of Nana turning up and working for him, unasked, after finding a uniform and cleaning materials when simply a customer in the store lacked credibility. The Claimant's evidence was neither persuasive nor reliable. On balance I find that

the Claimant wish to ensure that the store was cleaned, was under resourced and decided to use both Kofi and Nana without having checked their identity or ensuring that they were properly authorised to work.

Law

22 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

(1) did the employer genuinely believe that the employee had committed the act of misconduct?
(2) was such a belief held on reasonable grounds? And
(3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

23 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

24 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

25 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. There is a spectrum of gravity of misconduct which needs to be taken into account in deciding what fairness requires in any particular case. The gravity of the misconduct is not determinative in assessing the extent of investigation reasonably required. This will also depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced by the employee. The reasonableness of the investigation should be looked at as a whole and it is not necessary for the employer to investigate every point made by the employee in his defence, **Shrestha v Genesis Housing Association Ltd** [2015] IRLR 399.

26 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions

available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

27 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall: (i) the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive. (ii) disparity of treatment; (iii) mitigating factors, such as length of service, disciplinary record and whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong.

28 The fairness of dismissal must be judged by what the decision-maker knew or ought reasonably to have known at the time of dismissal. The knowledge of others within the employment organisation is not imputed to him merely because he is employed by the same employer, **Orr v Milton Keynes Council** [2011] ICR 704. It may however be relevant to whether or not the employer has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

29 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47. The Tribunal must also have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

30 The Claimant's claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee, **Neary v Dean of Westminster** [1999] IRLR 288. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

Conclusions

31 Dismissal is admitted and the Claimant accepts that Mr Lloyd Jones had a genuine belief in his misconduct. The first issue to consider is, therefore, whether this belief was reasonable based upon a reasonable investigation. I am satisfied that it was. Whilst CCTV footage was not checked, there was contemporaneous evidence

from Mr Hogg that he had seen both Kofi and Nana in uniform and cleaning on the day in question. The Claimant did not dispute that neither man had ID or payroll numbers. It is difficult to see therefore what additional evidence CCTV footage would have shown. Nor do I accept that there was an unreasonably short period of time between the invitation and the disciplinary hearing. The issue was relatively simple and the Claimant had adequate time to prepare.

32 As for the suggestion that witness statement should have been obtained from the Claimant's friends, I do not consider this to be a failure on the part of the Respondent. It is not clear what relevant information such statements would have added but, if the Claimant had believed they had relevant evidence, he could and should have adduced the evidence at either the disciplinary or appeal hearings. Additional tracker information would have little, if any, probative value given that it would only show when the Claimant's car was parked at the Hatfield site and not who was with him in the car when he got there. I am satisfied that the importance of ID checks and following proper recruitment process were made known to in-store managers and Area Managers through the memos to which I have referred and that this was something the Claimant had initially acknowledged. Whilst the Claimant raises a number of additional criticisms, for example, that Mr Lloyd-Jones had a conversation or attempted to telephone Nana, I am not satisfied that any criticisms are of such magnitude individually or cumulatively to take the investigation out of the reasonable range required.

33 As for alternative sanctions I accept that little, if any, alternative to dismissal was considered by Mr Lloyd-Jones. Nevertheless, I accept that he properly took into account the Claimant's clean disciplinary record, length of service and all the circumstance of the case. Mr Lloyd-Jones genuinely and reasonably believed that the Claimant had provided an inconsistent and unreliable account in the disciplinary process. Overall, I find that the sanction of dismissal was within the range of reasonable responses. In the circumstances I find dismissal was fair in all of the circumstance of the case.

34 As for the appeal, I am satisfied that it was a full and fair appeal carefully considering the Claimant's points but again rejecting them for genuinely held and objectively reasonable reasons. Whilst the 2016 memo about identification and recruitment checks removed the explicit reference to gross misconduct, it could have left a manager in no doubt that breach of the policy was a very serious matter which may result in dismissal. In essence, the effect is substantively the same. The issue was a basic one; the requirement to check ID was fundamental. Nor was I satisfied that there was any breach of the ACAS code for the reasons already given. The unfair dismissal claim fails and is dismissed.

35 As for the breach of contract claim, I prefer the submissions of Mr Underwood to those of the Claimant. Given the culture of the Respondent and the business risk of employing people without the right to work, it was inconceivable that the Claimant would not check Kofi's ID especially as on either account they had travelled to the store together which would provide ample opportunity for such a simple check. The Claimant's explanations in respect of both Kofi and Nana were not credible and I have rejected them. On balance, I am satisfied that the Claimant permitted both men to work at the store in breach of the Respondent's policy. This was conduct of sufficient

magnitude to amount to a repudiatory breach of contract, taking into account the nature of the contract of employment and the significant risks to the Respondent's business if identity checks were not stringently applied. The claim of wrongful dismissal also fails and is dismissed.

Employment Judge Russell

7 November 2017