



EMPLOYMENT TRIBUNALS

Claimant: Mr G Ashia

Respondent: Apcoa UK

Heard at: London South Employment Tribunal
On: 28 April 2017

Before: Employment Judge Martin

Representation
Claimant: Mr Braier - Counsel
Respondent: Mr Watson – Legal Consultant

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant was unfairly dismissed by the Respondent

REASONS

1. The Claimant presented a claim on 6 January 2017 claiming that the Respondent had unfairly dismissed him. The Respondent defended the claim by presentation of a response dated 3 March 2017 on the basis that the Claimant was fairly dismissed for gross misconduct.
2. I heard from the Claimant who provided a witness statement comprising seven pages and 19 paragraphs and for the Respondent from Mr Mark Longhurst (Supervisor who carried out the investigation who produced a witness statement comprising 16 paragraphs and four pages); Mr Abdoul K Makeri (Assistant Contract Manager who heard the disciplinary hearing who produced a witness statement comprising 4 pages and 14 paragraphs) and Mr Kedar Maharjan (Contract Manager who heard the appeal who produced a witness statement comprising 11 paragraphs and two pages). I had before me an agreed bundle of documents comprising 211 pages.

The issues

1. The issues that the Tribunal had to determine were:
 - 1.1 Was the Claimant unfairly dismissed contrary to section 98 of the Employment Rights Act 1996:
 - 1.2 Was the Claimant dismissed for a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1996?
 - 1.3 Was the dismissal fair in all the circumstances of the case within the meaning of section 98(4) of the Employment Rights Act 1996?
 - 1.4 Did the Respondent have a genuinely believe that the Claimant was guilty of misconduct
 - 1.5 Did the Respondent have reasonable grounds upon which to sustain that belief?
 - 1.6 At the stage that the Respondent formed this belief had he carried out as much investigation into the matter as was reasonable in the circumstances?
 - 1.7 Was the investigation carried out by the Respondent within the range of reasonable responses open to a reasonable employer?
 - 1.8 Was the decision to dismiss within the range of reasonable responses open to a reasonable employer?

The Law

2. The law as relevant to the issues:
 - 2.1 Section 98 of the **Employment Rights Act 1996** provides that on a complaint of unfair dismissal it shall be for the employer to show what the reason for dismissal was and that it was one of the reasons set out in subsection (2) of section 98.
 - 2.2 The reason relating to the employee's conduct is one of those reasons. Section 98(4) provides that where the employer has shown what was the reason for the dismissal then: *'...the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 that question shall be determined in accordance with equity and the substantial merits of the case.'*
 - 2.3 In the case of a reason relating to the employee's conduct, it is necessary that the employer should have genuinely believed that the employee misconducted himself and have arrived at that belief

on reasonable grounds after a fair investigation. The duty of the Tribunal where an employee has been dismissed because the employer suspects or believes that he or she has committed an act of misconduct is expressed by Arnold J., in the case of **British Home Stores Ltd v Burchell [1978] IRLR 379, 380**, as follows: *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time ... First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate on the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."*

- 2.4 The burden of proof is neutral. The Tribunal must not substitute its own views.
- 2.5 It was held in the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** that: *'it is the function of the [employment tribunal] 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 that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.'*
- 2.6 The case of **J Sainsbury plc v Hitt [2003] IRLR 23** held that when considering whether an employee has been unfairly dismissed for alleged misconduct, the 'band of reasonable responses' test applies as much to the question of whether the employer's investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss the employee for a conduct reason.
- 2.7 The ACAS Code of Practice on Disciplinary and Grievance Procedures 2004 provides guidance which the Tribunal must take into account when considering whether a dismissal is fair or unfair (**Lock v Cardiff Railway Co Ltd [1998] IRLR 358**).

The Facts that the Tribunal Found

3. The Tribunal found the following facts on the balance of probabilities having heard the evidence and read the documents referred to by the witnesses. These findings of fact set out those facts that are relevant and necessary to explain the decision reached. All evidence was considered even if not specifically noted below.

4. The Claimant was employed by the Respondent from 18 October 2004 to 1 September 2016 when his employment was summarily terminated on the grounds of gross misconduct. The Claimant was employed as a Civil Enforcement Officer (Parking Attendant) ("CEO"). The Claimant had no previous formal disciplinary matters brought against him save for a verbal warning in November 2015 given for failing to check several Parking Charge Notices ("PNC's") before leaving them on the vehicle.
5. The Respondent employs in the region of 1,600 employees and has a disciplinary policy which was in the bundle of documents.
6. From June 2015 CEO's were required to wear a body worn camera whilst on patrol which were to be switched on all the time except when on breaks. The Respondent issued a policy which the Claimant signed which stated that failure to have the body worn camera switched on at all time may result in disciplinary action. The Respondent says the reason for the body cameras was for safety although there was a suspicion amongst the CEO's that their purpose was to monitor them.
7. The body worn camera is on a strap which is worn across the body. There is a switch on the side that switches it on and off. The Respondent brought one to the tribunal and demonstrated switching it on and off. There was an audible beep when switched on and off. The Claimant's case is that it is possible to accidentally be switched off during a shift or for the lens to become obscured, for example by clothing.
8. CEO's also wear a radio which has a GPS tracking system and carry a hand-held computer. CEO's are required to log where they are on the hand-held computer, for example by changing streets when moving from one street to another. The Claimant's evidence was that CEO's sometimes forgot to change streets on the hand-held computer and forgot to switch on the body worn camera at the end of a break.
9. The incident which led to the termination of the Claimant's employment occurred on 25 July 2016 when the Claimant had been asked to count cars in a specific road on his route and record how many cars were compliant with parking regulations. The Claimant says this was not a common task and he had only done it once or twice before, whereas the Respondent says it was a common request made of all CEO's. The Claimant's evidence was that because this was an unusual task his normal routine was disrupted and he forgot to change streets on his hand-held computer and forgot to turn on the camera for part of the day. At other times when the camera was off, he assumes that it was accidentally switched off or became obscured by clothing or his body. During this day, the Claimant met an ex-colleague who worked as a CEO for another company and they had a conversation about how much better that other company was to work for with his ex-colleague encouraging him to apply for a job there. This conversation was recorded by the equipment the Claimant had on him.
10. The Claimant's supervisor was Mr Longhurst who gave evidence to the Tribunal. Mr Longhurst carries out monthly reviews with the 10 CEO's who report to him. His evidence was that there was ongoing discussion

about the Claimant's use of the body worn camera. Mr Longhurst's evidence was that on 2 August 2016 when he was preparing the Claimant's monthly review, he checked the reports filed, one of which was for his body worn camera. He noted the camera was switched off for about 50% of the shift and that the footage did not match the information logged on the hand-held device, i.e. the camera showed him on one street when his hand-held device recorded him on a different street. Mr Longhurst also noted that the Claimant had appeared to have taken longer breaks than allowed.

11. The Claimant's monthly review took place on 2 August 2016 and a record of this was in the bundle. This document (signed by the Claimant and Mr Longhurst) recorded that his use of the body worn camera was "*improving*" although it also recorded that the Claimant should "*ensure BWV is on at all times except authorised breaks*" as a concern. The conclusions were "*Godwin worked 22 shifts during July and experienced no major issues. Street visits were ok overall and there were no quality issues. Godwin needs to continue to focus on PCN Quality as one COO1 for incorrect VRM, use of BWV and use of Mobile phone as these are his areas of concern*".
12. Previous monthly review records recorded issues with the body worn camera not always being on and issues with each street being logged (presumably on the hand-held computer). The records in the bundle went back to 15 April 2016. There was no evidence to show whether other CEO's had similar issues.
13. Mr Longhurst did not mention any specific concerns about 25 July 2017 during the review that took place on 2 August 2016, even though he initiated a disciplinary investigation on 5 August 2017. Given that the issues recorded in the monthly reviews were similar going back several months, it is reasonable for the Claimant to have assumed at the review that there was nothing that caused undue concern on the part of Mr Longhurst. The allegation being investigated was that the Claimant had deliberately falsified records in that the location entered on the hand-held computer did not match the location on the automatic GPS and he had switched off the body worn camera. The Claimant was suspended from work after the meeting on 5 August 2016. There is a handwritten record of this meeting signed by the Claimant and Mr Longhurst. Mr Longhurst also wrote a report dated 10 August 2016 setting out the investigation and his recommendation which was to proceed to a disciplinary hearing.
14. During the investigation, the Claimant was unable to give a definitive reason why his body worn camera was off at times during the day, but said that he may have been distracted as he was carrying out a task which was outside his normal range of duties and as such as he had forgotten to put the camera back on after a break or it accidentally was switched off during the day. He denied falsifying records. As part of the investigation Mr Longhurst looked at various documents. He accepted in cross examination that he did not look at digital photographs which were taken by the Claimant that day and that he did not look at the compliance survey which the Claimant had completed. The Claimant suggested that these should have been looked at as part of the investigation particularly as the

allegations were of deliberate falsification i.e. fraud.

15. A disciplinary hearing was convened for 23 August 2016 by letter dated 17 August 2016. The disciplinary charges were:
 - Deliberate falsification of records;
 - Failure to follow the BWV (Body Worn Camera) work instructions Monday 25th July 2016;
 - Breach of Company Health and Safety rules on Monday 25th July 2016 and
 - Bringing the company into disrepute.
16. All documentation to be relied on was enclosed and the Claimant was given the right to be accompanied. He was warned in this letter that any of the four matters were potentially gross misconduct which could lead to his dismissal.
17. The disciplinary hearing was heard by Mr Makeri. The Claimant was unaccompanied. The hearing lasted from 10.42 until 13.00. At this hearing the Claimant reiterated what he had said at the investigation meeting, namely that his conduct was accidental and gave explanations for why he could not change location on the hand-held computer and that the camera could have been accidentally turned off. He did not think he had taken longer breaks than allowed and thought that he had forgotten to log back on after his break. He signed the handwritten record of the hearing although said in his statement that he felt pressurised into signing it and that it was not an accurate reflection of what was said.
18. The outcome was that the Claimant was summarily dismissed. This was set out in a letter dated 1 September 2016. The four allegations were set out and the conclusion was that *"I'm satisfied that based on the evidence provided you had attempted to conceal your location by entering locations where you had not visited which was a deliberate attempt to deceive."* There was no explanation as to which record the Claimant was alleged to have falsified or any in-depth analysis of why the conclusion was that there was deliberate falsification.
19. In the letter Mr Makeri sets out the mitigation he considered, namely *"remorse for your actions that you have described as unacceptable on Monday 25th July 2016 and you would like to apologise for that"*; length of service, that the Claimant forgot to turn his body worn camera back on and that the Claimant said he did not know what happened that day. Curiously, given this, he goes on to say *"you have not submitted any mitigating evidence throughout the investigation meetings and during the disciplinary hearing"*. This appears to be contradictory. Mr Makeri goes on to say that *"I feel that a breach of Company policy did occur. It is my reasonable belief that you have falsified your records on Monday 25th July 2016 by logging streets to conceal your true location from the Company for reasons other than the one you have provided"*. There is no

explanation as to why he does not accept the Claimant's explanation which was he made a mistake and issues with the body worn camera. There is no suggestion in this letter that he undertook any further investigation into matters raised during the disciplinary hearing. Mr Makeri refers to the Respondent's disciplinary policy where the sanction for gross misconduct is dismissal without notice saying he thought nothing less is appropriate but no explanation is given as to what else was considered and why it was not appropriate.

20. The Claimant was given the right of appeal which he exercised by letter dated 2 September 2016. The grounds of appeal set out issues relating to the Claimant's final payment from the Respondent; issues relating to the compliance task the Claimant was asked to do which made him forget to change streets on the hand-held computer for which he apologised again and his length of service with no indications his performance was poor.
21. Mr Maharjan chaired the appeal on 28 September 2016 which the Claimant attended without a companion even though he had been given the right to have one. The appeal is recorded as having lasted approximately one hour and twenty minutes. Mr Maharjan first dealt with the payment issues and then moved on to the part of the Claimant's appeal about the compliance task and how this affected his work on that day. The Claimant reiterated that he had forgotten to change streets on his hand-held computer and apologised for this again. There was no evidence of any other investigations undertaken by Mr Maharjan following the appeal hearing even though the Claimant indicated that he had raised complaints about the body worn camera and other equipment but that it was not taken up by (presumably) Mr Longhurst.
22. The letter dismissing the appeal is dated 10 October 2016 and comprises 2.5 pages. Of these pages, only three paragraphs relate to the dismissal itself, the rest is in relation to pay issues. In the narrative relevant to the termination of the Claimant's employment, Mr Maharjan says:

"In our meeting, we discussed in great length regarding the compliance you had carried out on 25th August. You stated that you could not change the location on your Handheld Computer (HHC) because you were counting the vehicles manually on street. You apologised and accepted the mistake. You had carried out the compliance before as well and said it was not a daily activity. You stated that your body work Video (BWV) camera could have been turned off as you use the strap which can be covered or turned off without noticing. You stated that the Radio GPS signal is inaccurate. You confirmed that you understood the policy and procedures.

..... I am not in belief that an experienced officer like yourself would not have entered the location on HHC because of the compliance being carried out. I can also confirm that your BWV cameras would not have been turned off because of the strap as we have been using the BWV cameras in Southward and other contracts for a few years and have not received any complaints as such. Had you had concerns regarding your equipment's.... You should have raised this with your line manager which you failed to do so."

Submissions

23. Both parties gave oral submissions which are summarised below:
24. The Claimant's submissions – The Claimant referred to the following authorities in addition to the *British Homestores v Burchill* case set out in the section on law above. **Stuart v London City Airport Ltd [2003] EWCA Civ 973** which went to the reasonableness of the investigation and that some cases have a higher threshold than others and that employers should take particular care in investigating allegations of misconduct of a kind which, if upheld, are likely to impact on the employee's reputation as to make it very difficult for him to obtain further employment. **Strouthos v London Underground Ltd [2004] IRLR 636** in which it was held that an employee should only be found guilty of the offence with which he has been charged and that the charge should be precisely framed and that length of service without disciplinary charge was a factor to be taken into account. **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854** which held that even where there is a finding of gross misconduct it does not automatically follow that summary dismissal is a reasonable response and that mitigating factors should be taken into account.
25. The Claimant's case centres round three factors: Conduct was not the principal reason for dismissal; that the dismissal was unfair (s98(4) ERA and *Burchill*) and that the sanction was outside the range of reasonable responses.
26. The reasons put forward for dismissal were the conversation with the ex-colleague. Initially Mr Makeri said he was unaware of it but the Claimant says he spoke to him about it at the time of suspension. That Mr Makeri perceived the Claimant as not being loyal so was trying to get rid of the Claimant. Additionally the Claimant gave evidence about pressure being placed on employees to issue parking notices. The Respondent says this did not happen.
27. Regarding the investigation it was submitted that given the nature of the charge the investigation should be towards the higher end of thoroughness and more should have been done to investigate.
28. It was submitted it was unclear what records were falsified and what was not falsified. There was a lack of information about this and why the conclusion was that there was deliberate falsification and not a mistake as put forward by the Claimant during the disciplinary process.
29. It was submitted that the Claimant's explanation was simple and consistent. He was not doing his normal task which put him off kilter. This was different to deliberate falsification of records to present a false account of the work he had done.
30. It was submitted that Mr Makeri was inconsistent in the evidence he gave especially in relation to the GPS records and this should count in the Claimant's favour.

31. Further, the Claimant submitted that the Respondent did not follow through on its investigation. There was no effort to look at previous records to see if there was a pattern which would have been expected or any other suggestions of dishonesty of which there were none.
32. The Claimant submitted that the fairness of the whole process was flawed by the invitation to the disciplinary hearing not being as clear as it should be as to what the case was that the Claimant had to meet. Reliance was placed on the investigation report which is sketchy at best when one looks at the conclusions as to what it is said precisely to have amounted to deliberate falsification, or what the other charges were meant to cover. This placed the Claimant at a disadvantage.
33. The Claimant was disadvantaged by the dismissal letter as it was unclear the extent of what was found against him and it was therefore difficult to hone in on what to appeal. In evidence Mr Maharjan had difficulty in explaining what was falsified and he took the admission of a mistake to mean what it did not mean.
34. Regarding the reasonableness of the sanction the allegations appear to relate at most to one or two entries between 11.30 am and 12 pm. There were no previous honesty issues in a 12-year career. The outstanding verbal written warning was not related to honesty. There was no analysis about whether to exercise a discretion to dismiss or give a lesser sanction and it is unfair to fail to advance that analysis and therefore in this context the dismissal with outside the range of reasonable responses open to a reasonable employer.
35. The Claimant submitted there should be no Polkey reduction and that contribution should be minimal on the basis that the Claimant made a mistake. In relation to the wrongful dismissal claim the Tribunal cannot be satisfied on the balance of probabilities that there was deliberate falsification of records and there is nothing else that goes to a repudiatory breach.
36. The Respondent's submissions – The Respondent in addition to the Burchill case set out in the section on law above also referred to **Boys and Girls Welfare Society v Macdonald** which held that the burden of proof was more neutral than in Burchill.
37. The Respondent based their case on the investigation carried out by Mr Longhurst and that his report was clear about what the allegations were. It lays out all his concerns regarding potential fraud. It indicates the level of the investigation. Mr Longhurst did not look at photographic evidence and discounted the evidence of the GPS.
38. The disciplinary hearing was properly conducted with lots of notes. There were breaks and photos were looked at as they were raised by the Claimant. There was a proper disciplinary enquiry. It is not necessary to have a forensically perfect investigation, but to do the best and fairest job possible.
39. Mr Makeri took a decision on what was in front of him much of what was

unchallenged. He does not think the Claimant made a mistake but that the Claimant was not being honest. The indications were that the Claimant had not been where he said he had been. The Claimant had been told the previous January about use of the body worn camera and it should be in the forefront of his mind as well as logging location on the hand held computer. But he does not do it. He apologises for it, the inference is that he was fraudulent, because not working or skiving or doing something else and this was a reasonable inference.

40. The appeal addressed the matters set out in the Claimant's appeal letter. There was no evidence to suggest that the Claimant brought up the relevant factors. His appeal letter was brief and all matters were covered. The Claimant says what he did was not enough to dismiss him however the Respondent submitted dismissal was within the range of reasonable responses.

The Tribunal's conclusions

41. The Tribunal has come to the following conclusions on the balance of probabilities having heard the evidence and considered the documents. At the forefront of the Tribunal's mind is that it must not substitute its opinion for that of the Respondent but to consider whether the Respondent acted reasonably in terminating the Claimant's employment.
42. The reason given by the Respondent for terminating the Claimant's employment is gross misconduct. The allegations are allegations of honesty. This is not a case where the Claimant was caught in the act in which case a lesser amount of investigation would be required. This was a matter based more on inference and as such the amount of inquiry and investigation is increased. The ACAS guide states that the more serious the allegation the more thorough the investigation should be. Here the potential effect on the Claimant was great, given the allegations of deliberation falsification.
43. The investigation should not only include inquiry into the actual matter in question, here the 25 July 2016, but also any other matter relevant. In this case this would include the monthly reviews and all other relevant matters including the quality of the equipment used. In relation to the monthly reviews, as noted in the facts above, there had been reference to the Claimant's use of the body worn camera and hand held computer from January 2016, with these matters being raised at each subsequent review. However, no disciplinary action or warning was given. What is striking is that at the final monthly review, which is when Mr Longhurst says he found the details which led to the disciplinary action being initiated, no mention was made of the concerns that were the subject of Mr Longhurst's investigation. The comments were like those of the previous months.
44. It is clear that the Claimant has had issues with the body worn camera and other equipment for some time. These have been dealt with only by way of the monthly reviews. No performance improvement plans were put in place. The wording of the charge against the Claimant, namely deliberate falsification, puts the onus on the Respondent to conduct an investigation at the higher end of the scale and be vigilant and thorough in its approach.

There was no consideration by the Respondent of the previous monthly reviews which revealed similar issues. The Tribunal does not know for instance, how long a camera was off in the times referred to in previous reviews.

45. Whilst the Tribunal appreciates that an investigation does not have to be forensically perfect and what is required is an investigation which is within the band of reasonable responses. However, given the wording of the charge against the Claimant, the Tribunal expects a more thorough investigation than may ordinarily be the case. The Tribunal finds that there were flaws in the initial investigation, in that previous reviews were not considered, photographs were not viewed and there was no investigation as to whether equipment was malfunctioning. This flaw was not remedied at either the disciplinary hearing or the appeal hearing as no further investigations were done at those stages.
46. The lack of detail in the dismissal letter and the appeal letter means the Tribunal does not know why the Respondent considered this to be deliberate falsification rather than a performance issue as issues of this kind had previously been considered at the monthly reviews.
47. Clearly there were issues in relation to the Claimant's use of the equipment and these issues needed to be addressed. The Tribunal is well aware that it must not substitute its view for that of the Respondent, however in this case the Tribunal finds that there were no grounds on which to have a genuine belief that the Claimant had deliberately falsified records and committed fraud. There may have been performance issues, however the Tribunal does not find a genuine belief of deliberately falsifying records based on the investigation carried out.
48. In all the circumstances the Claimant's claim succeeds. A remedy hearing will be listed and the parties will be notified of a date in due course.

Employment Judge Martin

Date 13 July 2017