THE EMPLOYMENT TRIBUNALS

Claimant: **Mr I Lidster**

Respondent: **Securitas Security Services (UK) Limited**

Heard at: **North Shields Hearing Centre** **On:** **Tuesday 11 June 2019**

Before: **Employment Judge SA Shore**

Representation:

Claimant: **In Person**
Respondent: **Ms J Young of Counsel**

RESERVED JUDGMENT

The claimant's claim for unfair dismissal fails.

REASONS

Background

1. The claimant was employed as a security officer by the respondent from 2 April 2016 until his summary dismissal on 11 December 2018.

2. The respondent is a large provider of security and other facilities management services and had a contract to provide security services for EE at its site at Darlington, where the claimant worked.

Claims

3. The file was coded as a claim of unfair dismissal and breach of the Working Time Regulations 1998. In discussion with the claimant, he confirmed that his only claim was one of unfair dismissal.

Issues

4. A list of issues had not been agreed between the parties. I therefore discussed the issues in the case with the parties explaining to the claimant that an issue is a question that the tribunal needs to find an answer to. After some discussion, it was agreed that the relevant issues were as follows:

   4.1 What was the reason for dismissal? (The burden for showing the reason for dismissal is on the respondent)

   4.2 Was the reason for dismissal one of the five potentially fair reasons? (If not, then the dismissal was unfair)

   4.3 If the reason for dismissal was potentially fair, was the respondent reasonable or unreasonable, having regard to the reason for dismissal shown, and in the circumstances (including the size and administrative resources of the employer's undertaking), in treating the reason for dismissal is sufficient reason for dismissing the employee which question is determined in accordance with equity and substantial merits of the case.

   4.4 In making the above assessment, the tribunal must bear in mind the principles in the case of *British Home Stores Limited v Burchell [1978] IRLR 379* in which it was decided that the tribunal had to determine whether the employer had a genuine belief in the employee's guilt, whether that belief was based upon reasonable grounds and whether those reasonable grounds followed a reasonable investigation.

   4.5 The case of *Iceland Frozen Foods Limited v Jones [1982] IRLR 439* was authority for the principles that the tribunal should not substitute its own decision for that of the respondent and that the respondent's decision to dismiss has to come within a band of reasonable responses.

   4.6 If the tribunal finds that the claimant was unfairly dismissed, it has to consider whether his award, if any, should be reduced by a percentage amount to reflect any contribution to his own dismissal which he had made.

   4.7 Following the authority of the case of *Polkey v AE Dayton Services Limited [1987] UKHL 8,* the tribunal must consider whether the claimant's dismissal was procedurally unfair and, if it was, what percentage likelihood there would have been of a fair dismissal, had a fair procedure been used. Compensation may then be reduced by that percentage amount.

   4.8 The tribunal would then award such compensation to the claimant as is just and equitable.

Housekeeping

5. Mr Lidster raised the issue that his witness, Mr Johnson, had to be at work for one o'clock and therefore asked that he be allowed to give evidence first. There was no objection from Ms Young to this suggestion.

6. The parties were happy that I had all the documents and witness statements that I needed. Mr Lidster tried to hand up a letter from the Information Commissioner's Office, which I had already seen on the file and which I found was not relevant to the issues that I had to determine.

7. I explained to the claimant that the tribunal operated on a series of rules and that rule 2 of those rules set out the overriding objective of the rules, which is to achieve a fair and just hearing. I gave a full explanation of the five matters that have to be considered in order to deliver the overriding objective and also reminded the claimant that this case was not about whether or not the respondent could prove that he had committed the act of gross misconduct alleged, but whether they were reasonable in finding that conduct warranted summary dismissal.

8. At this point, I advised the parties that I would complete the reading of the papers that had been submitted before starting to hear the evidence.

Evidence

9. Michael Johnson gave evidence on behalf of the claimant from a witness statement dated 3 March 2019. He had previously been employed by the respondent at EE Darlington for six years, although his employment had ended in March 2019. He said that he had witnessed other security officers closing their eyes in the same break area that the claimant had been in on 14 November 2018 and at the similar break areas across the site.

10. He believes that the claimant was victimised for the last three months of his employment by one or two EE staff that were going out of their way to try and frame him and get him sacked.

11. He referred to an investigation meeting in October 2018 that the claimant had attended at the respondent's Gateshead office, which looked into an allegation that the claimant had been asleep at work on 21 September 2018. The investigation found there was no case to answer. On 3 December 2018 he was in the room with the claimant when the claimant rang Geraldine McStea of the respondent to confirm that Mr Johnson would attend as his witness at a disciplinary hearing on Tuesday 11 December 2018. On Monday 10 December 2018, William (known as Ward) Gilliland, who was Ms McStea's line manager, returned to work and decided to forbid Mr Johnson from attending the meeting on 11 December because he was required at EE Darlington.

12. In answer to cross-examination questions, Mr Johnson did not agree that the claimant, who was shown in a photograph at page 103 of the bundle at 13:41pm on 14 November 2018, was asleep because you cannot tell from a photograph. He said the claimant could have been blinking, but accepted it was possible that he could have been asleep.

13. He was asked about the other occasions on which he said he had seen security staff with their eyes closed. He said that they were taking five minutes out and just resting their eyes and he had mentioned it to his supervisor, Kieran

Henderson. He accepted this wasn't in his witness statement and that these incidents occurred in 2015 or 2016. He could not remember the names of the individuals concerned.

14. Mr Johnson was asked about paragraph 6 of his witness statement in which he said the claimant had shown him further proof that the same people had made allegations against him. He said that he didn't see the proof and had just been told by the claimant that the claimant himself had seen the proof.

15. It was put to the witness that he had not witnessed the telephone conversation on 3 December 2018, because the respondent denied that such a conversation had taken place. He said that Ms McStea had agreed that he could attend as the claimant's witness at a disciplinary hearing on 11 December 2018.

16. Mr Johnson was then taken to page 143A of the bundle which was an e-mail from him to Ms McStea dated 4 December 2018 that asked for permission to attend as the claimant's witness and for confirmation that he was going to get paid. He was asked why he would have sent this e-mail if it had already been agreed, and said that it was just so that everything was above board and he wanted his pay agreeing in writing.

17. Mr Gilliland was on holiday so he wanted to make him aware of what was happening, so had copied him in on the e-mail.

18. I asked Mr Johnson a few questions. He said that the respondent's staff took breaks where they liked as long as it was a designated break area. I asked him what designated areas were and he said that they had to use EE staff areas. Where the claimant was photographed on 14 November was an EE staff break area.

19. Mr Johnson said that there was an instruction not to sleep on duty in the assignment instructions and the dismissal was at a time when the claimant was on his break, so was not on duty. There was no instruction that staff could not sleep whilst not on duty.

20. I asked Ms Young if there was a policy on this, as I had not seen one when I looked through the papers. She said that all security officers were paid for their breaks and they are required to be alert ready to act if required whilst on break. There are instructions to that effect but as that issue had not been challenged, the documents evidencing the policy were not in the bundle. I indicated that if there was a dispute in the evidence on this I would need to see the policy. If it wasn't disputed in the evidence, then I would accept the position as she had outlined it. It transpired that there was no dispute from the claimant in his written evidence, oral evidence or the documents that he relied upon that challenged the respondent's position that he should not have been asleep in his break on 14 November. He was at pains to assert that he was not asleep.

21. After Mr Johnson had given his evidence, Ms Young suggested that the case may be easier to understand for me if the respondent's witnesses gave their evidence and we left the claimant to give evidence last. Given the nature of the evidence

that had been given and that matters in dispute I thought this was the sensible way forward. The claimant agreed, so the next witness we heard from was Geraldine McStea, who is the service delivery manager for the respondent and was the investigating officer in the disciplinary matter that ended with the claimant's dismissal. Her evidence in chief was that she had experience in dealing with investigations, disciplinaries and grievances. On 19 November 2018, she received an e-mail from an EE employee that attached a photograph of the claimant who looked like he was asleep in the EE office on 14 November 2018 at 13:41pm [103].

22. On 22 November 2018, she attended EE Darlington to conduct an investigation meeting with the claimant. When she arrived on site, the claimant's line manager, Kieran Henderson, showed her to the room where she then met the claimant and conducted an investigatory meeting with him [108-112]. The minutes of the meeting show that the claimant said that "I just shut my eyes for five minutes to chill-out myself. I wasn't asleep. I just shut my eyes for five minutes to have a break". He was very upset that someone had taken a photograph of him whilst he was asleep.

23. Ms McStea came to two conclusions: firstly, that the claimant had been asleep , secondly, he was in a non-designated break area at the time. She regarded sleeping on duty as gross misconduct and reported the matter for a disciplinary hearing. She invited the claimant to a disciplinary hearing alleging gross misconduct by way of sleeping at work and bringing the company into disrepute [117-119] and also sent a copy of the respondent's disciplinary protocol and procedure [62-72], notes of the investigation meeting [108-112], a copy of the e-mail sent from the EE staff member [107] and the photograph [103-104].

24. On 28 November 2018, Ms McStea was asked to investigate a further e-mail complaint from an EE employee about the claimant allegedly harassing EE employees about the complaint that had been made against him and other matters. The claimant was interviewed on 30 November 2018 and denied the allegations.

25. The witness said that she did not have a telephone conversation with the claimant on 3 December 2018, but did receive an e-mail from Mr Johnson on 4 December 2018 as is referred to in the evidence above.

26. In answer to cross examination questions, Ms McStea denied that her witness statement that variously described the photograph of the claimant as "looking like he was asleep", "appearing to be asleep" and "drawing the conclusion that he was asleep" were contradictory. She was challenged on her evidence that the claimant was in a break-out pod, not a designated break area, and shown the photographs at page 103 and 215. In answer to a question from me, she said that the two areas were different because the proper lunch area had got picnic tables, vending machines and was well away from work spaces whereas the area where the claimant was sat was a matter of a couple of feet from where people were working. I asked the witness how the claimant would have known that he was sat in a place that wasn't a designated area; she wasn't able to answer.

27. The next witness was Ward Gilliland, who is service delivery manager for the respondent and the dismissing officer. His evidence in chief was that he had experience in dealing with disciplinaries, appeals and grievances. He received an e-mail on 19 November 2018 from an EE employee alleging that the claimant had been sleeping on duty together with the photograph at page 103. A further complaint was made by an EE contact on 27 November 2018 [121 -122].

28. The disciplinary hearing was attended by the claimant alone. The claimant was asked if he wanted a representative present and said that he was happy to proceed without one. The minutes of the disciplinary meeting were produced at pages 144 to 147. Before making his decision, Mr Gilliland considered investigation notes [98 – 101], the photograph [103 -104], the e-mail from the EE staff member [107], the claimant's handwritten statement [219 – 221] and photographs provided by Mr Lidster [214 – 218]. The written statement said that the claimant was on a break and shut his eyes for a few minutes, but he was sat up in his chair and entitled to do this. The lights were bright and he had a headache.

29. Mr Gilliland considered the evidence and found on the balance of probabilities that the claimant was asleep on duty on 14 November 2018 and had brought the company into disrepute.

30. He found that there was no supporting evidence for the later allegations and cleared the claimant of those matters.

31. Mr Gilliland had previous dealings with the claimant in October 2018 when a member of the EE staff complained that the claimant was asleep on duty on 21 September 2018. There was no corroborative evidence, so Mr Gilliland found that the claimant had no case to answer. However, Mr Gilliland advised the claimant at the end of the meeting on 9 October 2018 that people passing by could get the idea that he was sleeping at work, so in future, if he was taking a break, he was advised not to lay down around the place where he had been on 21 September.

32. Mr Gilliland considered the claimant's actions to be gross misconduct and dismissed him summarily. He confirmed the dismissal by a two-page letter dated 13 December 2018 [148 – 149] that advised the claimant of his right to appeal. The claimant sent in a short appeal letter and was asked for further details which prompted him to produce a twenty-four-page letter [155 – 179]. In answer to cross-examinations questions, Mr Gilliland confirmed that he had not given the claimant a written or disciplinary warning at the meeting on 9 October 2018 and that there had been no case to answer on the allegation of sleeping at work on 21 September. He thought that the place that the claimant had been accused of being asleep in September 2018 was the same place that he had been accused of being asleep on 14 November 2018. The claimant disputed this.

33. The claimant took Mr Gilliland to correspondence between him and the claimant's union representative, which seemed to indicate that the representative was under the impression that the disciplinary hearing would take place at EE Darlington on 11 December 2018. Mr Gilliland disputed that this had ever been agreed and assumed that the union representative had been mistaken. Mr Gilliland said that

he had received an e-mail from the union representative at 9.55 on 28 November 2019 saying that the meeting had been agreed for Darlington and that he had spoken to the claimant before e-mailing the representative at 9.59 to confirm that the meeting was to take place at the respondent's offices at Gateshead. It was put to Mr Gilliland that the claimant had said that he was unhappy to proceed without a representative at the disciplinary hearing on 11 December 2018. Mr Gilliland said that the note of the hearing which suggested that the claimant had consented to proceeding without a representative was accurate.

34. The last witness for the respondent was Stuart Hillier, Protective Services Branch Manager for the respondent and appeal officer in this case. He had been trained in dealing with disciplinaries and grievances and received a letter of appeal from the claimant dated 14 December 2018 [150]. There were no grounds for the appeal so he asked the claimant for grounds which were then received on 12 January 2019 [156 – 179]. Although this was after the seven-day window for submitting the appeal, Mr Hillier allowed the documents in. The appeal hearing took place in the claimant's absence, as he declined to attend and Mr Hillier sent out an outcome letter dated 28 November 2018 [181 – 184]. He upheld Mr Gilliland's decision that the claimant had been guilty of gross misconduct and the sanction of summary dismissal. The letter addressed all the points raised the claimant in his appeal documents.

35. Mr Hillier had experience of EE Darlington and thought that the EE security officers could have used the security room as a break area. The claimant challenged him on this evidence.

36. The claimant gave evidence from a prepared witness statement. Much of his evidence was not relevant to the issues that I had to consider. His evidence in chief was that he was not asleep on 14 November. There were no areas where he had been told he could not take his rest break. He was entitled to one-hour's paid break under his contract and twenty-minutes uninterrupted break under regulation 12 of the Working Time Regulations 1998. He believed that one or more members of the EE staff had conspired to make false allegations against him to get him sacked.

37. In a long cross-examination, the claimant rebutted any suggestion that he had been asleep, although he did accept that he was on duty at the time that the photograph of him was taken. He said that he was awake and alert and had his radio by him and would have responded to any emergency that arose.

38. He was shown the photograph page 103 and totally disagreed that it looked like someone who was asleep. He did not accept that his eyes were closed at first. He did not accept the notes of the disciplinary meeting were accurate.

39. It was put to him that, at page 109 in the investigatory meeting, he had said that he had just shut his eyes for five minutes. He said that they weren't shut for five minutes. It was off and on for five minutes in his dinner hour. He accused the note-taker of rewriting his evidence. He accepted that he signed the notes, but said that he never got to read them. He then accepted that he had been given a chance to read them, but that it had not been for very long.

40. It was put to him that if he had his eyes closed for five minutes, he wouldn't have known what was going on but said that he didn't have his eyes shut and that he was alert and ready. I don't find it necessary to record the rest of the cross examination, which was simply more questions about him being asleep and more denials.

Closing Submissions

41. In closing submissions, Ms Young relied on her skeleton. The claimant accepts that he was on duty at 13.41pm on 14 November 2018 and should not have been asleep. He accepted that he had his eyes closed. If that was for five minutes, as he had accepted in the notes, that is sleeping on duty. The issue of where he was asleep was something of a red herring, as he was required to be on duty at all times during his shift.

42. The photograph is clear on the fact that the claimant was asleep. He had his eyes closed and he was in a position that looked like he was sleeping. He was given the opportunity to explain himself, but was found to have been asleep on duty and was dismissed.

43. By his actions, the claimant brought the respondent into disrepute. He received three complaints about his behaviour, one of which was upheld. The claimant didn't accept that any of his behaviour was unacceptable, the reality was he was caught sleeping on duty which was unacceptable and the dismissal was fair. In his closing remarks, Mr Lidster said that he was a good employee who worked hard for the respondent. All he had done was, after six hours of his shift on 14 November 2018, he'd gone for lunch and sat in an area where he was central to a number of places where he might be needed. He denied everything that Ms Young had said. He had a break and shut his eyes. He had defended himself against one allegation against him which was based on one photograph.

Findings of Fact and Decision

44. I found the respondent's witnesses to be credible. Their evidence in chief was internally consistent and consistent with one another. Their evidence in chief was also consistent with the documents produced. I found that the respondent's witnesses were also consistent in their oral evidence both internally, with the statements they had given and with one another. I found that the documents that they produced, particularly the notes of investigatory, disciplinary and appeal meetings could be relied upon as being accurate notes of the events they purported to record.

45. I found Mr Johnson and the claimant not to be credible witnesses. Their written evidence in chief was not internally consistent or consistent with one another. Their oral evidence was not consistent with their evidence in chief, or one another, or with the documents.

46. I find that the documents produced favour the account given by the respondent's witnesses. The reasons that I find this are that the documents such as the

investigation minutes, disciplinary minutes and outcome letters tally with the agreed timeline and/or the evidence of the respondent's witnesses. The claimant's evidence that the interview notes were fabricated was simply not credible. He never disputed the contents of the investigation meeting notes in the disciplinary and never disputed the accuracy of the notes of the investigatory or disciplinary meetings in the appeal. I find he admitted that he had closed his eyes for five minutes in the investigatory meeting.

47. I find it difficult to believe that the claimant was the subject of a conspiracy between members of the EE staff and members of the respondent's own staff in order to bring about his dismissal. If such a conspiracy was in place, I doubt that Mr Gilliland would have dismissed the allegation against the claimant that he had been asleep at work on 21 September 2018. I find that the claimant accepted that he should not have been asleep in his break on 14 November 2018.

48. The photograph of the claimant asleep at work [103] is just that. I find that as someone who had seen the photograph the first time on the day of this hearing, it looked to me that the claimant was asleep. His eyes were closed and his head was in a relaxed position. I find that there is no merit in the claimant's submission that the photograph was taken from thirty feet away. I also find it inconsistent that the claimant said that he was alert and only closed his eyes for seconds when someone was able to take a photograph of him from the same room without him noticing.

49. The claimant admitted in the investigation meeting that he closed his eyes for five minutes. There was no ambiguity about that statement and he signed the investigation minutes as accurate. I therefore find that the claimant had accepted that he had closed his eyes for five minutes at the time that the photograph was taken on 14 November 2018. His subsequent attempts in his documents and in his oral evidence to back-track from that position were not credible.

50. If the respondent was intent on dismissing the claimant, then I doubt that Mr Gilliland would have made the finding that the final set of allegations that were received in November 2018 should be dismissed for lack of evidence.

51. I find that the claimant had been warned about the impression he could give by taking breaks in areas where he was visible to EE staff who might think that he was asleep. I am somewhat surprised, therefore, that within a month, the claimant allowed himself to be photographed with his eyes shut in what looked to me like a sleeping position within a matter of feet of EE staff at Darlington.

52. I find that the investigation by Ms McStea could have been better. She could have interviewed the complainant from EE in person and obtained more details about how long the claimant had had his eyes closed and further corroborative evidence from other people who were working in the room at the time. However, that does not detract from my finding that the respondent had a genuine belief in the claimant's guilt, that belief was based upon reasonable grounds and those reasonable grounds followed a reasonable (if not completely flawless) investigation.

53. I don't find that there are any flaws in Mr Gilliland's approach to the disciplinary. I find that the notes of the disciplinary meeting produced by the respondent were an accurate recollection of what was said. I find that the claimant did not raise the issue of his failure to arrange representation at the disciplinary hearing itself or in his appeal letter as I preferred Mr Gilliland's evidence.

54. It is perhaps a measure of the diligence with which Mr Hillier approached his task that he looked at the issue of representation that had been raised in the subsequent e-mail from the claimant, but not in either of his appeal letters, and considered it as part of the appeal. I find Mr Hillier's appeal outcome letter to be perfectly reasonable assessment of the evidence that was before him.

55. I understand that the claimant is still aggrieved at the way that he was dismissed. It may well be that there was friction between him and colleagues from both EE and the respondent, but when I answer the questions raised in the issues set out above I find that the respondent has shown that the reason for dismissal was misconduct and that it was reasonable to treat that reason as the reason for dismissal following the test in section 98(4) Employment Rights Act 1996 and the tests in British Home Stores v Burchell and Iceland Frozen Foods.

56. The claimant's claim is dismissed and I do not have to consider the issues of contributory conduct or Polkey or the award of any compensation or other remedy.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

14 June 2019