EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103669/2019

Held in Dundee on 23 and 24 September 2019

Employment Judge I Atack

Mr Alan Collins	**Claimant** **In person**
Interserve FM Limited	**Respondent** **Represented by** **Mrs Bennie** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the employment tribunal is that the claimant's claim of unfair dismissal is dismissed.

REASONS

Introduction

1. The claimant in this case claims unfair dismissal. The respondent accepts that the claimant was dismissed but asserts the dismissal was fair and that the claimant was dismissed for conduct.

2. The employment tribunal heard evidence from James Walker, guest services manager with the respondent; from Miss Tracy Neave, a housekeeping supervisor and from Ian Hannam a regional manager.

3. The parties had helpfully produced a joint bundle extending to 140 pages. The claimant wished to lodge three further documents on the first day of the hearing. Mrs Bennie objected to these documents being received on grounds of lateness, relevance and the fact she had no witnesses who could speak to the documents as she was not aware they were to be produced. The claimant's position was that the sole purpose of his presenting these documents was to show that his dismissal was premeditated.

4. After considering what both parties had said I decided to accept two of the documents namely a letter to the claimant from the respondent dated 28 February 2018 and a document from the respondent headed "Pension Salary Sacrifice Opt out Form". These were added to the bundle as pages 141-145 and 147 respectively. The final document which was headed "Employees Consultation Meeting" was not accepted as it referred to a meeting at which the claimant had not been present and its purported relevance was not made clear.

5. Reference to documents in the bundle will be by reference to their page number.

6. As the claimant was unrepresented I explained to him the procedure which would be followed at the hearing and, in particular, that I would look only at documents in the bundle to which I was referred. I also explained to the claimant that when cross examining the respondent's witnesses he would require to challenge evidence with which he did not agree and ensure that any contrasting evidence he might give and upon which the respondent's witnesses could comment should be put to them.

7. From the evidence which was led and the documents to which I was referred I found the following material facts to be admitted and proved.

Material Facts

8. The claimant was employed by the respondent as a service deck hand at the Overgate Shopping Centre in Dundee from 1 March 2010 until 10 January 2019 when he was dismissed.

9. The respondent is a business providing facilities management support services. It provided such services at Overgate Shopping Centre, Dundee.

10. On 27 June 2018 Mr Walker conducted an investigation into allegations that the claimant had acted in an intimidatory manner, showing unprofessional and aggressive behaviour and putting the company's name into disrepute. The note of that meeting is contained at pages 45 – 47.

11. Following the investigatory meeting the claimant was invited by letter of 29 January 2018, pages 48 – 49, to a disciplinary meeting on 18 July 2018.

12. The disciplinary meeting took place on 18 July. It was conducted by Craig Cunningham, then a guest service manager. The notes are contained at pages 50 – 53.

13. Having heard what the claimant had to say at the disciplinary hearing, Mr Cunningham informed him he would be given a final written warning.

14. That was confirmed by letter of 23 July, pages 54 – 55. The letter advised the claimant of his right of appeal.

15. The respondent's disciplinary policy is contained at pages 33 – 44 of the bundle.

16. The claimant did not appeal that final written warning.

17. On 28 September 2018 Craig Cunningham was advised by Kris Robb, another employee, that the claimant had said to him words to the effect that if he was to be sacked by the respondent he would pour petrol in the Overgate and set the management suite alight.

18. Mr Cunningham called the claimant to a meeting on 28 September. At that meeting the claimant was asked if he had used the words which Kris Robb had reported.

19. The claimant admitted he had said something similar but that he didn't mean it and the words were taken out of context. Mr Cunningham suspended the claimant on full pay and he was escorted from the site.

20. Mr Walker was also present at that meeting. Following its conclusion he wrote a note of what he had witnessed, page 75.

21. On 5 October 2018 a letter was sent to the claimant by Tracy Neave inviting him to an investigatory meeting on 12 October 2018 at 11 PM, page 58. That letter advised the claimant of the matter to be investigated namely:-

> "● Gross negligence, in that you deliberately acted in a manner which posed a risk to others.
> ● Unprofessional behaviour aggressive and threatening language at work.
> ● Unprofessional behaviour which has a risk of bringing the company name into disrepute."

22. That meeting was postponed as the timing given in the letter was erroneous.

23. A further letter was sent to the claimant on behalf of Tracy Neave inviting him to an investigation meeting on 16 October, pages 60 – 62.

24. The claimant requested that the meeting be postponed as he was unwell. It was rescheduled for 22 October 2018. The claimant was advised of this by letter dated 17 October, pages 63 – 65.

25. The claimant attended the meeting on 22 October but refused to answer any questions. The notes of that meeting are contained at pages 66 – 67.

26. The investigation meeting was reconvened on 1 November 2018. The claimant was accompanied by George Nicoll, a colleague. The notes of that meeting are at pages 68 – 72.

27. At the investigatory meeting Tracy Neave read to the claimant the statements from Kris Robb, Craig Cunningham, James Walker and Ian McGhee.

28. Following the investigatory meeting, the claimant was invited to a disciplinary hearing on 29 November 2018 by letter dated 23 November 2018, pages 70 – 74. The allegations against him were:

> "
> - Gross negligence, in that you deliberately acted in a manner which posed a risk to others.
> - Unprofessional behaviour; aggressive and threatening language at work.
> - Unprofessional behaviour which has a risk of bringing the company name into disrepute.
>   - On the 27th September 2018 you threatened to dowse the place in petrol or petrol bomb the Centre, namely the Management Suite, stating that there was only one way in and one way out. You were acting aggressive and banging doors."

29. The claimant was advised that he might be dismissed.

30. He was sent with the letter copies of the notes of the investigatory meetings, statement of his suspension and three witness statements.

31. That meeting did not take place as the claimant's chosen companion was not available. It was rescheduled for 4 December 2018, pages 79 – 81. That meeting did not take place, as the claimant failed to attend. It was rescheduled for 13 December but the claimant was unable to attend due to ill health and it was rescheduled for 20 December 2018.

32. The letter inviting the claimant to the rescheduled meeting on 20 December contained a further allegation of conduct towards a senior manager, Gill Wallis.

33. The disciplinary hearing took place on 20 December 2018. It was chaired by Ian Hannam. The claimant was accompanied by a colleague, Lewis Hughes. The notes are contained at pages 88 – 94.

34. At the meeting Mr Hannam read to the claimant the statements from Kris Robb, Ian McGhee, Craig Cunningham and James Walker. The claimant's response was that Kris Robb, Ian McGhee and Craig Cunningham were all lying.

35. Mr Hannam explored if there was any reason why the witnesses would make up a story. The claimant stated he had no issues with Kris Robb. He could give no explanation why Kris Robb should lie.

36. Mr Hannam adjourned the meeting to make further inquiries.

37. During the adjournment of the meeting Mr Hannam interviewed Stephen Howarth whom the claimant had said could corroborate the conversation he had had with Kris Robb. The notes of that interview are at pages 96 to 97.

38. Stephen Howarth informed Mr Hannam he could not confirm what had been said to Kris Robb as he was on the other side of a glass wall at the time. He informed Mr Hannam that after to speaking to the claimant Kris Robb was "taken aback".

39. Mr Hannam interviewed Kris Robb on 20 December 2018. Mr Robb confirmed his report of the conversation with the claimant. The notes of this interview are at pages 98 – 99.

40. Mr Hannam wrote to the claimant on 3 January 2019 inviting him to a reconvened disciplinary meeting on 10 January 2019, pages 100 – 103.

41. That letter set out again the allegations against the claimant and contained an additional allegation against the claimant namely:

> "Whilst on suspension you made contact with a member of the Overgate team and asked them to change their statement under duress."

42. That further allegation had been made as a result of a statement given by Ian McGhee on 20 December 2018, after the disciplinary hearing had been adjourned, page 95.

43. The letter also included copies of documents previously provided to the claimant, the additional statements taken following the adjourned meeting and the notes of that meeting.

44. At the reconvened disciplinary meeting the claimant's position was that the statements presented to him were untrue. He continued to deny the allegations against him.

45. Mr Hannam adjourned the meeting to consider what had been said.

46. Having considered what had been said he reconvened the meeting. He then advised the claimant that based upon the statements he found the claimant guilty of misconduct and that as he was already in receipt of a final written warning he would be dismissed with effect from that day but being paid in lieu of notice.

47. Mr Hannam informed the claimant that a letter would be sent confirming the decision and advised the claimant that he had a right of appeal. The notes of the disciplinary hearing are at pages 104 – 111.

48. A letter was sent to the claimant on 17 January 2019 on behalf of Mr Hannam, pages 112 – 114. That letter advised the claimant that he had been found guilty of

"
- Gross negligence, in that you deliberately acted in a manner which posed a risk to others.
- Unprofessional behaviour; aggressive and threatening language and behaviour at work.
- Unprofessional behaviour which has a risk of bringing the company name into disrepute.
    - On the 27th September 2018 you threatened to douse the place in petrol or petrol bomb the Centre, namely the Management Suite, stating that there was only one way in and one way out. You were acting aggressive and banging doors."

49. The claimant was dismissed on grounds of misconduct.

50. He was paid eight weeks' notice in lieu of pay. In his evidence the claimant denied he had been paid eight weeks' notice. That point was not put to Mr Hannam in evidence and I accepted his unchallenged evidence on the point that the claimant had been paid eight weeks paid in lieu of notice.

51. The allegation regarding the alleged misconduct relating to Gill Wallis was not found to be proved by Mr Hannam due to lack of evidence.

52. The letter advised the claimant of his right to appeal within five working days of notification of the decision.

53. In terms of the respondent's procedures if an employee wishes to appeal a decision they are required to inform the respondent in writing detailing the full grounds of appeal and that within five working days.

54. On 28 June the respondent received a letter from the claimant advising he wished to appeal. No grounds were stated. He said full reasons would be produced in seven days, page 115.

55. On 30 January 2019 the claimant submitted grounds of his appeal, page 116.

56. The respondent refused to consider the appeal as it was out of time in terms of their procedure and no explanation had been given as to why it had been presented out of time, page 117 – 118.

57. The claimant has been in receipt of Jobseekers Allowance until 23 July 2019. He was then in receipt of Universal Credit. He obtained a job picking litter for a period of three weeks from about 20 August 2019 and received a net payment of approximately £600.

Submissions

Claimant

58. The claimant's position was that he had done nothing wrong and that the allegations against him were all lies. His evidence was that Kris Robb,

Craig Cunningham and James Walker were all colluding and telling lies about him and the respondent wanted to get rid of him. It was also his position that Ian McGhee was also telling lies. It was because of these lies he had been unfairly dismissed.

Respondent

59. Mrs Bennie produced a written submission that she elaborated upon. I will simply summarise the main points of her argument.

60. It was the respondent's position that the reason for the dismissal of the claimant was his conduct and that it was both procedurally and substantially fair. Mrs Bennie set out the legal basis for her submission and referred to relevant cases on unfairness in conduct dismissals, namely

British Home Stores v Burchell [1978] IRLR 379
Graham v Secretary of State for Work and Pensions (Jobcentre Plus) 2012 EWCA Civ 903

61. It was her submission that there had been a reasonable investigation and the Acas code had been followed. She referred to the cases of

Sainsbury's Supermarkets Ltd. V Hitt [2003] ICR 111 and to
Santamera v Express Cargo Forwarding (t/a IEC Ltd.)[2003] IRLR 273

62. She submitted that the respondent did believe that the claimant was guilty of the misconduct and that they had reasonable grounds for that belief.

63. She also submitted that the response of the respondent was reasonable. They had dismissed the claimant with pay in lieu of notice. That was a reasonable response. In connection with the range of reasonable responses open to a reasonable employer. She referred to ***Iceland Frozen Foods v Jones*** [1982] IRLR 439.

64. She reminded the employment tribunal that it cannot substitute its own view for that of the employer as that is not its function. It is for the

tribunal to decide if the investigation was reasonable in the circumstances and whether the decision to dismiss, in the light of the results of the investigation was a reasonable response. She also made the point that it is the task of the employment tribunal to assess the reasonableness of the employer's conduct and not the injustice to the employee.

65. Her submission was that the decision was fair given that the claimant was in receipt of a final written warning which he had not appealed.

Decision

66. In reaching its decision the employment tribunal began by considering the terms of section 98(1) of the Employment Rights Act 1996 (ERA) which makes it clear that it is for the employer to show the reason for dismissal which should be one of the potentially fair reasons set out in section 98. If an employer can show that the reason for the dismissal is one of falling within the scope of section 98 the tribunal must then go on to consider whether the dismissal is fair or unfair. That would depend on whether in the circumstances (including the size and administered of resources of the undertaking) the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and is to be determined in accordance with equity and the substantial merits of the case.

67. The tribunal throughout was mindful of the fact that it must not substitute its own decision for that of the employer. Rather, it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case – ***Iceland Frozen Foods v Jones*** (above). The tribunal bore in mind throughout what this test means in practice. In a given set of circumstances one employer might decide that dismissal is the appropriate response whilst another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of the case.

68. The tribunal also bore in mind the test set out in ***British Home Stores Ltd v Burchell*** (above) with regard to the approach to be taken in considering the terms of what is now section 98(4) ERA:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. 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 at 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 that onus of demonstrating those three matters, we think, must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances."

69. In this case I had no hesitation in finding that the reason for the dismissal of the claimant was due to conduct. The claimant's allegation that the respondent was seeking to be rid of him was not borne out in fact and no evidence was produced by the claimant to substantiate that allegation.

70. Conduct is a potentially fair reason for dismissal in terms of ERA.

71. The next question to consider is whether the investigation was reasonable in all the circumstances of the case. In this case the initial investigation arose as a result of a report made by Kris Robb that the claimant had said words to the effect that he would pour petrol and set light to the management suite. That allegation was reported to Craig Cunningham who invited the claimant to a meeting with him to which James Walker also attended, to discuss the allegation. The notes of that

meeting indicate that the claimant admitted saying those words or something like them.

72. As a result of that initial investigation Tracy Neave was instructed to carry out a formal investigation. The claimant was invited to that investigation and knew the exact nature of the allegations which were being investigated. He was given the opportunity to respond to the allegations and was accompanied at the meeting on 1 November 2018.

73. Following the investigatory hearing the claimant was invited to a disciplinary hearing. He was advised of the nature of the allegations against him and given copies of all relevant documents. He was well aware of the case he had to meet and the allegations he faced and the potential penalty should he be found guilty.

74. The disciplinary hearing took place on 20 December 2018 and again the claimant was accompanied. As a result of the claimant alleging that Stephen Howarth would be able to confirm that he had not made the statement as claimed by Kris Robb Mr Hannam adjourned the meeting to take a statement from Mr Howarth and to clarify with Kris Robb the contents of his original statement. Mr Hannam gave evidence that he found Kris Robb to be a truthful witness who was surprised at being questioned again.

75. The disciplinary hearing was reconvened on 10 January 2019 and as a result Mr Hannam found the claimant guilty of the alleged misconduct, other than the allegation relating to Gill Wallis.

76. I was satisfied that the investigations carried out were fair and reasonable and that at each stage the claimant was given an opportunity to explain his answers to the allegations. There was no evidence that the investigatory hearings and the disciplinary hearing were anything other than procedurally fair. They were in accordance both with the respondent's own procedures and the Acas code.

77. I was satisfied that Mr Hannam did believe the allegations against the claimant. I was also satisfied that at the time he formed that belief in the final disciplinary hearing he had in his mind reasonable grounds upon

which to sustain that belief. He had the various witness statements, the reports of the initial investigatory meeting with Mr Cunningham and the notes of the investigatory hearing chaired by Tracy Neave. The claimant had suggested to him that another witness should be interviewed and Mr Hannam carried out that interview. He believed the witnesses and formed the view that the claimant had been guilty of the alleged misconduct. No reason was ever suggested as to why Kris Robb would make up an untrue story about the claimant and report that to his superior. The claimant accepted that he had a good relationship with Kris Robb and offered no suggestion as to why Mr Robb should lie about him.

78. Similarly, no evidence was produced to substantiate the allegation that Craig Cunningham and James Walker had lied when they reported that at the initial investigatory meeting the claimant had admitted using the words reported by Kris Robb or words very similar to them. I therefore concluded that Mr Hannam had reasonable grounds upon which to sustain his belief in the claimant's guilt. I was also satisfied that when he formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

79. The claimant's position throughout was that lies were being told but he could not explain to Mr Hannam or indeed to the employment tribunal hearing why any of the witnesses should lie about him.

80. Having concluded that Mr Hannam had reasonable grounds for his belief in the claimant's guilt, the next question to be considered is whether the response by the employer fell within the range or band of reasonable responses open to a reasonable employer.

81. I noted that Mr Hannam had not dismissed the claimant for gross misconduct, as he might have done, but instead chose to dismiss him for conduct and pay him eight weeks' pay in lieu of notice. Having found the claimant guilty of the allegations, with the exception of the one relating to Gill Wallis, the penalty of dismissal of an employee in receipt of a live final written warning was within the range of reasonable responses open to a reasonable employer.

82. I should add again at this stage, that there was some dispute as to whether the claimant had been paid in lieu of notice or, as he claimed, summarily dismissed. I accepted the evidence given by Mr Hannam, whom I regarded as a credible witness, and took into account that the claimant had not put this particular point to Mr Hannam in cross examination despite having been advised by me in advance that he should be careful to put to any witness any contrary evidence he might lead so they could comment on it. No indication was given while Mr Hannam was giving evidence that it was to be alleged that the claimant had not been paid in lieu of notice. I therefore concluded that the claimant had been paid in lieu of notice.

83. The claimant did endeavour to appeal his dismissal but the appeal was refused as being out of time. I was satisfied that the claimant had been told in the letter of dismissal of 17 January 2019 of his right of appeal and the timings for submitting it. He did not comply with those time limits and at no stage offered the respondent an explanation for his failure to lodge the appeal timeously. I was satisfied that the respondent acted reasonably in refusing to entertain the appeal.

84. For all these reasons the claimant's claim is dismissed.

Employment Judge: **Ian Atack**
Date of Judgment: **08 October 2019**
Date sent to parties: **09 October 2019**