



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Wright

**Respondents** Govia Thameslink Railway

**Heard via CVP (London Central) On:** 2 and 3 February 2022

**Before:** Employment Judge Davidson

## **Representation**

**Claimant:** Mr D Renton, Counsel

**Respondents:** Ms L Veale, Counsel

# RESERVED JUDGMENT

**The claimant's complaints of unfair dismissal and wrongful dismissal succeed. A remedy hearing will be listed to deal with remedy, including the claimant's request for reinstatement.**

# REASONS

## The issues

1. The claim is for unfair dismissal and wrongful dismissal. The issues are as follows:

### *Unfair dismissal*

- 1.1. It is accepted that the claimant was dismissed for a reason related to his conduct.
- 1.2. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:
  - 1.2.1. the respondent genuinely believed that the claimant had committed the misconduct;
  - 1.2.2. there were reasonable grounds for that belief;

- 1.2.3. at the time the belief was formed the respondent had carried out a reasonable investigation;
- 1.2.4. the respondent otherwise acted in a procedurally fair manner;
- 1.2.5. dismissal was within the range of reasonable responses.

*Remedy for unfair dismissal*

- 1.3. Does the claimant wish to be reinstated to their previous employment?
- 1.4. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 1.5. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 1.6. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 1.7. What should the terms of the re-engagement order be?
- 1.8. If there is a compensatory award, how much should it be? The Tribunal will decide:
  - 1.8.1. What financial losses has the dismissal caused the claimant?
  - 1.8.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - 1.8.3. If not, for what period of loss should the claimant be compensated?
  - 1.8.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 1.8.5. If so, should the claimant's compensation be reduced? By how much?
  - 1.8.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - 1.8.7. Did the respondent or the claimant unreasonably fail to comply with it?
  - 1.8.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
  - 1.8.9. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
  - 1.8.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
  - 1.8.11. Does the statutory cap of fifty-two weeks' pay apply?
- 1.9. What basic award is payable to the claimant, if any? Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

*Wrongful dismissal / Notice pay*

- 1.10. Was the claimant guilty of gross misconduct?

The evidence

2. The tribunal heard evidence from the claimant, Hellen Thiel (Ticket Office Sales Clerk), Keith Painter (Ticket Office Sales Clerk) on behalf of the claimant and from Vikash Patel (Station Manager), Sophie Finn (Station Manager) and Robert Walker (Area Station Manager London Terminals) on behalf of the respondent. They each submitted a witness statement and were cross examined and questioned by the tribunal.
3. There was a bundle of 187 pages with one further page added during the hearing.

The facts

4. The facts were largely not in dispute between the parties. The main facts are as follows:
5. The respondent is a train operating company that operates the Thameslink, Southern, Gatwick Express and Great Northern rail franchises. The claimant was employed by the respondent as a Ticket Office Clerk at Victoria Station. His employment commenced on 17 October 2005. He had an excellent work record and was known to be reliable, always punctual and never absent. He had a clean disciplinary record.
6. The following policies were in place during the claimant's employment:

***The Southern Rules of Conduct and Discipline***

*Your contract of employment required you to conform to the following rules of conduct and discipline.*

*(...)*

***2. Alcohol and drugs***

***2.1 You must not:***

- *report, or try to report, for duty at any time when unfit through alcohol or drugs*
- *consume alcohol or any illegal drug while on duty*

***19. Disciplinary offences***

*The agreed disciplinary procedure ... will be applied in any of the following acts of misconduct:*

- *You are unfit for work through consuming alcohol or drugs before, or while on duty\**

*(...)*

*Offences which break necessary mutual trust that must exist between employer and employee including breaches of Health & Safety rules will constitute gross misconduct for which the normal penalty is summary dismissal in accordance with the disciplinary procedure. Such offences are indicated with an asterisk (\*).*

***The prohibition of alcohol consumption in the Drug and Alcohol Policy***

*In order to meet this Policy, employees (including contractors / sub-contractors) :*

- *shall not come to work in an unfit state through drugs or alcohol;*
- *shall not consume alcohol whilst at work or during periods of paid 'on- call' duty;*
- *(...)*

*It is the employee's responsibility to report for duty fit for work and to report any side effects experienced of any medication taken at the time of booking on.*

*Any time when a person is being paid and is 'on duty', including periods of paid 'on call' duties.*

***The 'Alcohol, drugs and you...' booklet***

*GTR has a zero tolerance approach to individuals attending work whilst under the influence of drugs and/or alcohol. This policy is designed to protect everyone from the consequences of drugs and alcohol in the workplace by outlining the following principles:*

*Ensure that you do:*

- *Report for work and remain in a condition to perform your duties 100% free from the effects of alcohol, drugs or any other substance – this includes when on call, regardless of the likelihood of receiving a call or reporting for duty.*

*(...)*

*Do not under any circumstance:*

- *Start work if you have consumed alcohol in the previous few hours*
- *Come to work in an unfit state as a result of consuming alcohol or taking any drug*

7. Due to the COVID pandemic and the significantly lower passenger numbers, the respondent introduced a 'home standby process' under which a reduced number of staff attended the station and other staff were rostered to be on 'standby' at home, which meant that they would be paid and were available to be called into work.
8. The new policy was sent to staff by email and put up on the noticeboard. The claimant did not see it directly. It is not disputed that the claimant had problems with accessing emails on his work phone and had not noticed the policy on the noticeboard, which was used for various purposes and was crowded with notices. He was aware of the policy by speaking to his colleagues.
9. The terms of the policy included the following:
  - 9.1. To remain home and be contactable by phone
  - 9.2. To be able to get to work within an hour of being called

- 9.3. The Drug and Alcohol policy to be complied with as normal
- 9.4. Full basic pay to be paid
- 9.5. Any failure to be contactable by the manager or refusal to attend work will lead to the employee being marked absent and not receiving pay for that shift.
10. The policy included a provision that those on standby will be given an hour to get to work. The claimant misunderstood this and thought it meant that he would know an hour before the shift start time whether he would be needed. He told the tribunal that in his 15 years working in that role, he had never been aware of anyone being called in part-way through a shift to cover a colleague. He accepts that he misunderstood the policy but states that this was a genuine misunderstanding. The respondent did not challenge the genuineness of the misunderstanding.
11. On 28 May 2020, the claimant's standby shift began at 14.00. Under his understanding of the policy, he would know by 13.00 whether or not he would be required. When he had not heard anything by 13.00, he (incorrectly) assumed that he would not be called on that day. He had a glass of wine after 13.00 based on this understanding.
12. At 13.08, he received a call from his manager asking him to come into work to cover a colleague who had been given emergency family leave. The claimant, who was aware of the respondent's alcohol policy, told his manager that he was not able to come to work as he had had a glass of wine.
13. The following day, 29 May 2020, he attended for his shift at Victoria Station. He was then called to an investigation meeting which was conducted by the Station Manager, Vikash Patel, following which he was suspended. Mr Patel acknowledged that the claimant had been honest and suggested that would be taken into account to his advantage. He also told the claimant not to worry.
14. The allegation was that the claimant was under the influence of alcohol while on duty hence he was unfit to work, which is a risk to the business.
15. Mr Patel investigated the allegations, interviewing the claimant, Russell Allen (Station Manager) and Ofelia Fulston (Team Leader). At the conclusion of the investigation, Mr Patel put together an Investigation Pack and reached the conclusion that there was a case to answer. It is not clear what date the investigation was concluded.
16. On 3 July 2020, Vikash Patel asked Ofelia Fulston and Russell Allen if this was the first time the claimant had been called in from home standby when he had consumed alcohol. Ofelia Fulston replied that this was the first time in her time with the respondent (two years) that she had heard of the claimant and alcohol together and, in fact, he used to tell people not to drink at all when on duty due to zero tolerance. This exchange of emails was not included in the Investigation pack and was not before the disciplinary manager.

17. On 24 July 2020, the claimant was invited to a disciplinary hearing to be conducted by Sophie Finn on 31 July 2020. She had completed her disciplinary hearing training shortly before and this was her first dismissal hearing. At the hearing, the claimant was accompanied by Keith Painter and there was a note-taker present. The claimant was allowed to make representations and to make submissions in mitigation. Sophie Finn concluded that, as he was in breach of the alcohol policy, he had committed gross misconduct and she dismissed him with immediate effect.
18. In evidence before the tribunal, Sophie Finn said that she believed that summary dismissal was the only option and there was no argument in mitigation that the claimant could have made which would have changed her view. She did not consider it relevant that he had a drink at home, rather than in the workplace, that his role was not safety-critical or whether or not he was on or just over the railway alcohol limit.
19. She accepted that the Covid policy states that the implications of not attending for work when called from home standby are being marked as absent and forfeiting the day's pay. However, she took the view that the Alcohol policy was referred to in the Covid policy and therefore would be applied and would take precedence.
20. She did not accept that the claimant's misunderstanding about the 13.00 cut off was reasonable although she accepted it was genuine.
21. She accepted that she did not discuss with the claimant whether he would abide by a warning if a warning was imposed, which she agreed would be a relevant matter.
22. The decision was confirmed in writing on 3 August 2020. Although the letter states that she has taken into account mitigating factors, her evidence before the tribunal made it clear that she had not.
23. The claimant appealed against the decision. An appeal hearing was conducted by Robert Walker on 28 August 2020. The claimant was represented by Ray Cocoran (RMT Representative) and there was a note-taker present. Robert Walker took into account the claimant's honesty but found that the company's policies supported the decision to dismiss in the circumstances. He took the view that the policies were all that counted and that he would not look at what ACAS said. He also added that he found the decision difficult as it did not seem 'morally right' but it is clear he felt that the wording of the policies gave him no scope for manoeuvre. The decision was confirmed in a letter dated 29 August 2020.
24. The claimant understands that his co-workers have signed a petition in support of the claimant although this was not before the tribunal. This evidence was not challenged.

### The law

25. When considering whether a conduct dismissal is fair, the tribunal must follow the principles set out in *British Home Stores v Burchell* [1978] IRLR 379 affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.
26. Under *Burchell*, the tribunal must consider whether or not the employer had an honest belief that the employee had committed the misconduct, whether there were reasonable grounds on which to base that belief and whether the employer had carried out a reasonable investigation.
27. The tribunal must also consider whether a fair procedure was followed and whether the employer's decision to dismiss was within a range of reasonable responses to the conduct.
28. In *Taylor v Parsons Peebles* [1981] IRLR 119, it was held that the tribunal should consider what a reasonable employer could do, not just what the employer's policy states. The disciplinary manager should take into account length of service and previous good conduct and it is not reasonable to apply a rigid sanction of automatic dismissal.
29. In *John Lewis plc v Coyne* UKEAT/581/99, the EAT held that a dismissal was unfair where a manager had not approached the issue with an open mind since he regarded dismissal as the 'inevitable consequence' of the misconduct.
30. In *Brito-Babapille v Ealing Hospital NHS Trust* [2014] EWCA Civ 1626, the EAT did not agree with the proposition that once gross misconduct is found, dismissal must always be within the range of reasonable responses.
31. In *Vincent v Hinder* UKEAT/0174/13, the tribunal was entitled to find that the dismissal was unfair because the respondent did not take into account any mitigating circumstances.

### Determination of the Issues

#### *Unfair dismissal*

32. The tribunal reached the following conclusions applying the test in *BHS v Burchell*, taking care not to substitute its view for that of the respondent.
  - 32.1. The respondent genuinely believed that the claimant had committed the misconduct by drinking a glass of wine while rostered on standby duty.
  - 32.2. The respondent had reasonable grounds for that belief in that the claimant admitted that he had had a drink.
  - 32.3. I find that there was a reasonable investigation as the facts were not in dispute and the claimant was honest about what he had done.

33. I go on to consider whether a fair process was followed. I find that it was not. I find that Sophie Finn had made up her mind before the disciplinary hearing that dismissal was the only outcome based on her understanding of the Drug and Alcohol Policy and the 'zero tolerance' principle. She stated that any breach of the policy was gross misconduct. On reviewing the policies, this is clearly not the case. There is scope for mitigating factors to be taken into account and there are some offences which are not categorised as gross misconduct. The Guidelines set out the policy and stated that *'Failure to comply is a breach of the policy and could result in disciplinary action being taken against you'*. I find that Sophie Finn was wrong to conclude that any breach must result in dismissal, whatever the circumstances.
34. Following the line of authorities set out above, even if the policy required dismissal in any circumstances, that would not necessarily mean that the dismissal was fair. An employer must take into account mitigating factors, such as length of service, and any mitigating circumstances of the incident itself.
35. The zero tolerance approach is stated to apply to *'individuals attending work whilst under the influence of drugs and/or alcohol'* and is designed to *'protect everyone from the consequences of drugs and alcohol in the workplace'*. It is accepted that the claimant was in breach of the policy by having a drink while rostered for work but there is no suggestion that he attended work while under the influence of alcohol. In fact, in accordance with the policy, he told his manager that he could not attend and he understood that, if he attended, he would be in breach of the policy and could be a risk to the business. There is also no suggestion that the claimant was a risk to anyone since he did not attend the workplace.
36. As there was no risk to the safety of staff or passengers, the risk to the business was no greater than if the claimant had not attended for another reason. The harm to the business was needing to find another person to cover the shift, which would have been the case if the claimant declined the shift for another reason. The sanction for that was set out in the Covid policy as loss of the day's pay and being marked 'absent'. The claimant is in the position that, if he had made up another reason for declining the shift, he would not have been dismissed and, as pointed out by Robert Walker, the claimant has been disadvantaged by his honesty and *'his own moral code worked against him'*.
37. I find that Sophie Finn considered herself obliged to dismiss under the various rules and policies in force. Not only was this an incorrect reading of the relevant rules and policies, it resulted in a substantive unfairness because the claimant's representations in mitigation were destined to fail as the outcome had been pre-determined.
38. I must also consider whether dismissal is an appropriate sanction. I must consider whether dismissal is within the range of reasonable responses and I find that it is



not. Taking into account the following factors, I find that no reasonable employer would dismiss in these circumstances:

- 38.1. the claimant was honest throughout, even though it would have been to his advantage to lie;
- 38.2. he had an exemplary attendance record, clean disciplinary record and long service;
- 38.3. his explanation, while amounting to a misunderstanding of the rules, was genuine;
- 38.4. the publicised penalty for failing to attend shift was forfeiting a day's pay and being marked absent;
- 38.5. the gross misconduct offences in the alcohol policies are focussed on safety on the railway, which was not at stake in this case.

39. In conclusion, I find that the claimant was unfairly dismissed.

*Wrongful dismissal*

40. I find that the claimant was not in fundamental breach of his contract of employment and that he had not committed gross misconduct. He was therefore wrongfully dismissed.

*Remedy*

41. A hearing will be listed to deal with remedy.

Employment Judge Davidson  
Date 14 February 2022

JUDGMENT SENT TO THE PARTIES ON

15 Feb. 22

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FOR EMPLOYMENT TRIBUNALS

Notes

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CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.