EMPLOYMENT TRIBUNALS
By CVP

Claimant Mr. L. Murawiecki

Respondent Securewais UK Ltd

v

Heard at: Watford **On**: 27 November 2020
Before: Employment Judge Heal

Appearances
For the Claimant: in person
For the Respondent: Mr. R. Freedman, Chief Executive and Financial Officer

RESERVED JUDGMENT

1. The complaint of breach of contract is well founded and (by consent) the respondent shall pay to the claimant the agreed sum of **£1553.70** net.

2. The complaint of unpaid accrued annual leave is dismissed upon withdrawal.

3. The complaint of unfair dismissal is well founded.

4. The complaint of unauthorised deductions from wages is well founded and the respondent shall pay to the claimant the sums of **£489.17.**

5. Unless the matter is resolved between the parties, there will be a remedies hearing on **22 January 2021** to determine the basic award and compensation for unfair dismissal.

ORDER

On or before **11 December 2020** the claimant shall disclose to the respondent all of his documents relevant to remedy.

Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, further education or training, all

pay slips from work secured since the dismissal, the offer letter and terms and conditions of any new employment, etc…

REASONS

1. By a claim form presented on 16 September 2018 the claimant made complaints of unfair dismissal, breach of contract (unpaid notice), unpaid accrued annual leave and 'other payments'.

2. I have had the benefit of three bound volumes of bundle provided by the respondent. These were not agreed in the sense that the claimant said that there were emails missing which the respondent had not disclosed and the claimant could not access because his work email account was closed on his dismissal. The claimant supplied me with one further document during the hearing: a piece in the Metro newspaper about delays in the London Underground service. During his evidence Mr House agreed that the claimant had sent him an email which he then sent onto Mr Freedland who sent it to the claimant and the tribunal.

3. I have also heard oral evidence form these witnesses in this order:

Mr Allan Waisman, Chief Executive Officer
Mr Nicholas House, Project Manager,
Mr Lukasz Murawiecki, the claimant and
Ms Tasha Henry, the claimant's partner.

4. At the outset of the hearing and with the help of the parties I identified the issues as follows:

Unfair dismissal claim

4.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. The respondent says that the factual reason was '*breach of two final written warnings and consistent late arrival, early departures and consistent non-attendance at work*.' The respondent must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

4.2 Did the respondent carry out as much investigation as was reasonable in all the circumstances and hold its belief in the claimant's misconduct on reasonable grounds?

4.3 Was the decision to dismiss based on a fair procedure and was it a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

4.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

4.5 Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place? ('Polkey')

4.6 The remaining claim was for 'other payments' which turned out to be a complaint of unauthorised deductions from wages.

4.7 The claimant said that deductions had been made from his final salary payment. The pay slip was at page 46 of the bundle and showed deductions for '*sick leave, advance pay and equipment.*'

4.8 The respondent said that the 'sick leave' was for three 'waiting days' when the claimant was off sick. The 'advance pay', said the respondent, was because sometimes an engineer was on the rota to work on a particular day, but then another engineer would cover. Normally engineers would transfer the payment themselves, however this did not happen because the claimant was dismissed.

4.9 The respondent said that the 'equipment' was that the claimant did not return his uniform and therefore he owed for the cost of it.

4.10 Were these deductions overpayments or authorised?

The law.

Unfair dismissal

5. My starting point is always the wording of section 98 of the Employment Rights Act 1996.

6. Where an employer has a suspicion or belief of an employee's misconduct and dismisses for that reason, I have to apply the three-stage test set out in British Home Stores v Burchell [1980] ICR 303. I find it helpful to remind myself of the relevant passage in the judgment of Arnold J:

> *"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 the onus of demonstrating those three matters, we think, who must not be examined further."*

7. It is with that test in mind that I have formulated the issues in this case. The burden lies upon the employer to prove the reason for the dismissal: that it had a genuine belief in the misconduct. Thereafter the burden is neutral. On that neutral burden I ask whether the employer had in its mind reasonable grounds upon which to

sustain its belief in the conduct, and also, on a neutral burden of proof, I ask whether the employer had carried out as much investigation as was reasonable in all the circumstances.

8. I remind myself that it is not for me to substitute my own view for that of the employer. The question (at this stage) is not whether the claimant was actually guilty of misconduct, or whether I would have dismissed in the circumstances or even whether I would have investigated as this employer did. The question is whether this employer took an approach which was open to a reasonable employer: was it within the reasonable range of responses? I find those principles set out in the judgment of Browne- Wilkinson P in Iceland Frozen Foods v Jones [1983] ICR 17 paragraph 24.

9. I have to apply that test as much to the question of whether the employer carried out a fair procedure as to the question of whether dismissal was a fair sanction. I have to focus therefore on the evidence that was actually before the employer, not on evidence that I have heard but that the employer did not hear.

10. In asking whether or not an employer has carried out a fair procedure, I bear in mind and have referred to the ACAS Code of Practice and Guide to Disciplinary and Grievance procedures (2015).

11. Is it open to the claimant to challenge a prior warning? In *Stein v Associated Dairies Ltd [1982] IRLR 447* the EAT held that the test required to be satisfied before it would be appropriate for a tribunal to look behind a warning was that provided the warning was issued in good faith and there were prima facie grounds for it (or, to put it another way, provided the warning was not issued for an ulterior motive or was not manifestly inappropriately issued) the employer and the tribunal are entitled to regard the warning as valid for the purposes of any dismissal arising from subsequent misconduct, provided that the subsequent misconduct is such that, when taken together with the warning, the dismissal or the decision to dismiss is a reasonable one.

12. A deduction from a worker's wages will only be lawful if one of the following three conditions set out in ERA 1996 s 13(1) is satisfied:

(i) the deduction is required or authorised to be made by virtue of any statutory provision (s 13(1)(a));
(ii) it is required or authorised to be made by virtue of any relevant provision of the worker's contract (s 13(1)(a)); or
(iii) the worker has previously signified in writing his agreement or consent to the making of the deduction (s 13(1)(b)).

13. An overpayment of wages is an exception to section 13.

Facts

14. I have found the following facts on the balance of probability.

15. The respondent is a limited company engaged in the business of supply, installation and maintenance of electronic security systems.

16. On 21 September 2015, the claimant began his employment with the respondent as a Security System Engineer.

17. There were the following express terms in the claimant's contract of employment:

Termination for cause

13.2…

'While the Company will endeavour to deal fairly with allegations against you, we reserve the right to proceed under this clause without prior notice and without holding a hearing or inviting any representations from you.

Uniforms and Identification

20.1… The Company may, in its absolute discretion, render you liable for the cost of replacement items of uniform.

Deductions

22.1 the Company reserves the right to deduct any monies owing by you to the Company, or any overpayments made to you by the Company, from your salary and any applicable bonus.'

18. I have found Mr House to be a reliable witness. In part, this is because he readily volunteered the existence of an (undisclosed) email in his possession, the production of which might be viewed as damaging to the respondent's interests. I accept Mr House's evidence that from the later part of 2017 he had reason to view the claimant's timekeeping and attendance at work with concern. Mr House had a number of conversations informally with the claimant about his timekeeping. On these occasions the claimant assured Mr House that he would no longer report for work late or leave early.

19. On 2 March 2018 Mr Freedman sent to the claimant an email recording that he had asked for and was denied permission to take leave on that day. The email says that nonetheless claimant took the leave. Accordingly, the respondent gave the claimant a final warning that any further unauthorised leave would result in his summary dismissal.

20. The email ended,

'*if you wish to discuss this or any other matter with me, feel free to arrange to meet*.'

21. There was no hearing or meeting with the claimant before this warning was issued. The claimant was not told of any right to appeal. Nor however did he take up Mr Freedman's offer of an opportunity to have a discussion subsequently. The claimant says that his *second* warning was given wrongly but he does not criticise the validity of this first warning.

22. By email dated 15 March 2018 the claimant told Mr Freedman that he would not be in that day because he had a problem with his stomach. He was in pain. He understood that Mr Freedman might be annoyed with him because of his absence but he asserted that he was trying to be a good worker. He added,

'*I understand your email, and warning but I'm really not in condition to be in today*.'

23. I conclude from this email that the claimant was fully aware that the respondent did not see him as a good worker because of his absences. He was aware too of the import of the final warning.

24. Mr Freedman responded that the claimant would need a medical certificate. The claimant replied that he could not get an appointment with his doctor until the following Monday and said that he was still feeling bad so that he would not be in work on 16 March either. On the email correspondence, it appears that the claimant did not go to work and did not communicate with the respondent on 19 March.

25. On 16 May 2018 Mr Freedman sent an email to the claimant saying that it had been brought to his attention that the claimant had been absent without consent. He said that he had discussed this with the claimant on two previous occasions and agreed that should it happen again he would be in breach of his employment agreement. He added,

'*you are now formally advised that you are in breach, this is a FINAL WRITTEN WARNING, any further unauthorised absence will result in dismissal.*

If you wish to discuss this matter with me, kindly call during office hours.'

26. There had been no hearing or meeting before this warning was issued and the claimant was not given any right of appeal. Nor however did the claimant take up Mr Freedman's offer of a discussion.

27. This was the email, sent originally on 15 May 2018, which Mr House disclosed during the course of the tribunal hearing:

'Hi Nick.
Ive spoke with Allan and David. Tried to call you. Its my bday tomorrow and my gf made unexpected suprize party. I called Allan and asked if I can be off tomorrow, he said to call David and if its ok with David to be by himself, its fine just in case if I will get your permission as well. I called David, he said its fine.
Kind Regards
Lukasz'

28. 'Allan' was Mr Waisman.

29. Had the respondent conducted a hearing or investigation before issuing the final written warning, it is highly likely that the claimant would have referred to this email in his defence so as to show that he did in fact receive permission from Mr Waisman to be absent on 16 May. However, the procedure adopted did not give him that opportunity.

30. On 21 June 2018 the claimant was off sick, and Mr Freedman wrote to him saying that in the light of his recent absences the respondent required a doctor's certificate for each and every absence from work. He said that he would also arrange for the claimant to attend the company doctor who would produce a report.

31. Mr Freedman repeated this on 26 June 2018 and asked for an undertaking from the claimant that he would attend an appointment with the doctor. The claimant replied requesting the credentials of the company doctor so that the company doctor could liaise with his own doctor who was aware of the claimant's medical history. He said that he was already aware of the cause of his illness and told the respondent of the diagnosis.

32. Mr Freedman replied that the claimant did not have the right to approve which doctor the company arranged an appointment with and he requested again an undertaking from the claimant that he would abide by the conditions in his contract of employment.

33. The claimant was signed off work sick from 21 June 2018 to 27 June 2018.

34. On 28 June 2018, Mr Waisman happened to see the claimant arriving at work 32 minutes late. He took a photograph of the claimant and asked him why he was late. The claimant shrugged his shoulders in response and did not say anything.

35. Mr Waisman therefore contacted Mr Freedman and said,

'*What is going on? As you know there were two warnings. It is enough*.'

36. Mr. Waisman decided then to dismiss the claimant. In doing so, he knew that the claimant was a good worker and he worked hard when he was at work. However, he knew of the two previous warnings and took them both into account. He had witnessed the claimant shrug and his nonchalant attitude to his lateness. Mr Waisman took into account that in the respondent's industry the attitude of workers was important to the reputation of the respondent. He was troubled about the claimant's attitude in this context. He decided that the respondent had had enough of the claimant's behaviour.

37. In making this decision to dismiss Mr Waisman carried out no further investigation of the matter beyond his challenge to the claimant when he took the photograph. The respondent as a whole carried out no further investigation. There was no hearing or meeting with the claimant and the claimant did not have an opportunity to put forward any defence or mitigation in the knowledge that he was likely to be dismissed. The claimant was not offered any opportunity to appeal.

Analysis

Unfair dismissal

38. I consider that the respondent dismissed the claimant unfairly for the following reasons.

39. The reason for the dismissal was the claimant's conduct in that he was late for work on 28 June 2018 having had two prior warnings for being absent without leave. I accept that this is genuinely the respondent's reason for dismissal. Mr Waisman's instant reaction, having seen claimant coming to work late and his opening words to Mr Freedman are strong evidence of the genuineness of the reason for dismissal.

40. However, the respondent did not carry out as much investigation as was reasonable in all the circumstances. Although Mr Waisman did at least ask the claimant why he was late - which is some investigation - the claimant was not given a chance to reflect and gather his thoughts so as to put forward a considered explanation if he had a real excuse or some mitigation for being late.

41. Moreover, there was no disciplinary hearing, and the claimant had no colleague or representative with him. He was not given an opportunity to put forward his defence or mitigation and to have it considered in a calm, disciplined setting.

42. Furthermore, Mr Waisman was the witness who saw the alleged conduct. Mr Waisman was the only investigator. Mr Waisman then made the decision to dismiss.

43. Although the respondent is a small family style company, there were other senior people or directors available who could have conducted an objective investigation and carried out an objective decision-making process. Instead, the claimant was dismissed as the result of one director's instant reaction to witnessing his conduct.

44. That having taken place, there was then no appeal which would have given the claimant an opportunity to raise these points about fairness and/or given him an opportunity to put forward any defence or mitigation.

45. Therefore, although the respondent has proved its reason for dismissal, it has not carried out as much investigation as was reasonable in all the circumstances and therefore it cannot be said that its genuine belief in the claimant's misconduct was reasonably based on that investigation.

46. Moreover, no reasonable employer would have conducted this dismissal using the process which this respondent used. Given the size and resources of this respondent's undertaking it was outside the range of reasonable responses for the person who witnessed the conduct to act both as investigator and dismissing manager. It is also outside the range of reasonable responses, especially bearing in mind the ACAS code of practice, to dismiss in the circumstances without warning the claimant of the facts alleged against him, of the risk that he faced dismissal and without giving him a hearing and an appeal at which to put a defence and or mitigation.

The warning

47. Therefore, this dismissal is unfair, and it would be unfair regardless of whether the final written warning was given appropriately. However, given that the claimant has raised this issue, I deal with it as well. I consider it 'manifestly inappropriate' to issue a final written warning without any prior hearing or investigation, without any right of

appeal and without giving the claimant an opportunity to put forward a defence such as that contained in the email disclosed during the course of this hearing. It was furthermore manifestly inappropriate to decide that the claimant had been absent without leave when his own email to Mr House demonstrated that he had taken steps to secure permission and believed that he had been given permission to take his day's leave. Given that Mr Waisman relied on the final written warning in deciding to dismiss, I consider that for this reason too the dismissal is unfair.

Clause 13.2

48. Mr Freedman relied on the section of clause 13.2 quoted in paragraph 17 above in his cross examination of the claimant. I remind myself of section 203 of the Employment Rights Act 1996 which renders void any clause in a contract in so far as it purports to exclude or limit to operation of any provision of the Employment Rights Act 1996 except for settlement agreements which comply with the requirements of section 203. The part of clause 13.2 quoted is therefore void.

'*Polkey*'

49. Having found the dismissal unfair, I now ask myself what is the percentage chance of a fair dismissal in any event, and when such a dismissal would have taken place? Given the manifestly inappropriate circumstances of the final written warning, had respondent approached the events of 28 June fairly I do not consider that he would have been dismissed at all because of those events. He would have been half an hour late, but there would have been one prior warning, not two. The respondent had not in fact dismissed when it believed that there was only one warning.

50. Looking into what would have happened thereafter, I find the claimant's past behaviour a reliable indicator of his likely future behaviour. So, I consider that had the claimant not been dismissed because of the events of 28 June, there is a 75% chance that he would have been dismissed after three months in any event, because he did not seem ready or able to change his behaviour.

51. Any compensation for loss of earnings awarded to the claimant for any period *after three months from 28 June 2018* will be reduced by a factor of 75%.

ACAS Code of Practice

52. I now consider whether any increase should be made to the claimant's compensation because of the employer's failure to comply with material provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. (section 207A TULR(C)A 1992).

53. Although the investigation was scant, there was some investigation of the conduct on 28 June 2018. There was however no consideration of whether a different person should carry out the decision to dismiss. The claimant was not informed in writing that there was a disciplinary case to answer and therefore it follows that he was not given sufficient information about the alleged misconduct and its possible consequences so as to enable him to prepare to answer the case at a disciplinary meeting. He was not given any written witness statements or evidence. No meeting

was held with the claimant to discuss the problem. It follows that he was not allowed any accompaniment at a disciplinary meeting and there was no opportunity of appeal.

54. I consider that all these failures were unreasonable, and that the code of practice applies. Therefore, I may increase any compensation awarded to the claimant by no more than 25%. Giving some credit for the fact that Mr Waisman did at least ask the claimant why he was late, I increase the compensation awarded to the claimant by 23%.

55. This increase to the claimant's compensation will be made *after* any reduction to reflect the percentage chance of a fair dismissal in any event (Polkey).

Contributory fault

56. I now turn to contributory fault. I have accepted as a matter of fact that the claimant had developed a habit of turning up for work late and leaving early. I have accepted Mr House's evidence of this. I have accepted that the claimant did not alter his behaviour because of informal discussions or warnings. I have also accepted Mr Waisman's evidence of the claimant's lateness and nonchalant demeanour on 28 June 2018.

57. Although there is some evidence that the claimant had a medical condition, I do not have evidence that that or indeed any delays on the London Underground caused any particular incident of lateness.

58. I consider that level of culpable conduct has contributed to the claimant's dismissal by a factor of 30%.

59. This reduction in compensation will be made after the application of an increase of 23%.

Unauthorised deductions from wages.

60. During the discussions at the outset of the hearing which identified the issues in the case, I told the respondent that I would have to hear specific evidence about the deductions made, that is the dates and circumstances of the sick leave and the advance pay and that I might not accept evidence on the basis of what 'would have been done'.

61. However, although the issues were identified in discussion, no evidence was presented by the parties on these matters.

62. It was not in dispute that deductions had been made from the claimant's final salary payment and recorded in his wage slip. The claimant's case was that he had not authorised these deductions and did not know what they were for.

63. The claimant had identified these matters as an issue in his email to the tribunal dated 1 November 2018 copied to the respondent. He made it clear that he was

seeking the sum of £489.17 for '*sick leave, advance pay and equipment taken from me'*.

64. This correlates to his final payslip. Therefore, the respondent knew or should have known that these matters were in issue.

65. I have not been given any evidence at all about which days the sick leave and advance pay related to. There has been no explanation or exploration in the evidence of whether these were waiting days or in the case of advance pay, days when the claimant was on the rota to work but did not in fact work. If the circumstances were those of overpayment, then there would have been an exception to the right not to suffer a deduction from wages. However, although the respondent has asserted overpayment as a defence, the respondent has not proved that defence.

66. Turning to the 'equipment', this is not an overpayment situation, but the respondent says that the terms of the contract give authorisation to recover the cost of uniform not returned.

67. Clause 22.1 of the contract, headed 'Deductions', reserves to the respondent the right to deduct any monies owing by the claimant to the respondent from the claimant's salary. Clause 20.1 says that the respondent may its absolute discretion render the claimant liable for the cost of replacement items of uniform.

68. If the situation was that during the claimant's employment, he lost, say his uniform fleece, and had to be *replaced* with a new fleece, then it appears to me that that situation is covered by these two clauses and the respondent would be entitled to deduct from the claimant's salary the cost of replacing the fleece.

69. However even though I was not given evidence about it, the situation I was told about at the outset of the hearing was that the claimant did not return his used uniform at the end of his employment. The respondent did not incur the cost of a replacement or substitute uniform. Instead it is claiming the value of a worn uniform. There was no need to replace it and I have heard no evidence that it was replaced. I do not consider that the clauses in the contract of employment cover this situation so as to authorise the deduction from the claimant's salary for failing to return a worn uniform at the end of his employment. I have in any event heard no evidence about the value of that uniform or that the sum claimed of £65 is justified.

70. For those reasons, I consider that the respondent has made unauthorised deductions from the claimant's salary in the sums of £338.46, £85.71 and £65.00.

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Employment Judge Heal
29/12/2020
Date: ……..

Sent to the parties on: ...30/12/2020.....
T Henry-Yeo
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Case Number: 3333011/2018

For the Tribunal Office