



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100109/2024

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Held in Glasgow on 15 & 16 April 2024

Employment Judge L Wiseman

10 **Mr Mark MacDonald**

**Claimant
In Person**

Transport UK London Bus Limited

**Respondent
Represented by:
Mr W Griffiths -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided the dismissal of the claimant was fair. The tribunal decided to
20 dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 8 January 2024 alleging he had been unfairly and wrongfully dismissed.
2. The respondent entered a response admitting the claimant had been
25 dismissed for reasons of conduct, but denying the dismissal was unfair. The respondent asserted the claimant had been dismissed for reasons of gross misconduct and, in the circumstances, no payment of notice was due to the claimant.
3. Mr Griffiths informed the tribunal, at the commencement of the hearing, that
30 the respondent had changed its name in the period between the claim being made and this hearing. The change in name was from Abellio London Ltd to Transport UK London Bus Ltd. It was agreed the name would be varied and reflected in this Judgment.

4. The tribunal heard evidence from Mr Tony Bowen, Contract Manager, Greater Anglia, who took the decision to dismiss and Mr Andrew Lamont, Head of Transport UK Rail Replacement and Taxis, who heard the appeal. The claimant also gave evidence.
5. The tribunal was referred to a jointly produced file of documents. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

6. The claimant commenced employment with the respondent on 5 January 2021 as a Taxi Controller. He was employed in that position until the termination of his employment on 4 September 2023.
7. The respondent's business includes a rail replacement operation which arranges alternative transport (bus and taxi) when rail services are disrupted. The claimant was employed as a Taxi Controller, responsible for arranging taxi road transport in times of train service disruption, and managing and tracking planned staff taxis each day.
8. The claimant worked a 4 on 4 off shift pattern, alternating day and night shifts, with each shift being 12 hours with a 36 minute unpaid break. The claimant earned £499.30 gross per week, giving a net weekly take home pay of £422.39.
9. The respondent has a Staff Handbook and a Code of Conduct which sets out standards for all employees, including to act honestly, fairly and with transparency in the conduct of their work.
10. The claimant was working night shift on 24/25 July 2023 with his colleagues Mohammed Ahmed and Ameer Sahi. David Reid was also working night shift in the same area, although he is not involved with taxi arrangement. There was no Manager/Supervisor on duty that night and the Team Leader was on holiday.

11. The respondent (Mr Shakil Akbar, Control and Schedules Manager and Interim Taxi Contract Manager and Ms Ann Clark, Operator Account Manager Scotland) received a complaint from Mohammed Ahmed dated 31 July 2023 (page 101). The complaint stated Mr Ahmed had *“reached boiling point”* with the claimant and asserted *“things have not been good with him as my team mate for a long time”*. The complaint made reference to a number of issues with the claimant including an allegation that during the nightshift the claimant had done the TCS report at 0125 and then left his desk to go and have a lie down on the sofa. Mr Ahmed stated it was busy at the time. He approached the claimant at 2am and described that he was sleeping. Mr Ahmed tried to wake him by shouting at him, but he noticed the claimant had his ear-pods in and concluded the claimant was either sleeping or blatantly ignoring him. Mr Ahmed noted the claimant did not return to his desk until 4am.
12. The claimant was advised on 3 August, that he was being suspended on basic pay because a complaint had been received, and that he was to hand in his laptop and phone and not to make contact with his colleagues.
13. The claimant received a letter dated 4 August (page 111) from Mr Akbar confirming the suspension and confirming the reason for the suspension was because of an allegation of falling asleep whilst on duty. The letter went on to say that *“the above has now been fully investigated and you will remain on suspension until further notice. At first sight the above matters would appear to fall within the category of gross misconduct for which you may be liable to be summarily dismissed unless you are either exonerated or the outcome is found to be less serious.”*
14. The claimant received a further letter dated 11 August (page 123) from Ms Clark confirming the reason for the claimant’s suspension was because of an allegation that he had fallen asleep whilst on duty. The letter went on to invite the claimant to an investigatory meeting to investigate the allegation of falling asleep on duty.
15. The claimant attended an investigatory meeting with Ms Clark on the 14 August and a note of the meeting was produced at page 124. The focus of

the meeting was on the allegation of the claimant being asleep for a 2/3 hour period and whether the phone records and IT log would show any activity in the relevant period. The claimant was made aware that witnesses had alleged he was asleep and that they had tried to wake him because it was a busy evening.

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16. The claimant was provided with a copy of the notes of the meeting, which he amended before signing.

17. The claimant received a letter dated 30 August (page 148) inviting him to attend a disciplinary hearing on 4 September. The allegations were:

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- Unauthorised break, namely falling asleep for a prolonged period of up to 2 hours during working time;
- Failure to fulfil nightshift duties, namely to be alert and responsive to clients' needs and
- Breach of the Code of Conduct, namely unprofessional conduct by sleeping on duty and failing to respond to colleagues.

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18. The claimant was provided with the witness statements, evidence and meeting minutes, together with a copy of the respondent's Disciplinary Procedure.

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19. The disciplinary hearing was chaired by Mr Tony Bowen, Contract Manager Greater Anglia. Mr Bowen is a senior manager responsible for securing alternative travel arrangements when rail services are disrupted in the East of England. He had an understanding of the job carried out by the claimant and the systems used. Mr Bowen informed the claimant that his role was not to state definitively whether he was asleep or awake, but to focus on whether he was actively working or not based on the witnesses and the system activity.

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20. The claimant confirmed to Mr Bowen that he had received and read the investigation pack which had been provided. He challenged the complaint from Mr Ahmed because he had worked with him for over a year and he had not ever raised with the claimant that there were any issues.

21. The claimant told Mr Bowen that he took his break away from his workstation, on the couch. He had his earbuds in and was on his phone. He accepted that in order to get his attention his colleagues would have had to tap him. He denied being asleep and denied his colleagues had tapped him and he had ignored it.
22. The claimant accepted he had taken his 36 minute unpaid break and thought it "*extended beyond that by an hour*". The claimant relied on his colleagues to tell him if there was work to do.
23. Mr Bowen summarised that for a period of time, which appeared to be up to 2.5 hours, the claimant had been away from his desk and could not have been working. He referred to the systems log activity and he told the claimant that it was his chance to say what he had been doing during that period, and what other information the claimant wanted him to look at.
24. The claimant challenged the reliability of the witnesses; referred to having had IT issues; suggested that it was custom and practice to have extended breaks; complained that as he had been denied access to the system, he could not access information helpful to his case and challenged that Ms Clark, who carried out the investigation, had not looked broadly enough at the systems and information available.
25. Mr Bowen adjourned the meeting to consider the position. The meeting was reconvened after 38 minutes and Mr Bowen verbally informed the claimant of his decision. Mr Bowen accepted there had been factual inaccuracies in the first letter the claimant received informing him the investigation had been concluded, however he was satisfied the investigation carried out by Ms Clark had been thorough.
26. Mr Bowen referred to the fact that by the claimant's own admission he had been lying on the couch with his hood up, ear buds in, listening to music and watching his phone between the hours of 1.30am and 4am. He concluded there was a period of 1.5 hours during which the claimant was being paid but was not working, and he viewed this as an unauthorised break and failure to fulfil his duties.

27. Mr Bowen further noted the claimant argued long breaks were custom and practice, but did not consider this was acceptable conduct and had placed the claimant's colleagues under additional pressure that night: it also being noted the claimant did not have (and did not seek) authority to take an extended break.
28. The claimant's colleagues had been working during the period in question and Mr Bowen concluded that if the claimant had been at his desk he would also have had work to do.
29. Mr Bowen acknowledged the claimant denied sleeping, but concluded that either he had been sleeping or had ignored the efforts of his colleagues to rouse him: neither of which amounted to professional conduct.
30. Mr Bowen concluded he had a reasonable belief that the claimant failed to fulfil his duties to remain alert and responsive to his colleagues and client's needs. Overall taking over 2 hours away from his desk and being unresponsive during that time amounted to an unauthorised break and the conduct on the night in question amounted to a breach of the respondent's Code of Conduct. Mr Bowen decided he had no alternative but to uphold all the allegations and summarily dismiss the claimant for gross misconduct.
31. The decision of Mr Bowen was confirmed in writing by letter of 5 September (page 159).
32. The claimant appealed against the decision to dismiss (page 161). He was invited to attend an appeal hearing (page 164) which took place on the 20th September. A note of that appeal hearing was produced at page 165.
33. The appeal hearing was heard by Mr Andrew Lamont, Head of Transport UK Rail Replacement and Taxis. The claimant asked Mr Mark Plant to accompany him to the appeal hearing. Mr Plant had been claimant's chosen representative for the disciplinary hearing but he had been on holiday. Mr Plant was unable to attend the appeal hearing with the claimant because he had just returned from holiday and was under work pressures.

34. Mr Lamont, prior to the appeal hearing, was provided with a pack of information which included an extract from the Freedom system (page 75) showing a gap in activity for the claimant between 01.24 and 04.16 on the 25th July; and similar extracts for Mr Ahmed (page 81) and Mr Sahi (page 89) showing activity taking place within those hours, together with the statements made by the witnesses, stating Mr Ahmed had tried to get the claimant to come and help.
35. The claimant's appeal focused on the fact he felt errors had been made in the investigation and that it had not been dealt with fairly; that Mr Sahi was a youngster who could be easily swayed; there was insufficient evidence against him; no-one was present to authorise a break and there could have been collusion with people not telling the truth.
36. The claimant wanted Mr Lamont to check all activity records to confirm when he was back at his desk. Mr Lamont did this by checking the claimant's personal emails, the phone records, the CCTV and the Freedom activity lists. The CCTV did not cover the area where employees sat at their desks. None of the other information showed any activity by the claimant in the period 01.24 to 04.16.
37. Mr Lamont acknowledged there had been errors in the initial process, but the investigation carried out by Ms Clark had been thorough. Mr Lamont concluded there was no basis to overturn the decision to dismiss. Mr Lamont's decision was confirmed by letter of the 3 October (page 173).
38. The claimant sought the remedy of reinstatement if successful with his claim. Mr Lamont confirmed the respondent had lost a contract and this had resulted in the claimant's team reducing in size. Mr Lamont acknowledged that someone in the team had resigned and therefore there was a vacancy in the team, but he believed it would not be appropriate to reinstate the claimant if he was successful with the claim because of the dismissal process and the comments made regarding his colleagues (albeit Mr Ahmed and Ms Clark have left the employment of the respondent).

39. The claimant had, prior to dismissal, applied for a job with a Bank and secured an offer of employment. This offer was withdrawn after his dismissal for gross misconduct. The claimant had, at the same time, turned down another job offer because he had secured employment with the Bank.
- 5 40. The claimant has continued to apply for jobs and is currently awaiting dates for interviews. He has been in receipt of Jobseekers Allowance (£164 per fortnight) which ended on the 31 March 2024.

Respondent's submissions

- 10 41. Mr Griffiths referred to the cases of *British Home Stores Ltd v Burchell 1980 ICR 303*; *Sainsbury's Supermarkets v Hitt 2003 ICR 111*; *Inner London Education Authority v Gravett 1988 IRLR 497*; *Polkey v AE Dayton Services Ltd 1988 ICR 142* and *Nothman v London Borough of Barnet 1980 ICR 501*.
- 15 42. Mr Griffiths invited the tribunal to find the respondent's investigation fell within the band of reasonable investigations. The respondent had received a complaint and carried out an investigation of that complaint by interviewing three witnesses and considering the IT logs; phone logs and CCTV. It was submitted that the absence of activity demonstrated by the records was not the issue: the issue was that the claimant was away from his desk, on the sofa, and could not be roused by verbal intervention. The records offered no explanation for the claimant being away from his desk and did not undermine the complaint which had been made. Mr Griffiths acknowledged periods of inactivity from time to time were to be expected, but not on all systems for the length of time the claimant had been inactive.
- 20 43. Mr Griffiths referred to the respondent's disciplinary policy and to the list of gross misconduct which was not exhaustive. He submitted bullet points 1 and 8 were relevant. Further, it was submitted that it must be known that not doing your job for a lengthy period would be gross misconduct because it goes to the heart of the employment relationship.

44. The reason for the dismissal was conduct and it was submitted the dismissal had been procedurally and substantively fair. The claimant had been away from his desk for at least 2.5 hours in circumstances where he knew the break was 36 minutes. His conduct undermined trust and confidence and it had
5 been reasonable to dismiss in the circumstances.
45. Mr Griffiths invited the tribunal to dismiss the claim. However, if the tribunal found the dismissal unfair, he submitted there should be a reduction to compensation based on contributory conduct and/or Polkey. Mr Griffiths further submitted that the remedy of reinstatement would not be practicable
10 in the circumstances because trust and confidence had been damaged, the claimant admitted (in part) the misconduct complained of and he had made accusations of animosity and collusion.

Claimant's submissions

46. Mr MacDonald referred to being denied access to colleagues, company
15 equipment and premises during the period of suspension. The first letter received told him the investigation had been completed without any opportunity for him to defend himself. A new person had then been appointed to the investigation and she had refused or dismissed his requests for information. The only way Mr MacDonald could defend himself was to ask Ms
20 Clark to look at certain information but she had refused to do so.
47. The allegations against him changed and he was only made aware of this days before the disciplinary hearing. Mr MacDonald believed the allegations had been changed because the respondent knew they could not prove he had been sleeping.
- 25 48. Mr MacDonald challenged the knowledge of Ms Clark, Mr Bowen and Mr Lamont to interpret the information from the systems. He also pointed to the fact the system records showed long periods of inactivity for other members of staff, but there had been no complaint about this. This pointed to unfair treatment and an attack on him by Mr Ahmed.

49. Mr MacDonald acknowledged he had taken up to one hour for his break and had been away from his desk for this length of time. However, 36 minutes of that time was his break, and to be dismissed for 24 minutes extended break could not be fair. Mr MacDonald challenged that there had been no-one on
5 night shift to authorise a more extended break.

50. Mr MacDonald invited the tribunal to uphold that his dismissal had been unfair. He sought reinstatement and saw no reason why he could not return to work, particularly as Ms Clark and Mr Ahmed had left.

Discussion and Decision

10 51. I referred firstly to section 98 Employment Rights Act which provides that:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal and

15 *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it –

(b) relates to the conduct of the employee.

20 *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a
25 sufficient reason for dismissing the employee and*

(b) shall be determined in accordance with equity and the substantial merits of the case.”

52. I next had regard to the cases to which I was referred. The case of **British Home Stores Ltd v Burchell** held that it is the employer who must show that misconduct was the reason for the dismissal and must show that (a) it believed the employee guilty of the misconduct; (b) it had in mind reasonable grounds upon which to form that belief and (c) at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
53. The case of **J Sainsbury plc v Hitt** held that the band of reasonable responses test applied to the investigation carried out by an employer.
54. The case of **Inner London Education Authority v Gravett 1988** held that the level of investigation required will very much depend on the particular circumstances, including the nature and gravity of the case. The President of the EAT gave the following advice: *“at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.”*
55. Mr Griffiths invited the tribunal to accept this was, effectively, a caught in the act case. I could not accept that submission because it was clear that whilst a complaint was made against the claimant alleging he had been sleeping, this was denied by the claimant. Accordingly, it was for the respondent to carry out as much investigation as was reasonable into the alleged misconduct.
56. The first issue for this tribunal to address is whether the respondent has shown the reason for the dismissal of the claimant. The respondent’s position was that it had dismissed the claimant for reasons of misconduct. The claimant did not dispute this had been the reason for dismissal, although he disputed the allegations against him. I, having regard to the points set out below, accepted the respondent had shown the reason for the dismissal of the claimant was misconduct in terms of section 98(2)(b) Employment Rights Act.

57. I next turned to have regard to the fairness of the dismissal for that reason, and I had regard to the investigation carried out by the employer. This matter started with a complaint by Mr Ahmed (page 101) in which he made a number of allegations against the claimant all of the nature of avoiding work. In particular it was alleged the claimant had, on the night in question, *“done the TCS report at 0125 ... left his desk to go and have a lie down in the sofa ... it was busy at this time because there was disruption in Northampton, Rugby, London areas. A lot of jobs came through and we were struggling to source taxis at this time of night, and we required help, I went over to where he was sleeping at 2am to wake him up and shouted on him, he refused to move, and had his ear pods in and might have been sleeping or blatantly ignoring me..”* The complaint made reference to two other colleagues on shift that night.
58. The respondent took this as an allegation the claimant had been sleeping whilst on duty. Mr Akbar wrote to the claimant on 4 August (page 111) to inform him of his suspension because of the allegation that he had fallen asleep whilst on duty.
59. Mr Akbar also confirmed the matter had been fully investigated. There was however no evidence to suggest whether Mr Akbar had investigated this matter and if so what he had done. The claimant did question Ms Clark about this and was told *“the investigation [was] not concluded at this stage”*. I noted the respondent accepted Mr Akbar had made an error in stating the investigation had been concluded. I considered it clear that either Mr Akbar did not investigate or, if he did commence an investigation, it was taken over by Ms Clark.
60. The claimant attended an investigation meeting on 14 August with Ms Clark. The allegation under investigation was *“falling asleep whilst on duty”* (page 123).
61. The claimant rejected any suggestion that he had been asleep whilst at work. The investigation meeting looked at how much work would usually be done on a quiet night and a busy night at work and what the claimant’s phone and IT logs could be expected to show. The investigation was, essentially, a

search of the records for evidence of work activity during the period in question.

- 5 62. Ms Clark carried out the investigation of work records after she had spoken to the claimant. She interviewed Mr Ahmed and Mr Reid on 21 August, and Mr Amir on 24 August and obtained their statements. She also examined call records, the Freedom system (IT system) and a report from the IT Support Provider, Getronics, regarding no faults being logged on the shift in question. The documents demonstrated a lack of activity by the claimant between the hours of 0130 and 0400 and this contrasted with the activity of his colleagues on the night in question and also contrasted with the activity of the claimant on other shifts.
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- 15 63. The claimant was provided with Ms Clark's investigation report (page 105) and all of the documents referred to, prior to the disciplinary hearing. Mr Bowen, at the disciplinary hearing, made it clear to the claimant that this was his chance to detail his defence. He told the claimant, towards the end of the hearing, that *"you still have not told me about the other tasks you may have been engaged in and what other evidence you feel is missing."* Mr Bowen carried out no additional investigation because the claimant did not raise anything for him to consider.
- 20 64. The onus on the employer is to carry out as much investigation as possible before deciding whether dismissal is a reasonable response in the circumstances. The claimant was critical of the investigation carried out by Ms Clark because he considered she was not sufficiently knowledgeable about the IT Freedom system to be able to investigate it properly. The difficulty with this argument is that the claimant did not, at any time, say either to Ms Clark or Mr Bowen, to look at "X" or "Y" which would demonstrate that there had been activity. The call records and the Freedom system showed no activity after the claimant had done the TCS report at 0125.
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- 30 65. The claimant, when challenged why he had not made reference to points to be investigated, for example, intermittent IT issues, took the position that it was not his job to investigate and that he had not been clear he could ask

questions or ask for witnesses. The tribunal found this difficult to accept in circumstances where the claimant clearly understood the need to demonstrate activity during the period in question. For example, the claimant, at the end of the meeting with Ms Clark, stated “*Just hoping the IT logs show that I was logged in then*”. Further, Mr Bowen made it clear at the disciplinary hearing what the claimant needed to do, but the claimant did not bring anything forward to be investigated or considered.

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66. I concluded from the above that the respondent had carried out as much investigation as was reasonable into the allegations against the claimant. I acknowledged that at the appeal hearing the claimant asked Mr Lamont to investigate the email system, the VOIP phone system and the CCTV and this was done. However, none of these systems disclosed anything favourable to the claimant: they either added no further information (the CCTV system) or disclosed no activity. I concluded from this that there had not been an error in the investigation when it failed to consider these matters. I should state that even if there had been an error in the investigation in this respect, it was corrected on appeal when Mr Lamont looked at the CCTV, the emails and the VOIP phone system.

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67. The claimant challenged the reasonableness of the investigation when he questioned the ability of Ms Clark, Mr Bowen and Mr Lamont to interpret the information they obtained on the systems. I could not attach any weight to the claimant’s challenge in circumstances where he did not explain what information Ms Clark, Mr Bowen and/or Mr Lamont would have found had they been sufficiently experienced to interpret the information and interrogate the systems. The claimant gave no examples of work activity they could have found if only they had looked in the right place.

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68. The claimant was also critical of the fact that whilst suspended he had been denied access to his colleagues, company premises and equipment. The same point is made in relation to being denied access to the systems: the claimant could not say what information he would have been able to obtain had he had access to the systems. The position was that the claimant was

unable to demonstrate that he had carried out work during the period in question.

5 69. I decided, in the circumstances, the investigation carried out by this employer fell within the band of reasonable responses because the investigation gathered statements from the relevant witnesses and investigated the relevant phone and IT systems to understand whether there had been any activity by the claimant during the hours of 0130 and 0400.

10 70. I next considered whether the respondent, based on their investigation, had reasonable grounds to believe the claimant guilty of the allegations against him. Mr Bowen decided to uphold all of the allegations against the claimant. The allegations against the claimant were:

- unauthorised break, namely falling asleep for a prolonged period of up to 2 hours during working time;
- 15 • failure to fulfil nightshift duties, namely, to be alert and be responsive to client needs and
- breach of Code of Conduct; namely, unprofessional conduct by sleeping on duty and failing to respond to colleagues.

20 71. I considered it clear from the use of the word “namely” in the allegations, that the unauthorised break related to the claimant falling asleep for a prolonged period of up to 2 hours during working time. Further, the unprofessional conduct related, in part, to sleeping on duty.

25 72. I noted Mr Bowen made it clear to the claimant at the disciplinary hearing, that his role was not to state definitively whether the claimant was asleep or awake: instead he would focus on whether the claimant was actively working or not. Mr Bowen concluded the claimant had failed to fulfil his duties to remain alert and responsive to his colleagues’ and clients’ needs, and that taking over 2 hours away from his desk and being unresponsive during that time amounted to an unauthorised break and a breach of the code of conduct. Mr Bowen, in the letter of dismissal, noted the claimant denied sleeping but in
30 circumstances where at least 2 of the claimant’s colleagues could not capture

his attention, Mr Bowen concluded the claimant was *“either sleeping or ignoring [his] colleagues, neither of which was professional conduct”*.

73. I considered firstly whether there were reasonable grounds, based on the investigation, to uphold the first allegation. I was satisfied there were reasonable grounds to uphold the first allegation and I say that because all of the information pointed to the claimant being away from his desk for a prolonged period of inactivity in circumstances where he was lying on the sofa, with earbuds in and not responding to the calls of his colleagues to come and help.
74. I acknowledged Mr Bowen did not make a specific finding that the claimant was asleep, and I considered whether, in the absence of such a finding, there were reasonable grounds upon which to uphold the first allegation. I decided there were reasonable grounds, based on the investigation, to uphold the first allegation against the claimant and I say that because whilst Mr Bowen did not specifically find the claimant was sleeping, he concluded he may have been sleeping. I was satisfied not only that there were reasonable grounds, based on the investigation, for the conclusion that Mr Bowen reached, but I was further satisfied that the conclusion the claimant may have been asleep was a sufficient basis upon which to uphold the first allegation.
75. I next considered whether there were reasonable grounds, based on the investigation, to find the claimant had failed to fulfil his nightshift duties, namely, being alert and responsive to client needs. I understood this allegation covered the situation should the claimant not have been sleeping: by this I mean that even if the claimant was not asleep, there had been a failure to carry out his nightshift duties because he had not been alert and responsive to the needs of the business or his colleagues. There was no real dispute regarding this in circumstances where the claimant accepted he had been lying on the sofa with his earbuds in and that someone would have had to tap him to get his attention. The claimant had, essentially, removed himself from carrying out work between the hours of 0130 and 0400.

76. I concluded, in relation to the third allegation, that Mr Bowen had reasonable grounds, based on the investigation, to conclude there had been a breach of the respondent's code of conduct. The first and second allegations amounted to a breach of the code of conduct.
- 5 77. I next asked whether the respondent's decision to dismiss the claimant was fair. I had regard to the case of *Iceland Frozen Foods Ltd v Jones 1983 ICR 17* where the EAT made clear that the correct approach for tribunals to adopt when considering the question of whether a dismissal is fair or unfair is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. The tribunal must not substitute its view whether it would have dismissed the claimant.
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- 15 78. I, in considering this question, had regard firstly to the conclusion, above, that the respondent had carried out as much investigation as was reasonable in the circumstances and that, based on its investigation, the respondent had reasonable grounds to conclude the claimant had done what was alleged. The claimant challenged the fairness of the dismissal by pointing to the fact Mr Akbar had made an error regarding the investigation and to the fact the allegations against him changed between the investigation and the disciplinary hearing. These matters were not in dispute: Mr Bowen and Mr Lamont both acknowledged an error had been made by Mr Akbar. The issue for the tribunal, in terms of reasonableness, is whether the claimant was disadvantaged by these matters. I asked whether either of these matters impacted the claimant's ability to understand the allegations against him and to respond to them. I was entirely satisfied that there was no disadvantage to the claimant. I say that for two reasons: firstly, because the erroneous letter from Mr Akbar referring to an investigation did not undermine or detract from the investigation which was carried out by Ms Clark and in which the claimant fully participated. Secondly, the claimant had notice of the expanded allegations prior to the disciplinary hearing and had an opportunity to respond
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to them. Further, whilst the allegations expanded, the nature of them remained the same.

79. I also acknowledged the claimant, at the disciplinary hearing, argued the system records showed long periods of inactivity for other members of staff. Mr Bowen noted there had been no complaints regarding this and he considered it would be a matter for local managers to deal with. I noted the claimant did not pursue this and there was no further information either before Mr Bowen or the tribunal. I concluded that in the absence of any further information this was not a matter which could be considered further.

80. I asked whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might adopt. I decided, having had regard to all of the points set out above, that the decision to dismiss did fall within the band of reasonable responses. I reached that conclusion because the evidence against the claimant to support that he had been away from his place of work for a period of 2.5 hours was significant and, to some extent, accepted by him. There were reasonable grounds for the respondent to conclude the claimant had either been sleeping or had absented himself from working in circumstances where his colleagues had been busy and where the claimant would have had work to do if he had engaged with it.

81. I, in conclusion, decided the dismissal was fair.

Employment Judge: L Wiseman
Date of Judgment: 28 May 2024
Entered in register: 02 June 2024
and copied to parties