EMPLOYMENT TRIBUNALS

Claimant: **Mr D Nightingale**

Respondent: **CBRE Managed Services Limited**

Heard at: **Nottingham**

On: **17 May 2017**

Before: **Employment Judge Ahmed (sitting alone)**

Representation

Claimant: **Mr N P Cooper, Trade Union Representative**
Respondent: **Mr Boyd of Counsel**

JUDGMENT

The Judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed but contributed to his dismissal. The basic and compensatory awards shall be reduced by 75% by reason of contributory conduct.

2. The complaint of breach of contract succeeds.

3. The issue of remedy is adjourned to 24 July 2017.

REASONS

1. By a claim form presented to the Tribunal on 28 October 2016 Mr David Nightingale (born 1 February 1953) brought complaints of unfair dismissal, disability discrimination and breach of contract. The complaint of disability discrimination was withdrawn earlier.

2. The facts of this case are not materially in dispute. It is agreed that the determination of the unfair dismissal complaint depends on whether the decision to dismiss ultimately fell within the band of reasonable responses open to a reasonable employer and whether dismissal, for the purposes of the breach of contract claim, was justified. Mr Nightingale has been employed by the Respondent since 1 October 1995 as a Maintenance Engineer. At a disciplinary hearing on 19 August 2016 he was dismissed for gross misconduct. The

misconduct related to an incident which occurred on 6 August at the premises of a client of the Respondent for whom the Claimant has undertaken work over a number of years.

3. As part of his duties on the day in question Mr Nightingale was instructed to remove external canopy lighting from the third floor balcony of the client's premises at premises called Future Walk. The work was being carried out on a Saturday morning. At the rear of the premises is a car park which is open to members of the public to use at weekends. Between the car park and the client's building is a small glass verge. The balcony is itself covered by vermin netting. Below the balcony are a number of steel louvered canopies which act as sunshields.

4. On the day in question, Mr Nightingale's task was to take old lighting shields from the third floor so that they could be disposed of in the skip on the ground. As these shields were dirty and quite large, Mr Nightingale concluded that to take them down the lifts was likely to cause damage and spread dirt to the other parts of the building. He made a conscious decision not to take them down through the reception area which had recently been refurbished. In any event Mr Nightingale's view was that they would not fit in the lift. He looked over the balcony and concluded that they could be dropped to the ground below. He cut the vermin netting as appropriate and dropped the lighting shields to the grass area below. A member of the public saw the shields being dropped and reported the incident to the client as a health and safety issue. There is no suggestion of anyone being injured.

5. Following a brief investigation the Claimant was sent notice of disciplinary hearing on 15 August with a disciplinary hearing to take place four days later at which the Claimant was summarily dismissed for gross misconduct.

6. The reasons for dismissal in the subsequent letter were as follows:-

"The dropping of objects from the third floor balcony at Future Walk constitutes a breach in health and safety policies and procedures. The act itself should be considered an unsafe act which could have caused harm to members of the public, client or co-workers or caused damage to property.

The decision taken by you, that the best course of action to remove the light fittings from the area, was by dropping them onto the ground below (open grass area), was undertaken deliberately and involved damaging the client properly (bird netting) fitted around the perimeter of the balcony.

You failed to report this indent to your supervisor or manager after the client representative had made you aware of the complaint on 6 August 2016."

THE LAW

7. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996"), so far as they are relevant state:

"(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

(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,

(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 sufficient reason for dismissing the employee, and

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

8. In applying section 98(4) ERA 1996 I have borne in mind the guidance in **HSBC Bank plc v Madden** [2000] ICR 1283 (originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439) that:

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute it's decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal…….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."

9. I am satisfied that the reason for the dismissal was 'conduct' which is a potentially fair reason under section 98(1) ERA. The issue is whether the dismissal was fair under section 98(4) ERA. In coming to my decision I have focussed on what was in the mind of the dismissing officer and her reasons. In particular I have considered carefully those reasons set out in the dismissal letter. These may be summarised as follows:-

9.1 That the Claimant dropped objects from a third floor balcony in breach of health and safety procedures which could have caused harm to those below and that this was an act of gross misconduct;

9.2 That the Claimant's decision to cut vermin netting was also similarly, either in isolation or in conjunction with the above, also amounted to an act of gross misconduct;

9.3 That the Claimant failed to report the incident to his supervisor or manager.

10. I begin with the second and third parts of those reasons. Clearly, neither of those on their own or together would justify dismissal by reason of gross misconduct. No reasonable employer would dismiss an employee for cutting vermin netting in order to provide room for objects to be dropped or for failing to report what had been done. The real issue is whether dropping objects from the third floor balcony on a grass verge, close to a public car park, was an act of gross misconduct for which the employer was entitled to dismiss.

11. Fairness of a dismissal for health and safety reasons always depends on

the individual circumstances. Naturally, one would expect any employer engaged in work of the nature undertaken by the Claimant to take health and safety seriously and there is nothing to suggest that the Claimant did not take his health and safety responsibilities seriously. He had been engaged by the Respondent for a very long time and it is not disputed that he was valued by the ultimate client who has not applied any pressure for dismissal. The Respondent's assertion that it has a zero tolerance approach does not take the matter any further as health and safety dismissals depend on the circumstances.

12. Having regard to all of the circumstances I find the decision to dismiss was unfair for the following reasons:-

12.1 The decision to dismiss was disproportionate in all of the circumstances. Whilst it was an error of judgment no reasonable employer would have dismissed for the claimant's action;

12.2 The Respondent failed to take into account the Claimant's previous good disciplinary record and very long service. Mr Nightingale had 21 years service with the Respondent and 23 years if one counts his period as an agency worker with the Respondent. He had a previous good record of adhering to safety procedures. I am satisfied that there was a failure to take into account the Claimant's past service. Although there is a reference to taking this into consideration in the dismissing officer's witness statement for these proceedings that seems to me to be very much an afterthought. There is no reference to it in the notes of the (rather short) disciplinary hearing or in the dismissal letter. In the appeal, the Claimant's length of service is actually turned on its head as the Claimant is he effectively told that given his length of service he should have known better!

12.3 I recognise that it is difficult for a tribunal to assess the gravity of health and safety breaches and I have been careful not to substitute my decision for that of the employer. Employers are entitled to take health and safety matters seriously but it is equally important that the reasonable employer is not too precious about health and safety to justify a disproportionate act of dismissal. In her witness statement, the appeal officer says:

"*The company's reputation with regard to health and safety is extremely important when it comes to retaining clients and a complete disregard of basic health and safety is completely unacceptable. We would have had a client account for 20 years of more but if there was a serious health and safety failing we could lose that client and lose our reputation in that client's industry very quickly*".

13. With respect, it is not factually correct to say that the Claimant showed a 'complete disregard for health and safety'. He weighed up the risks and made an assessment, albeit one that he now accepts was an error of judgment. Admittedly he did not complete a formal risk assessment form but he assessed the danger and felt what he was doing was safe. To suggest a loss of a client for the incident is perhaps a little over-dramatic in the circumstances. There is no evidence that the Respondent was ever in danger of losing this particular client as a result of what happened.

14. Nevertheless, the Claimant accepts that his actions on the day amounted to an error of judgment. He has certainly caused or contributed to his dismissal. The level of his blameworthy conduct in my view falls in the 'largely to blame' category of the three categories identified in **Hollier v Plysu** [1983] IRLR 260. I consider it is appropriate to deduct both the basic and compensatory awards by

75%. I recognise that there are slightly different considerations that apply to reductions for the basic as opposed to the compensatory award but such considerations do not justify a different percentage for deduction of the awards in this case.

15. As to the breach of contract complaint the issue here is whether the Claimant's conduct justified summary dismissal for gross misconduct on ordinary contract law principles. The classic test as to what constitutes conduct justifying dismissal was set out in **Laws v London Chronicle** [1959] I WLR 698, where it was held that the employee's behaviour must disclose "a deliberate intention to disregard the essential requirements of the contract".

16. In my judgment the Claimant's conduct did not amount to a repudiatory breach such that the employer was entitled to accept that repudiatory breach and consider itself discharged from its obligations under the contract of employment. The complaint of breach of contract therefore succeeds. The Claimant is entitled to notice pay either under the provisions of his contract or reasonable notice under statute.

17. The issue of remedy is adjourned. The remedy hearing will deal with both compensation for unfair dismissal and damages for breach of contract.

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Employment Judge Ahmed

Date: 20 June 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE