



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE BALOGUN
BETWEEN:

MR A CARNEY

Claimant

AND

MINISTRY OF DEFENCE

Respondent

ON: 25 & 26 July 2017

Appearances:

For the Claimant: Mr M Green, Counsel

For the Respondent: Ms E Gordon Walker, Counsel

RESERVED JUDGMENT

The unfair dismissal claim fails and is dismissed.

REASONS

1. By a claim form presented on 27 October 2016, the Claimant complained of unfair dismissal. Other claims were withdrawn prior to the hearing.
2. The Claimant gave evidence on his own behalf. I heard evidence from the Respondent through: Tom Taylor, Retired Operational Support Manager; George Melton, Operations Manager and; Trevor McKinnon, Assistant Head, Strategy. The parties presented a joint bundle of documents and references in square brackets in the judgment are to pages within that bundle.

The Issues

3. The agreed legal and factual issues are set out at paragraph 7 of the case management summary of Employment Judge Elliot, dated 11 January 2017. [39-40]. Notwithstanding the agreed issues, Mr Green, was permitted to assert, on behalf of the Claimant, other allegations of procedural unfairness not specifically identified in the issues.

The Law

4. Section 98(2) of the Employment Rights Act 1996 (ERA) sets out the potentially fair reasons for dismissal. One of those reasons is conduct.
5. The case of British Home Stores Ltd v Burchell [1978] IRLR 79, establishes that in a case of a conduct dismissal, an employer must have a reasonable suspicion amounting to a genuine belief in the individual's guilt and that belief must be based on reasonable investigation of the circumstances.
6. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.
7. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Findings of Fact

8. The Claimant was employed by the Respondent from February 2008 in the MOD Guard Services (MGS) as an unarmed security guard, latterly based at the Royal Marines Reserve Establishment in Wandsworth (RMR Wandsworth), up until his dismissal.
9. On 17 February 2016, the Claimant was suspended on full pay pending investigation into a number of allegations, said to amount to breach of the Respondent's misconduct policy. These are set out in a number of separate letters sent to the Claimant, some of which he claims not to have received, which is entirely possible, given that he was, for a time, of no fixed abode. However, he confirmed in evidence that he did receive the letter

dated 17 February 2016, sent to him at 6 Blore Close, which that sets out the 6 allegations (a-f) relied on by the Respondent. [210-211] All of the allegations relate to events occurring before the Claimant commenced a period of sickness absence on 11 November 2015. That absence continued up until his suspension in February 2016 and he did not return to the workplace thereafter.

10. The Claimant was advised that the alleged breaches could amount to gross misconduct and, if proven, were likely to lead to his dismissal. [203-204]. In the event, by the appeal stage, 2 of the allegations were dismissed as the dismissing officer had found that there was no case to answer on them. The appeal manager decided, in advance of the appeal hearing, to dismiss a further 2 allegations on the basis that they were not serious enough to constitute gross misconduct. I have therefore focused on the 2 allegations considered at appeal to be gross misconduct justifying the dismissal.
11. The 2 allegations were that the Claimant:
 - a. Failed to monitor CCTV while on duty in the reception area
 - b. Knowingly permitted access to MOD premises by unauthorised persons
12. Those allegations arise out of events on 5 November 2015. It is common ground that on that day, the Claimant was working alone in the reception area and part way through his shift was visited by his adult son, his son's girlfriend and his grandson (a toddler) at work. The Respondent contends that this was in breach of its MGS Operations Manual, (the "Ops Manual") which is an all embracing document setting out policies, procedures and conduct rules for MOD personnel. The Claimant said in evidence that he had never seen the MGS Manual in his 12 years in the job and was first provided with a copy following his suspension. That evidence appears somewhat inconsistent with his evidence that he had made himself aware of policies and procedures on each specific site that he had worked at. Further, the Respondent's witness, George Melton (GM) Operations Manager, told the tribunal that he was responsible for introducing the Ops Manual into the site in November/December 2014; it was a generic policy which applied to other sites and that the Claimant would have been aware of it, having worked across a number of sites. I do not consider the Claimant's evidence on this credible and consider it more likely than not that he was aware of the MGS Manual and its relevant contents.
13. The Claimant was not, in my view, a reliable or straightforward witness. His evidence was contradictory in parts, as evident above. He introduced new evidence not contained in his witness statement or supported by other evidence, without explanation and he was slow to admit facts which ought to have been admitted. For example, he initially denied that it was part of his job to operate and monitor the CCTV, claiming that he had not been trained for it. It was only when he was shown documentary evidence contradicting this that he, after much prevarication, admitted that it was one of his duties. Other contradictions are referred to further on in the judgment. By contrast, the Respondent's came across as reliable and honest.
14. As well as the Ops Manual, the Respondent issued Assignment Instructions which set out site specific rules and procedures. There was an Assignment Instruction in place for RMS Wandsworth, introduced by GM in April 2014 and revised by Kelly Sharp (KS) Operations Manager, though the date of her revisions is unclear.

15. The allegations were investigated by GM, who met with the Claimant on 4 March 2016 to discuss them. At that meeting, the allegations were put to the Claimant and he provided his response to them. The notes of that meeting were provided to the Claimant, which he read and signed that day [229-231].
16. On 9 March 2016, having completed his investigation, GM issued his report, in which he concluded that there was a case to answer. The report enclosed a number of witness statements and documents relied on by GM, including his interview with the Claimant. [232-265]
17. On 25 May 2016, the Claimant attended a disciplinary hearing, conducted by Peter Cuningham (PC), Infrastructure Manager; with a Case Advisor and Note Taker in attendance. [346-351]. On 10 June 2016, having upheld 4 of the 6 allegations, PC wrote to the Claimant with the outcome of the hearing, which was his summary dismissal for gross misconduct. [375-377]
18. The Claimant appealed against his dismissal, raising a number of procedural points relating to the investigation and criticising the decision and conduct of PC. [389-393].
19. The appeal was heard by Trevor McKinnon (TMK) Assistant Head of Strategy, on 9 August 2016, which the Claimant attended, accompanied by a colleague. [427-431]. On 22 August 2016, TM wrote to the Claimant informing him that his appeal had been unsuccessful and that the decision to dismiss him was upheld. [444-446]

Submissions

20. In compliance with my order, counsel for the parties sent in written submissions and replies, a couple of weeks after the hearing, for which I am grateful. I do not propose to summarise those submissions but have made reference to them in my conclusions, where necessary.

Conclusions

21. Having considered my findings of fact, the parties' submissions and the relevant law, I have reached the following conclusions on the issues:
22. The Respondent's reason for dismissing the Claimant or, more pertinently, for upholding the dismissal, are the matters referred to at paragraph 11 above. These are reasons related to conduct.
23. During the course of the evidence, it was suggested by Mr Green, counsel for the Claimant, that dismissal was predetermined as the Respondent knew that the MOD customer responsible for RMR Wandsworth (who had apparently raised some concerns about the Claimant's conduct) did not want him back on site. When it was put to TMK in cross examination that the Respondent had no choice but to dismiss the Claimant because of the customer, he denied this, stating that had there been no grounds for dismissal, he would have looked into redeploying the Claimant within his travel to work area. The Respondent had a number of sites within London, some of which the Claimant had worked at previously. There is therefore no reason to suppose that redeployment would not have been feasible. Also, if the Respondent's intention all along had been to dismiss the Claimant regardless of merit, as suggested, then it would have been in its interest to pursue as many of the allegations as possible to increase the likelihood of this

happening. Yet it dismissed 4 of the 6 charges which, in my view, is inconsistent with such an intention. I therefore accept TMK's evidence and am satisfied that dismissal was not predetermined but solely by reason of the Claimant's conduct.

24. In relation to the first allegation – failure to monitor the CCTV – it is clear from the Terms of Reference for Civilian Security Officers, and now accepted by the Claimant, that one of his key objectives was to operate and monitor the CCTV [811-812]. GM told the Tribunal that the level of monitoring is agreed with each client on each site and at RMR Wandsworth, it was agreed that monitoring would be passive. In practice, this meant that unless a Security Officer was on patrol or away from his post for some other valid reason, he would be expected to be at his desk viewing the CCTV monitors. There were 2 monitors; one showing one image and the other, split images. When on duty on his own, the Claimant was also expected to carry out active CCTV patrols of the site, which presumably required more concentration than passive viewing. The Claimant initially denied that he did CCTV patrols. However, this was contradicted by his own entries in the daily occurrence book, where, in the extract I have seen, he wrote on 8 separate occasions that he was carrying out CCTV patrols. When asked to explain the discrepancy in his evidence, he said that although he was recording that he was doing the patrols, he was not. That response can only be to his discredit but, if anything, it demonstrates that he knew he was required to do the CCTV patrols.
25. It was the Respondent's case that the Claimant was distracted from his CCTV monitoring duties on 5 November 15' by the presence of his family and it, in the main, on CCTV footage of the reception area at the time. The CCTV images, were played to the Tribunal and also appear as stills in the bundle. They show that the Claimant's family was present in the reception area from 18.52 to 20.25 - just over 1½ hours. They also show the Claimant in conversation with his son and playing with his grandson. TMK told the Tribunal that he was not convinced that the Claimant was paying as much attention to the CCTV, especially when picking up his grandson, and spent time with his back to the monitor.
26. Paragraph 6.54 of the Ops Manual deals with distractions from duty and contains the statement: "*MGS officers must not put themselves in a position where private interests conflict with official duties*". The Respondent contends that the Claimant's interactions with his family was in breach of this provision. However, when read as a whole, it is clear that the focus of the provision is on distractions from electronic devices such as phones, MP3 players, Tablets/laptops and the like. I therefore disagree with GM's assertion that the provision extends to other types of distractions, specifically face to face conversations with unauthorised persons. However, that does not mean that the presence of the Claimant's family was not a distraction amounting to some other breach of conduct.
27. Having viewed the CCTV footage, I am satisfied that the Respondent was entitled to conclude that the Claimant was distracted from carrying out his CCTV monitoring duties by the presence of his family on site.
28. The Respondent has a Lone Working Policy which would have applied to the Claimant on the day in question. He confirmed in evidence that he was aware of the policy. [433] The Respondent's case was that a lone worker is expected to remain at their post throughout the shift, including over lunch, but are allowed to leave for short periods for toilet breaks or to make a cup of tea etc. The only exception is when the guards are

carrying out physical patrols of the site. Such patrols were to be carried out during silent hours which, according to the Claimant, were from 10pm – military lights out.

29. The CCTV footage of the family visit shows the Claimant leaving his visitors unsupervised in the reception area for 17 minutes. The Claimant said that he told the disciplinary panel that he went to the toilet (he then changed this to I must have gone to the toilet). There is no reference to this in the disciplinary hearing notes. The Claimant also claims he gave a similar explanation at the appeal hearing but TMK said that the Claimant gave no explanation at the appeal hearing, and none is recorded in the minutes. I prefer TMK's evidence. TMK told the Tribunal that the Claimant leaving his post while his visitors were in reception without passes was a breach of the Lone Worker Policy.
30. Turning to the second allegation – *knowingly permitting access to MOD premises by unauthorised persons* – one of the Claimant's duties was to ensure that no unauthorised persons or vehicles were granted access to the establishment. That meant that anybody seeking entry had to hold a valid pass or permit. Visitors to the site were issued with temporary passes, subject to the production of acceptable ID, and a register of all visitors and vehicles had to be maintained [562]. It was the Respondent's case that none of these rules were followed in the case of the Claimant's family.
31. The Claimant accepted that none of these procedures were followed in respect of his family's visit but contended that he believed his son was an authorised person because he was a serving soldier with service personnel ID. The Respondent rejected this as an explanation on the basis that a service ID card was simply one form of identification and did not give automatic access to a site. That is supported by the Ops Manual, which lists a valid service ID as one form of acceptable identification for the issue of a temporary visitors pass [562].
32. For the hearing, the Claimant produced a Guard Rule booklet, which he said was his guide as to what was and was not authorised. He said that he produced the booklet at the investigation meeting. GM, who was recalled to give evidence on this, said that the booklet was never produced or mentioned at their meeting. GM said that the booklet related to the Northwood headquarters, was over 10 years old and had been superseded by the Ops Manual. I accept his evidence.
33. Even if the Claimant genuinely believed that his son was an authorised person, he would have known that his son's girlfriend was not, and he had not follow the authorisation procedure in respect of her attendance either.
34. Tom Taylor (TT), was, until his retirement in October 2016, the Operational Support Manager and countersigning officer for the Claimant. He told the Tribunal that the Claimant would have needed permission from the Commanding Officer or Unit Security Officer to get his visitors authorised and would have been aware of that. The Claimant denies this. There is evidence that the Claimant was aware of the need for specific authorisation for his guests in circumstances where they would otherwise be unauthorised. TT told the Tribunal that in June 15' the Claimant's line manager, Ms Sharp reported to him that the Claimant had been entertaining a friend (Ms Ruby) on RMR Wandsworth premises during working time. Ms Ruby used to give the Claimant a lift to work in her car and pick him up at the end of his shift and she had permission, granted at the Claimant's request, to wait in the reception if she arrived early on pick up but the expectation was that this would be no more than about 10 minutes [78]. It was

alleged that on that occasion, she stayed for nearly 2 hours. Ms Kelly Sharpe (KS), the Claimant's line manager, who did not give evidence, provided a statement referring to this incident, as part of the disciplinary investigation. In it, she states that she told the Claimant that Ms Ruby's presence was unauthorised and instructed him to ask her to leave, which the Claimant objected to. [242-244]. She also made a contemporaneous file note of the conversation [72] and of another conversation with the Claimant in September 15' after a report of a further visit by Ms Ruby. [80]

35. The Claimant denied in cross examination that KS spoke to him about Ms Ruby being on site. However, this is contradicted in paragraph 6 (the unredacted part) of his witness statement, where he refers to a conversation with KS on 18 June 15' when she was alleged to have said in relation to Ms Ruby, that she did not want any "*undesirables here*". It appears from this that the Claimant is recounting the same conversation as KS, albeit putting his own slant on it.
36. I am satisfied based on the evidence before the Respondent at the time, that it was entitled to accept KS' account of events and conclude from it that the Claimant was aware that he was not allowed guests on the site without prior authorisation.
37. Taking all of the above matters into account, I am satisfied based on its investigations the Respondent had reasonable grounds for believing that the Claimant was guilty of the allegations.
38. Turning to the matters to be considered under section 98(4) ERA, the Claimant raises a number of procedural issues in relation to the process.
39. The Claimant complains that he was not shown the CCTV evidence at the investigative meeting. It is common ground that at the meeting on 4 March 15', the CCTV evidence was not available for viewing. The Claimant was invited to a follow up meeting on 28 April to discuss the findings of the investigation and it was GM's evidence that he intended to show the Claimant the CCTV footage at that meeting, though that is not expressly stated in the letter. [268-269]. The Claimant wrote to GM querying the need for such a meeting, suggesting that GM was exceeding his remit under the disciplinary procedure. [271] Rightly or wrongly, GM treated the Claimant's response as a refusal to attend the meeting and it did not go ahead.
40. On 5 May 2016, the Respondent wrote to the Claimant (at the new address he provided), inviting him to the disciplinary hearing and enclosing the disciplinary pack. [285]. The letter was undelivered because the Claimant did not sign for it. He then requested for it to be re-sent to his solicitors but the Respondent refused. Instead, PC sent a text to the Claimant on 18 May inviting him to attend the Respondent's premises the following day to pick up the document pack for the disciplinary hearing and to view the CCTV [326]. The Claimant did not attend and PC sent him a further text informing him that the pack would be left for his collection. [326]. The Claimant says that he did not receive either text because of problems with his phone. When the parties eventually made contact, the Claimant notified the Respondent that he was out of London and would not be able to collect the pack until 24 May - he told the Tribunal that he had been out of London since 19 May. In the same correspondence, the Claimant asked to view the CCTV and the Respondent confirmed by return that he could collect the pack and view the CCTV on 24 May [343].

41. The Claimant duly collected the pack on 24 May but claims that he did not view the CCTV as there was no one there to show it to him. TT denies this and claims that he set it up on his laptop and showed it to the Claimant on the 24 May but after 15 minutes, the Claimant said that he'd had enough.
42. If the Claimant's request to view the CCTV had not been adhered to as agreed, he would have complained about this at the disciplinary hearing the following day. I have read the notes of the disciplinary hearing and there is no such complaint recorded. There is however a reference to the Claimant complaining that the images of his son, his partner and grandson had been downloaded and used as evidence against him and he confirmed to the Tribunal that when he made that comment, he had already seen the CCTV footage. It is clear from the notes of the disciplinary hearing that the CCTV footage was only shown at the hearing, after the comment was made. The Claimant must therefore have watched it prior to the hearing. The only opportunity for him to have done so was the day before when he collected the pack. I therefore accept TT's evidence that that Claimant was shown the CCTV footage on 24 May.
43. The Claimant complains that none of the witnesses referred to in the investigation pack were present at the hearing for him to question. There is not a general requirement for witnesses to be present at a hearing and there was no specific request for any of them to be so from the Claimant. He had copies of their statements and an opportunity to comment on their evidence.
44. The Claimant also claims that he had insufficient time to prepare fully for the disciplinary hearing or bring a companion. Given the sequence of events described at paragraph 40 above, it is clear that the Respondent made every effort to provide the Claimant with the evidence in good time before the hearing and it is through no fault of its own that they were unable to do so. Further, had the Claimant felt unable to proceed with the hearing on the 25 May, he could have requested an adjournment. He did not do so.
45. The Claimant had an opportunity to put his case again at the appeal hearing, which he did in his detailed letter of appeal [389-393] and at the hearing itself, at which he was accompanied by a colleague. [427-431].
46. I am therefore satisfied that the Claimant had a reasonable opportunity to state his case.
47. Turning to the sanction of dismissal, I am satisfied that the allegations amount to gross misconduct under the Respondent's disciplinary code [595, 655-656]. The RMR Wandsworth site is a training barracks for the reserves and cadets. Military personnel were sometimes resident overnight and there were weapons on the premises. Indeed one of the CCTV images was of an officer walking through reception with a rifle [514]. The Claimant acknowledged in evidence that security of the site was of the utmost importance. This was more than theoretical; he had personal experience of the grave threat facing MOD sites as he refers in his evidence to having previously averted a terrorist attack at work. In the circumstances, the Respondent was entitled to treat the Claimant's conduct as a breach of security inviting the most serious of sanctions.
48. TMK told the Tribunal that he was aware of others that had been dismissed for allowing unauthorised access to the site. The Claimant's dismissal was therefore consistent with the general approach of the Respondent. TMK took into account the Claimant's service but did not consider his record exemplary or sufficient excuse when weighed against his level of experience and the seriousness of his conduct. I am satisfied that he was

entitled to take that position, especially given the absence of any contrition on the Claimant's part. The Claimant maintained throughout that he had done nothing wrong and that was his position in these proceedings.

49. Overall, I am satisfied that the sanction of dismissal was fair.

Judgment

50. The unfair dismissal claim fails and is dismissed.

Employment Judge Balogun
Date: 16 October 2017