EMPLOYMENT TRIBUNALS

Claimant: **Mr R Venkatachellum**

Respondent: **Heathrow Airport Limited**

Heard at: **LONDON SOUTH** **On: 17 July 2017**

Before: **EMPLOYMENT JUDGE HALL-SMITH**

Representation

Claimant: **Ms P Soobrayen**

Respondent: **Mr T Kirk, Counsel**

REASONS

(for the Tribunal Judgment sent to the parties on 9 August 2017 and at the request of the Respondent)

1. By a claim form received by the Tribunal on 26 March 2017, the Claimant, Mr Roddy Venkatachellum brought a complaint of unfair dismissal against the Respondent, Heathrow Airport Limited.

2. At the Hearing the Claimant was represented by Ms Pamela Soobrayen, who called the Claimant to give evidence before the Tribunal.

3. The Respondent was represented by Mr Tom Kirk, who called the following witnesses on behalf of the Respondent, namely Mrs Laura Nicholls, who was then employed as Security Project Manager, and Mr Tom Willis, Director of Security. There was a bundle of documents before the Tribunal.

The Issue

4. The issue to be determined by the Tribunal was whether the Claimant's dismissal for the potentially fair reason of conduct had been fair within the meaning of Section 98(4) of The Employment Rights Act 1996. The Claimant did not seriously challenge the Respondent's contention that the reason for his dismissal was the potentially fair reason of conduct.

The Facts

5. The Claimant was employed by the Respondent as a Security Officer at Heathrow Airport. The Claimant's employment with the Respondent commenced on 14 January 2013.

6. The Claimant's role as a Security Officer included the Claimant in operating and watching an x-ray machine, which shadowed passengers' luggage from the airport side into the airline side.

7. The process is a familiar one to all airport passengers and is intended to ensure that only those items of luggage would be passed through, which did not present a security risk. Suspicious items of luggage which contained potentially hazardous contents, should have been identified in the x-ray process.

8. The Claimant's role was a critical safety role and each session operating the x-ray machine would be limited to twenty minutes.

9. The Respondent sensibly recognised that a session lasting longer than twenty minutes, which would involve an operator such as the Claimant in exercising a very high degree of concentration, could well be prejudicial to the operator, whose concentration could falter after a period of twenty minutes.

10. I found that until the matters giving rise to the Claimant's dismissal he had been a conscientious and dedicated member of the Respondent's staff and the Claimant's witness statement evidenced impressive scores for the frequent training that the Claimant was required to undergo in his role as a Security Officer.

11. On 17 August 2016 the Claimant was on duty watching the x-ray screen, observing luggage passing through to the airline side. It is common ground that near to the end of the shift he turned round in order to obtain some water from a water dispenser located behind him. The Claimant's action involved him in turning away from the screen he was required to observe.

12. In circumstances where the close attention and observation of the Security Officer monitoring the screen might be interfered with for whatever reason, the Respondent's security system requires that officer to switch the screen off by means of a keypad in front of the operator.

13. Although there was some issue as to whether the Claimant had made an attempt to switch off the moving channel which conveys the luggage through the x-ray tunnel, CCTV footage, which was later considered by the Respondent revealed that the Claimant had not switched the moving platform off. Accordingly it followed that there was a risk that potentially hazardous luggage might have passed through at a time when the Claimant had turned away from the screen.

14. A more senior manager who had observed what had happened switched the moving platform off and it appears that no potentially risky items of luggage had been passed through.

15. The Respondent's x-ray screen reading standard pages 56-58, reinforces the twenty minute requirement under Clause 10 of the procedure which provides:

    You should never spend more than twenty minutes' x-ray screen reading. During this time, pay full attention to all images displayed.

16. On 2 September 2016 Kyrinien Eke, Terminal Security Manager, page 70, wrote to the Claimant informing him that he had been appointed as investigating officer and that he would be investigating the following allegations, namely:

    - **Not paying attention whilst screen reading;**

    - **Failure to follow the company's HR, Operating, IT, Health and Safety, Code of Professional Conduct to Security Policies and Procedures.**

17. The Claimant was interviewed on 9 September 2016 and was shown CCTV footage of the incident under investigation. The Claimant accepted that he had made a mistake but that he thought he had hit the stop button. I found as a fact on the evidence that the Claimant had not pressed the stop button and that it was only stopped when his line manager, Samira Baig turned it off.

18. It was not a difficult matter to investigate and Samira Baig and another potential witness, Thomas Middleton, who was shadowing Samira Baig on the day were also interviewed.

19. The Claimant had been placed on restricted duties during the investigatory process which involved him in undertaking a role identified as CLIO. The role involved the Claimant in greeting, welcoming and directing passengers to the appropriate security lanes.

20. The investigating officer, Kyrinien Eke, prepared an investigation report dated 17 September 2016 pages 86-91 which concluded that the Claimant had in fact made no attempt to stop the luggage belt. It was recommended that the matter should proceed to a disciplinary hearing.

21. Laura Nicholls, Security Assurance Manager, was appointed to conduct the disciplinary hearing. On 3 November 2016 Laura Nicholls wrote to the Claimant pages 93-94 that at the disciplinary hearing he would be required to answer the following charges of gross misconduct, namely:

- **Serious breach, failure or negligence to comply with the company's health and safety rules and regulations, which could pose a serious risk to customers and employers.**

- **Serious and/or deliberate breach of the company's HR, Operating, IT, Health and Safety, Code of Professional Conduct and Security Policies and Procedures.**

- **Breach of trust and confidence.**

22. In her letter to the Claimant Laura Nicholls pointed out that the charges might constitute gross misconduct and that if proven it could lead to his dismissal.

23. The hearing took place on 1 December 2016 and the Claimant attended, accompanied by his trade union representative, Mark Williams.

24. The CCTV footage was considered, although it was not available at the Tribunal Hearing. There was no issue that the Claimant had not switched off the belt at the material time when turning away to obtain some water and there was also an issue in relation to the Claimant's body language which was described as fidgety and not presenting a professional appearance to passengers.

25. During the course of the disciplinary hearing the Claimant apologised for his behaviour and stated that he was grateful to Samira Baig for intervening before there was a serious outcome. He accepted that he had been fidgety but that it had been a long day. Laura Nicholls did not consider that the Claimant had provided a sufficient explanation or mitigation for his conduct and informed the Claimant that it was her decision to summarily dismiss him on the grounds of gross misconduct.

26. On 5 December 2016 Laura Nicholls wrote to the Claimant, pages 153-155 confirming her decision to dismiss him. Laura Nicholls's letter included the following:

> "**I feel the action of turning away from the x-ray screen to get yourself a cup of water without clearing the tunnel or stopping the x-ray screen to be a serious breach of both our health and safety rules, as well as a serious breach of our security procedures.**
>
> **I also feel the behaviours displayed by you as shown on CCTV, up to the point of the incident, which included swinging on the chair, did not portray a positive professional image and would be extremely concerning for our passengers and stakeholders to witness.**
>
> **I also feel that the above two acts have caused a breach of confidence in your abilities to undertake the role that you were trained for and leave no confidence in these behaviours or a similar incident would not happen again.**

Overall I feel the actions constituted a failure and negligence to comply with the company's rules and regulations which pose a serious risk to our passengers and stakeholders. This was a serious breach of security policies and procedures. You did not portray a professional image and did not maintain full concentration; you were not diligent or professional and did not portray positive body language. You should have cleared the tunnel and then pressed the stop button if you were in need of a drink, but instead you simply turned your back to the screen to get some water and the machine was only stopped when Security Manager, Samira Bait(?) saw this happen and stopped the belt. You articulated that you understood the process that you should have followed and the behaviours which you should have displayed. However, you advised that you were unaware of your professional behaviour/mannerisms whilst on the screen, which does not provide me with confidence in you undertaking your role to the highest standards of professional behaviour.

27. The Claimant appealed against his dismissal. The Claimant's appeal was on the grounds that his dismissal was harsh or unfair.

28. The Claimant's appeal hearing took place on 2 February 2017 and was chaired by Tom Willis, Director of Security.

29. During the course of his appeal the Claimant raised the cases of two other individuals namely Ghurav Nayer who had been not been looking at the screen and had failed to reject bags which should have been rejected. Ghurav Nayer was given a twelve month warning. Another employee, Selina Andrews, had been seen using her 'phone whilst screen reading but was not dismissed, pages163 to 164 and 178A to 178K.

30. The Claimant's appeal was dismissed.

31. On 8 February 2017, page 176 confirming the outcome of his appeal hearing. In relation to the issue of comparator cases Tom Willis stated the following:

I understand from the information that you supplied that you believe a number of individuals had been involved in similar incidents related to conduct whilst screen reading, who have not been dismissed. At the appeal you specifically referenced the cases of Ghurav Nayer and Selina Andrews. Each case is assessed independently on it's own merits and the outcome is determined upon individual circumstances. Having reviewed a range of cases within both Terminal 4 and indeed Heathrow more broadly, I have concluded that the decision reached by Laura Nicholls to be within the range of decision making based on the specific circumstances. Therefore, the points raised on comparator cases added little weight to my overall decision."

The Law

32. The Claimant was dismissed for the potentially fair reason of gross misconduct. In a conduct dismissal the Tribunal has to remind itself that it is not its role to consider what it would or might have done had it been the employer at the material time but that it's role is to review the entire disciplinary process and consider whether throughout the process the Respondent employer acted reasonably or in other words whether each stage of the process fell within the range of reasonable responses available to a reasonable employer. Further the Tribunal has to determine whether the sanction of dismissal amounted to a reasonable sanction in all the circumstances. It does not follow that a harsh decision is necessarily an unreasonable decision in the event that it involved a sanction which a reasonable employer could have adopted in all the circumstances.

33. In a conduct dismissal the guidelines of the EAT in ***British Home Stores Limited - v – Burchell*** ***1980 ICR 303*** are relevant, namely whether the Respondent believed that the employee was guilty of the misconduct alleged, whether it had reasonable grounds upon which to sustain that belief and that in order to justify its belief it had carried out a reasonable investigation into the conduct alleged.

34. The statutory framework is set out in Section 98(4) of The Employment Rights Act 1996 which provides

    … the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons 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.

Conclusions

35. I bore in mind the priority the Respondent justifiably placed on security issues. Any lapses in security could have disastrous consequences for both staff and passengers.

36. There are many cases in which an employer might well take the view that the conduct of an employee was such as to lead them to conclude that they would have no confidence that such conduct would not be repeated in the future. However such cases usually are founded upon aggravating circumstances, such as the employee concerned denying his involvement in the conduct alleged, which was not the situation in the present case. At the disciplinary hearing the Claimant accepted the seriousness of his conduct and when asked how can the business trust you and how can the business have faith and trust, the Claimant answered, page 136,

You have made me aware and how this can be perceived by others. I can adhere to rules and operate machines. I can't turn back time but will to those things and retrain,

37. The Claimant had a good work record which did not on the evidence appear to have been considered sufficiently or at all during the disciplinary process, and the Claimant had apologised for his conduct, and said in the disciplinary hearing that he would make amendments and that '*this is the first and last mistake'*.

38. I was also concerned that the Claimant's body language which had not been considered during the investigatory process featured to a very significant extent at both the disciplinary and the appeal hearings.

39. I had further concerns about the apparent inconsistency of treatment in relation to the Claimant and the two employees identified by him at the appeal hearing. In relation to the employee, Ghurav Nayer, there was documentation relating to his disciplinary process included in the Tribunal bundle. The incident took place on 19 August 2016, two days after the incident involving the Claimant and involved Ghurav Nayer in failing to reject number of bags during the time he was on duty screen reading. Ghurav Nayer, unlike the Claimant was not dismissed and was issued with a twelve month warning. The employee, Selina Andrews, was not dismissed for using her phone whilst screen reading.

40. I reminded myself that a Tribunal should approach contentions of inconsistent treatment with great caution, see ***Hadjioannou – v – Coral Casinos Limited* 1981 IRLR 352, EAT**. Nevertheless, there had been an incident of a failure to observe items of luggage which should have been rejected whilst screen reading only two days after the incident involving the Claimant, which had not involved a dismissal of the employee concerned. In my judgment the Claimant's case falls within the scope of those limited cases where inconsistent treatment is relevant, particularly having regard to the disparity of treatment involving the Claimant and Ghurav Nayer. In addition there was evidence before the Tribunal and before the appeal hearing that another employee was not dismissed for using a mobile 'phone whilst screen reading.

41. In my judgment, Tom Willis, in his letter confirming the dismissal of the Claimant's appeal, failed to address the issue of inconsistent treatment in any convincing way apart from broadly stating that he had reviewed a range of cases and that the decision reached by Laura Nicholls had been in the range of decision making based on specific circumstances.

42. Again I noted that Ghurav Nayer had been informed of the outcome of his disciplinary hearing on 19 October 2016, whereas the Claimant himself had been allowed to continue in an alternative role until his disciplinary hearing in December 2016 nearly four months following an incident which the Respondent considered was so serious as to justify the Claimant's summary dismissal.

43. In my judgment, having regard to the nature of the conduct and the existence of the CCTV footage the incident was a very straightforward matter but the Claimant was not written to and informed that he was required to attend a disciplinary hearing until 3 November 2016, nearly three months after the incident itself.

44. I have not found this an easy case to determine having regard to the potential security implications of the Claimant's conduct. However, I found that the Respondent did not consider the Claimant's conduct record nor the fact that he had been working in an alternative role, as part of the security process in shepherding passengers, for a period of over three months before the decision to dismiss was taken. Again, in my judgment the other cases raised by the Claimant in the appeal process which attracted a far lesser sentence in both cases, namely twelve months' warning, pages 163-164, on the face of it were inconsistent with the treatment afforded to the Claimant.

45. I found that the Respondent failed as a reasonable employer to consider any alternative penalty and to take into account adequately or at all the treatment afforded to the employees identified by the Claimant. A reasonable employer, would in my judgment, have considered such matters, before reaching its decision about the level of sanction.

46. In all the circumstances, I have concluded that the Claimant was unfairly dismissed by the Respondent having regard to Section 98(4) of the 1996 Act. Nevertheless, I found as a fact that there was a high degree of contribution on the part of the Claimant. Mr Kirk on behalf of the Respondent submitted that were the Tribunal to consider contribution it should be as high as 100%. In my judgment, the Claimant's conduct was serious enough to be reflected in a finding of contributory fault to the extent of 75% pursuant to Section 123(6) of the Employment Rights Act 1996.

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Employment Judge Hall-Smith

11 October 2017