



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr A Cooke

and

Respondent
LHR Airports Limited

Held at Reading on 18, 19 & 20 October 2017

Representation **Claimant:** Mr M McGrath, lay representative
Respondent: Mr M Cole, counsel

Employment Judge Mr S G Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Unfair Dismissal – Section 98 Employment Rights Act 1996

2. The Claimant was dismissed by reason of misconduct on 14 October 2016 and that was the effective date of termination. The dismissal was not unfair. This complaint fails.

Wrongful Dismissal - article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

3. The Claimant was guilty of gross misconduct such as to justify summary dismissal. The dismissal was not wrongful. This complaint fails.

Reasons

4. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

- 1 Claimant On 2 March 2017 the Claimant presented complaints of unfair dismissal and breach of contract/notice pay to the Employment Tribunal.
- 2 Respondent The Respondent presented a response on 3 April 2017. Both claims were resisted. The Respondent claimed that the Claimant had been fairly dismissed on 14 October 2016 by reason of misconduct.

PRELIMINARY ISSUE

- 3 At the start of the hearing, the Claimant made an application for a specific disclosure order in respect of six cases of alleged misconduct by other employees of the Respondent for the purpose of comparison of disparity of dealing/sanction with the Claimant's case.
- 4 The application was refused and reasons for the refusal were given.

EVIDENCE

- 5 The Tribunal heard evidence on oath on behalf of the Claimant from Mr Andrew Cooke (Senior Airfield Officer) and Mrs Parvinder Guyan ((Senior Airfield Officer).
- 6 The Tribunal heard evidence on oath on behalf of the Respondent from Mr Nigel Houlton (Airfield Duty Manager / investigating officer), Mr Fernando Lopez Calleja (Head of Aerodrome Licensing & Assurance / dismissing officer) and Mrs Becky Ivers (People Director Expansion / appeal officer).
- 7 The Tribunal also read documents in a bundle provided by the parties.
- 8 From the evidence heard and read the Tribunal made the following findings of fact.

FINDINGS OF FACT

Background

- 9 The Respondent is the operator of London Heathrow Airport.
- 10 The Claimant was employed by the Respondent as a Senior Airfield Officer, Airside Operations. He was employed from 9 April 2003 until his dismissal on 14 October 2016.

- 11 Part of the Claimant's duties involved the use of firearms to deal with birds and vermin on the airfield. The Respondent had a stock of firearms and ammunition for the use of Senior Airfield Officers. The Claimant was licensed to handle and use firearms as part of his duties and he last completed the course "Safe Handling of Firearms for Airfield Operations" on 15 December 2015.
- 12 The Respondent's Firearms Control Policy included the following:

"Safety Critical Activities

It must be remembered that there is no such thing as a safe gun

1. *Always prove a gun to be unloaded when you pick it up, take it or hand it to anyone.*
2. *Always point the firearm at your target.*
3. *Do not place your finger on the trigger until you are ready to shoot.*
4. *Never point a firearm at anyone.*
5. *Where possible firearms must be carried "broken" or with a "breach flag" installed to show that it is unloaded.*

Personal Protective Equipment (PPE) must also be worn when shooting firearms. This PPE will consist of (as a minimum) eye and hearing protection."

Incident 3 August 2016

- 13 On 3 August 2016 the Claimant was involved in an incident in which it was alleged that he had mishandled a firearm. The incident was reported and made the subject of a formal investigation by Mr Houlton. The Claimant was suspended from duty, on full pay, on the same date.
- 14 Witness statements were provided by 9 staff and Mr Houlton conducted interviews with 10 staff. The Claimant was also interviewed.
- 15 On 24 August 2016 Mr Houlton produced an investigating officer's report headed "*Allegation of Reckless Mishandling of a Firearm*" which stated:

"Nature of the incident

- *On Wednesday 3rd August 2016 after signing out a shotgun from the ASD gun room Mr Cooke re-entered the control room (Bridge) and following some discussion with the Airfield desk controller and some reported swearing it is reported that he swung a broken shotgun into the cocked position with the barrels ending up pointing at Michael Brown and within close proximity of his face / upper body area."*

- 16 The report recommended that there was a case to answer and the Claimant was invited to a disciplinary hearing.

Disciplinary hearing

- 17 On 13 September 2016 Mr Lopez wrote to the Claimant to invite him to a disciplinary hearing and included the following:

“At this hearing you will be required to answer the following charges of gross misconduct:

- *Reckless Mishandling of a Firearm*
- *Putting Health, Safety and Wellbeing of Colleagues in Jeopardy.*
- *Failure to follow correct firearm procedures*

I have included a copy of Heathrow’s disciplinary procedure as well as a copy of the investigation findings which include:

- *Investigating Officer’s Report – Allegation of Reckless Mishandling of a Firearm*

(please note that the appendices of the investigation report are being copied and will be provided to you in due course, at least 10 days before the disciplinary hearing)

You should be aware that these/these charges may constitute gross misconduct and, if proven, could lead to your dismissal.

I would like to take this opportunity to remind you of your right to be accompanied to the hearing by a work colleague or a Trade Union Representative.”

- 18 The disciplinary hearing took place on 14 October 2016 chaired by Mr Lopez. The Claimant was accompanied by Mr McGrath, his trade union representative. The allegations were put to the Claimant and he was allowed to respond, giving his account of the incident. At the end of the hearing, Mr Lopez informed the Claimant that he found the allegations proved, that they amounted to gross misconduct and that he was summarily dismissed. The outcome was confirmed in a letter dated 20 October 2016 which included the following:

“You described the incident in detail and confirmed that, on 3rd August, after collecting a shotgun and Very pistol from the gun room, you were carrying the shotgun and a cup of tea into the control room when you started a conversation with your colleague Michael Brown. You stated that the shotgun, which was broken and held over your right arm, slid, which made you tilt your right arm upwards resulting in the shotgun closing and pointing at Mr Brown’s head. You described the event as an accident. You then described

your reaction as panic, and wanting to leave the building. You proceeded to exit the building with the closed shotgun over your shoulder until you arrived at the front door and were challenged by Mr Turner. At this point, you broke the shotgun again.

I reviewed with you each one of the charges in order, in terms of 'Reckless mishandling of a firearm', you acknowledged that the closing of the firearm in the control room, carrying the firearm out of the building, still closed, over your shoulder, was not appropriate. You disputed that you did not intend to point the firearm at your colleague – however agreed that the firearm, in your words by accident, ended up pointing at him. We then reviewed the charge of 'Failure to follow correct firearm procedures'. We reviewed the Airside Procedure ASOP-15-017, dated 22 December 2015, and noted points 5 and 6 of paragraph 5, Safety Critical Activities. These points require Heathrow colleagues to (a) never point a firearm at anyone, and (b) where possible, carry the firearms broken to show that they are unloaded. You acknowledged that your actions on the day did not follow Heathrow's firearms procedures. We then moved on the last charge of 'Putting Health, Safety and Wellbeing of Colleagues in Jeopardy'. You acknowledged that your actions could have put your colleague Mr Brown at risk however insisted that the shotgun had been unloaded at the time. I noted that it is industry standard that, at no point, should firearms be carried closed or pointed at anyone, as this removes a critical safety layer in terms of avoiding accidents should the firearm be loaded inadvertently. I concluded that, in my opinion, you had removed this critical safety layer and therefore you did put your colleagues at risk and their safety in jeopardy.

Finally, we reviewed potential mitigating circumstances that could have contributed to the events on the day. Firstly, you believed that the stress and your diagnosed depression caused by the previous and ongoing grievance investigation contributed to your actions on the day. While I accepted that this could have been a factor in your behaviour after the incident, when in your words you panicked and left the building with the closed shotgun over your shoulder, I did not accept that it contributed to the main event itself, where the shotgun became closed and pointing at Mr Brown's head, as, in your words, it was accidental – therefore not induced by behaviour. Secondly, you stated that your depression was mishandled by the company, as despite several meetings with your manager, you remained at work. You produced during the meeting evidence of your trade union representative raising concerns to HR about your stress and depression due to the length of the grievance investigation in June and July 2016. I noted that your manager, once informed by yourself of your GP's diagnostic as depression and issue of antidepressants, referred you to Heathrow's Occupational Health. You acknowledged that your manager fulfilled his duty of care. I noted that the report from Occupational Health was succinct but did not indicate any restrictions at work, Given the referral to Occupational Health and its

outcome, I do not believe that the company mishandled your condition or that you should not have been at work on the day of the incident. Finally, you noted a number of potential concerns with regards to the firearms procedures at Heathrow and how those could have contributed to the events on the day. Please note that I have passed your comments to the Airside Safety Department so that any improvements to our procedures can be considered. You focused in particular on the lack of advice regarding how many firearms should be taking out of the gun room at one time, and the lack of requirement to carry the firearms in sleeved while in the building. While I thanked you for your comments, I noted that the accident appeared to have been as a result of carrying other items that the firearms (you quoted carrying a cup of tea in your left hand, in line with the evidence in the Investigation Report, however you questioned this later in the meeting). As such I did not believe that those potential shortages in our procedures contributed to the incident on the day.

I concluded the hearing by confirming that the three charges of gross misconduct were upheld. I also concluded that the mitigating circumstances put forward at the hearing did not, in my opinion, have a significant contribution to the events or the charges reviewed.”

Appeal

- 19 The Claimant exercised his right to appeal on 28 October 2016 and an appeal meeting was held on 28 November 2016 chaired by Mrs Ivers. The Claimant was again accompanied by Mr McGrath. After discussion regarding the disciplinary process and the incident, Mrs Ivers adjourned the hearing and gave the outcome in writing on 6 December 2016. The outcome letter included the following:

“I considered each of your reasons carefully and have summarised my rationale for upholding this decision below.

1. *I believe that the disciplinary process was followed and that all relevant documents were either considered in advance or during the hearing. Whilst the documents you presented were not in the original pack they were considered fully by Fernando and myself during the appeal hearing. In reviewing these personally I believe that there is no correlation between the incident and your wellbeing as you agree the incident was an accident and therefore was not as a result of your state of mind or depression. I also believe that the Investigating Officer did carry out a full and thorough investigation.*
2. *I believe that we have disclosed the relevant information in relation to our dealings with the police and having read the letter from The Metropolitan police that you received on the 5th August I do believe that you have interpreted this incorrectly and that this does not point to*

colleagues at work being interviewed in relation to yourself. It is clear in the letter that Sergeant Tait spoke to one colleague only.

3. *Having reviewed the evidence I believe your actions did constitute gross misconduct for the reasons highlighted in the letter dated the 20th October and therefore Fernando's decision to dismiss was appropriate. As you know Safety is Heathrow's number one priority and the Health Safety and Wellbeing of colleagues and passengers is critical. I also believe that mitigating circumstances were considered fully. In relation to the other cases and the sanctions given I have reviewed these and believe there is no correlation to your case.*
4. *I believe that the business did provide a duty of care to you in events leading up to the event and by your own agreement these events are not linked. You stated that you felt fully capable to complete your duties and that you would have asked if you felt you needed a change of role, which you had not.*
5. *I have taken on board your comments regarding our operating procedures and reiterate Fernando's note in that these have been forwarded to the Airside Safety department. I do believe however that any omissions in our policy or process would not impact on your actions and that any training undertaken in relation to your licence would have highlighted how to handle weapons in a safe manner.*

This now exhausts the internal Company appeal process."

RELEVANT LAW

Employment Rights Act 1996

20 Section 94. *The right.*

(1) An employee has the right not to be unfairly dismissed by his employer.

21 Section 98. *General.*

(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, ...

(3) 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.

- 22 For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.
- 23 Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.
- 24 Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.
- 25 Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses.
- 26 In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the

means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.

- 27 In respect of allegations of disparity the Tribunal took account of the guidance in Hadjiioannou v Coral Casinos Ltd [1981] IRLR 352 as approved in MBNA Ltd v Jones [2015] UKEAT/0120/15/MC. The EAT said that Tribunals should scrutinise arguments based upon disparity with particular care. There will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues upon the particular circumstances of the individual employee's case. It is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

DECISION

Unfair Dismissal

- 28 The Tribunal found that the reason for dismissal was misconduct.

- 29 In his witness statement, the Claimant stated:

"I am strongly of the opinion that the respondents have seen this incident as an 'opportunity' to dismiss me due to the fact that I am being paid substantially more than colleagues in a similar position and grade within the company. ... The fact that I am being paid considerably more is that, due to several restructuring programmes within Heathrow, I have found my role in the company being removed and these protections are in line with company policy when finding alternative roles within HAL. ... It could be seen that HAL have used my dismissal as a cost saving exercise... ."

- 30 The Claimant's opinion on these matters was not supported by any evidence. Mr Lopez said that he knew the Claimant's salary had been kept to a previous level one band above his current position. He confirmed however that that did not affect his decision. His evidence was not challenged by the Claimant and he was not questioned about it by the Claimant's representative.
- 31 In his closing submission for the Claimant, Mr McGrath raised the following matters in support of the claim that the dismissal was unfair.

Mr Houlton's investigation was focused upon finding guilt

- 32 The Tribunal found that the investigation was thorough and fair. All witnesses who could give information regarding the incident provided witness statements and were interviewed. They were asked relevant questions and there was no apparent bias in the questions asked to the witnesses or the Claimant.

Mr Houlton omitted to mention any mitigation in his investigation report

- 33 In fact, the Claimant was allowed to provide his account of the incident and any mitigating factors in his interview with Mr Houlton. He put forward a detailed account of both the incident and background and mitigating factors including matters relating to his health. All of this was included in the investigation report.

Mr Houlton had himself, the previous day on 2 August 2016, loaded a shotgun causing a health and safety risk

- 34 Mr Houlton gave an account of this occurrence and explained that he had not loaded the shotgun but simply demonstrated how to insert a magazine into the belly of the shotgun. There were never any rounds in the breach.
- 35 Additionally, this matter was not the subject of any complaint or allegation, it was not investigated and he was not subject to any disciplinary action or sanction. From the brief details provided by Mr Houlton, even if it had been investigated, the circumstances would have been materially different to those on the following day involving the Claimant.

The outcome of the disciplinary hearing was pre-determined because Mr Lopez deliberated for only eight minutes

- 36 Mr Lopez was questioned about this and said that he had read the investigation report before the hearing and that a brief adjournment was sufficient time to reach a decision. He had at that time just finished hearing from the Claimant during the hearing. The facts surrounding the incident were largely undisputed. The brevity of his adjournment before he announced his decision did not make his decision unfair.

There was a failure to consider the effects of the Claimant's illness and no account was taken of his good standing and career record

- 37 In fact, it is clear from the interview with Mr Houlton, the disciplinary hearing minutes and the appeal hearing minutes that the claimant had raised in detail his health problems involving stress and depression arising from an ongoing grievance investigation against him. Although it was suggested to Mr Lopez that he had not considered any mitigation or health matters, the record of the disciplinary hearing shows that Mr Lopez had read a copy of the occupational

health report dated 23 June 2016 in which there is reference to his stress and anxiety but the conclusion was that he was fit for full duties without restrictions. Also, Mr Lopez confirmed that during the disciplinary hearing, he spent a lot of time discussing mitigating circumstances with the Claimant and that he had looked at his disciplinary record beforehand and seen that there were no outstanding matters. He was therefore aware of the Claimant's unblemished disciplinary record. In the confirmatory letter dated 20 October 2016 (quoted above), he made extensive reference to mitigating circumstances, including the Claimant's health.

The Claimant made reference to comparator cases during the appeal but Mrs Ivers did not look at the case files but relied upon summaries of those cases from the HR department. It was also suggested that the appeal was not independent and impartial because HR were present

- 38 Mrs Ivers confirmed that she had given full consideration to the comparator cases raised by the Claimant and she referred to a review of them in her appeal outcome letter. It was reasonable for her to rely upon the summaries given by the HR department and it was clear that the circumstances of those cases were materially different to the circumstances of the incident in which the Claimant was involved. There were two cases. One involved an employee making a firearms-related threat to another employee but no firearm was actually involved. The second case involved an employee whose firearms licence was revoked by the police because of a personal domestic incident. It was not work-related. Mrs Ivers took account of these matters and discounted them.
- 39 The presence of an HR employee at the appeal hearing did not affect Mrs Ivers' independence or impartiality. A note-taker from the HR department is a usual and uncontroversial practice.

On 21 October 2016, Mr Lopez wrote to his colleagues raising a number of concerns regarding the handling of firearms which had been raised by the Claimant at the disciplinary hearing

- 40 None of the matters raised in this email were relevant to the circumstances of the incident in which the Claimant was involved. The email referred to the lack of shotgun sleeves, lack of a shooting range, control of ammunition, records of Very pistols and shotguns and staff training.
- 41 Insofar as procedural fairness was concerned, the Respondent complied with its own policies and also complied with the ACAS Code of Practice. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

- 42 The Tribunal found that the Burchell tests were satisfied on the charges found proved by the Respondent. There was a reasonable investigation and the Claimant was informed of all the evidence against him before the disciplinary hearing. He was given the opportunity at the hearing to give his own account and he was allowed to be accompanied by his trade union representative. The investigation both before and at the disciplinary hearing provided reasonable and sufficient grounds to sustain the Respondent's genuine belief in the Claimant's misconduct. The outcome of the hearing was confirmed in a reasoned and detailed decision letter. The Claimant was allowed an appeal and an appeal hearing was held. A written outcome of the appeal was given.
- 43 It was apparent from the outcome letters dated 20 October 2016 and 6 December 2016 that both Mr Lopez and Mrs Ivers took full account of any possible mitigation and consideration was given to the appropriate sanction. The disciplinary process was well documented and transparently conducted.
- 44 There was no procedural unfairness.
- 45 The Claimant claimed that throughout the incident, his conduct was accidental and there was no malicious motive or intent behind it. However, it is clear from the dismissal outcome letter dated 20 October 2016 that account was taken not only of the circumstances in which the shotgun became closed and pointed at Mr Brown's head, but also the Claimant's conduct in continuing through the building with the closed shotgun over his shoulder and through to the front door of the building where he was challenged by Mr Turner. It was only when this occurred that the Claimant broke the shotgun again.
- 46 The Claimant was a certificated and trained firearms user. The incident involved more than an accidental slip resulting in the shotgun becoming closed. The Respondent took account of the full circumstances of the incident. Those circumstances were such that dismissal was within the range of reasonable responses.
- 47 The dismissal was not unfair.

Wrongful dismissal

- 48 The test for wrongful dismissal is different to the test for unfair dismissal. In wrongful dismissal the reasonableness or otherwise of the employer's actions is irrelevant. The question is whether the Tribunal considers the employee to have been guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.
- 49 The Tribunal looked objectively at the evidence placed before it and found evidence of gross misconduct such as to justify summary dismissal based upon the same evidence relied upon by the Respondent referred to above. There

was evidence that the Claimant had, by serious mishandling of a firearm, conducted himself in such a way as to commit a fundamental breach of his contract of employment.

50 The dismissal was not wrongful.

Employment Judge Vowles

Date: 23/11/ 2017

Sent to the parties on

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For the Tribunal office