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EMPLOYMENT TRIBUNALS

Claimant: Mr Emmanuel Omololu
Respondent: Cleanbrite (UK) Limited
Heard at: East London Hearing Centre
On: 29 March 2018
Before: Employment Judge Hallen (Sitting alone)

Representation:

Claimant: In person
Respondent: Mr M Welsh (Solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for unfair dismissal is unfounded and is dismissed.

REASONS

Background and Issues

1 In his Claim Form submitted to the Employment Tribunal on 16 November 2017, the Claimant claimed unfair dismissal. The Respondent in its Response Form resisted the claim for unfair dismissal submitting that the Claimant was fairly dismissed by reason of conduct. At the outset of the hearing, the parties agreed the issues as follows:-

2 What was the reason for dismissal and did it fall within the reasons as outlined in Section 98(1) of the Employment Rights Act 1996 ("ERA"). In this case, the Respondent asserted that the reason was misconduct.

3 Was the reason for dismissal fair or unfair within the meaning of Section 98(4) ERA? In this case as the Respondent asserted that the reason for dismissal was misconduct, the Tribunal had to consider whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee at the time the misconduct

occurred. This involved three elements. First, there must be established by the employer the fact of that belief: that the employer believed it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief must have carried out as much investigation into the matter as was reasonable in all the circumstances of case. Was the penalty of dismissal by reason of misconduct within the band/range or reasonable responses which a reasonable employer might have adopted after a fair dismissal procedure had been adopted?

4 The Tribunal had before it an agreed bundle of documents as well as a witness statement from the Claimant and a witness statement from Kate Lawrence who was the Respondent's Corporate Services Director who gave evidence on behalf of herself who as the appeal officer as well as on behalf of the dismissing officer who was David Brooker the Respondent's Operations Manager. All witnesses including the Claimant were subject to cross-examination and re-examination as well as questions from the Tribunal.

Facts

5 The Claimant was employed by the Respondent as Regional Operation Manager having initially commenced employment with a company called Integrated Cleaning and Management Limited on 13 April 2015. The Claimant was dismissed by reason of gross misconduct on 2 November 2017 which was the effective date of dismissal. The Respondent is a cleaning company and the Claimant's role within the company was to manage 18 stores to which he would travel in his company car and such role involved the management of cleaning operatives at various stores and sites and the Claimant agreed that it was a senior position and one of trust.

6 Prior to commencement of his service with Integrated Cleaning Management Limited the Claimant was convicted of a driving offence on 24 April 2014 and this offence related to driving whilst intoxicated for which the Claimant had his licence suspended until 23 January 2015. The offence of driving with a alcohol level above the legal limit meant that the Claimant was fined £415 and suspended from driving for nine months by the West London Magistrate's Court. The Claimant at the Tribunal hearing sought to give the impression that he was unaware of whether the conviction was spent or not and that therefore he did not need to disclose it. He sought to give the impression to the Tribunal that the conviction was spent at the end of the nine month suspension from driving period. The Tribunal did not accept this evidence. The Claimant was an intelligent man who had a senior position with the Respondent and was well aware that this was a serious matter and needed to be disclosed to both Integrated Cleaning Management Limited and the subsequently to the Respondent at the time of his transfer to them under the Transfer of Undertaking Regulations. As a matter of law, the offence for which the Claimant was convicted was not spent for a period of five years namely until 24 April 2018.

7 When the Claimant was appointed by Integrated Cleaning Management to his position, he was issued with a letter of appointment which was at pages 1 to 4 of the bundle of documents. At page 2 of the letter it stated: "*should you fail to provide the relevant documentation or where necessary, fail to notify the company of any convictions this will result in the termination of your employment.*" The Claimant confirmed during the course of the hearing that he was aware of the content of the letter of appointment. The Claimant transferred to the Respondent's employment under the Transfer of Undertakings

Regulations in April 2016. At page 13 of the bundle he signed a statement of employment particulars with the Respondent in which he confirmed in answer to the question “*have you been convicted of an offence for which your conviction is unspent under the Rehabilitation Offenders Act 1974?*” that he had no such convictions. He was asked to provide details if he had been convicted on a separate sheet and failed to do so and the contract also contained the phrase “*failure to disclose an unspent conviction may result in any offer of employment being withdrawn or your employment being terminated.*” At the Tribunal hearing, the Claimant sought to give the impression that he had disclosed his conviction to Integrated Cleaning Management Limited by producing his paper driving licence. The Tribunal did not accept this evidence. If he had disclosed his driving licence with the conviction shown it was improbable in the Tribunal’s mind that he would have answered no to the question asked of him in the statement of employment or particulars contained at page 13 of the bundle. The Claimant also sought to give the impression that he produced his paper licence showing the conviction to the Respondent on transfer to them in April 2016. The Tribunal did not accept this evidence. The Tribunal accepted the Respondent’s evidence that the only documentation disclosed by the Claimant in respect of his driving licence was that contained at pages 16 and 17 of the bundle of documents which was his photo ID driving licence and not the paper licence which showed the conviction.

8 The Claimant was involved in a minor traffic accident involving his company vehicle on 28 September 2017 at 8.05am. The Claimant completed an email which he sent to Kate Lawrence on 6 October 2017 providing brief details of the collision and this was at page 23 of the bundle of documents. To this, the Claimant attached two photographs which were at pages 24 and 25 showing the minor damage to the motor vehicle as well as including a statement of fact which was at page 29 of the bundle of documents. The statement of fact had handwritten additions to it. In particular there was a question which asked for other driving information and requested whether the Claimant had any motoring convictions in the last five years. The Claimant stated that he did not. At the Tribunal hearing, the Claimant sought to argue that the statement of fact was not completed by him and was forged by the Respondent. The Tribunal did not accept his evidence in this regard. His answering no to the question whether he had been convicted of any motoring offences in the last five years was consistent with the answer he gave the Respondent upon transferring to their employment in April 2016 where he answered no to the question of whether he had any offences and convictions. The Tribunal’s view was that it was probable that the Claimant filled in the statement of fact and hoped the Respondent would not find out about his motoring conviction.

9 As part of the completion of the insurance claim in respect of this accident, the Respondent found out from its insurers that the Claimant had been convicted of a motoring offence in April 2014 and this was shown at page 30 of the bundle of documents which were the details of the conviction. As a consequence of this discovery, the Respondent suspended the Claimant from duty from 26 October 2017 and this was evidenced at page 32 of the bundle of documents which was the letter of suspension and confirmation that the Claimant would be invited to a disciplinary meeting to take place on 31 October 2017. At the hearing, the Claimant sought to argue that the Respondent was obliged to have an investigation meeting with him. The Tribunal did not accept this; the Respondent’s disciplinary procedure did not require the Respondent to have an investigation meeting with the Claimant. Furthermore, the Tribunal accepted the evidence of the Respondent that its investigation involved a review of its contractual documents including the letter of appointment dated 21 April 2015 in respect of Integrated Cleaning

Management's appointment of the Claimant, as well as a review of the Claimant's personnel file, a consideration of the statement of employment particulars contained at page 13 of the bundle of documents, a review of the company vehicle policy contained at the pages 18 – 22 as well a consideration of the insurance document submitted by the Claimant in respect of his accident on 28 September 2017. All of the documents were subsequently provided to the Claimant at the disciplinary hearing which took place on 31 October and he was given an opportunity to comment on each of the documents as shown in the notes of the disciplinary minutes contained at pages 33 – 38 of the bundle of documents. It is noted that the Claimant signed these notes confirming their accuracy. The letter of suspension at page 32 of the bundle of documents dated 26 October 2017 informed the Claimant that with immediate effect he was suspended on full pay pending investigation into matters set out in the letter namely the Claimant's alleged breach of contract in failing to disclose to the Respondent a conviction for drink driving. He was advised that his letter of engagement dated 21 April 2015 which constituted written terms and conditions of employment stated that a failure to disclose any conviction would result in the termination of his employment and he was warned that if the allegation was found proven at the subsequent disciplinary hearing his employment could be terminated.

10 The disciplinary hearing took place on 31 October 2017 and the dismissing officer was David Brooker. A decision was reached at the end of the hearing to dismiss the Claimant for gross misconduct. The Claimant was sent a letter of dismissal explaining the Respondent's reasons for dismissal. This was contained at pages 39 – 40 of the bundle of documents. The letter confirmed that the Claimant was charged in respect of gross misconduct for failing to disclose a conviction of drink driving. The letter of dismissal confirmed that the letter of appointment dated 21 April 2015 stated that a failure to disclose a conviction would result in the termination of employment. It was confirmed that at the disciplinary hearing on 31 October 2017 these allegations were put to the Claimant and evidence presented to him of his failure to disclose when asked a conviction for drink driving which was not spent until 24 April 2018 a period of five years. It was also confirmed in the letter that the Claimant failed to disclose this conviction in the statement of facts sent to the insurers on 28 September 2016 and that as a consequence of the failure to disclose the unspent conviction the company's vehicle insurers sought to impose special terms which included an excess of £1000 for failure to disclose the conviction. In the circumstances, Mr Brooker came to the conclusion that the Claimant's failure to disclose the conviction and deliberately attempting to hide it amounted to gross misconduct. He confirmed that in a position of trust which the Claimant occupied his failure was a serious breach of contract and warranted summary dismissal for gross misconduct. The Claimant was given an opportunity to appeal against his dismissal which appeal he exercised by way of email dated 6 November which was at page 42 of the bundle of documents. In his email of appeal at page 42, the Claimant said that his conviction was spent at the end of the nine month suspension of his driving licence, that he presented his paper driving licence to the Respondent showing the conviction, and that he did not recollect signing any documentation saying that he had no convictions. Ms Kate Lawrence conducted the appeal on 9 November 2017 at an appeal hearing and the minutes of the appeal signed as being accurate by the Claimant were at pages 43 – 47 of the bundle of documents. Ms Lawrence did not accept that the Claimant had produced his paper driving licence showing that he had a driving conviction either to the Respondent or in respect of Integrated Cleaning Management Limited when he started his employment. This ground of appeal was dismissed. She did not accept that the conviction was spent after the period of nine months during the driving licence suspension and dismissed this aspect of the Claimant's appeal. She believed that the Claimant was

well aware of his duty to disclose the conviction and was deliberately trying to hide it from the Respondent hoping that it would not find out. As a consequence she upheld the dismissal for gross misconduct and dismissed the Claimant's appeal.

The Relevant Law

11 Section 98(1) ERA provides that it is for the employer to show the reason or principal reason for dismissal of the employee and 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. If the Respondent fails to do so the dismissal will be unfair.

12 If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

13 Section 98(4) ERA provides:-

“the determination of the question whether the dismissal is fair or unfair (having regards 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.”

14 In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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.

15 In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

16 The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer (**London Ambulance NHS Trust v Small [2009] IRLR 563**).

17 In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believed that he has committed an act of misconduct, in determining whether the dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question and obtained a

reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involved three elements. First, there must be established by the employer the fact of that belief, that the employer did believe it. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage on which he formed that belief on those ground, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

Tribunal's Conclusion

18 The Tribunal was satisfied in this case that the reason for dismissal was misconduct and that it was serious misconduct pursuant to the Respondent's disciplinary statement which was at page 41 of the bundle of documents warranting dismissal without notice. Gross misconduct was defined in the disciplinary policy as being deliberate and wilful failure to follow a reasonable instruction and a serious breach of confidence. The Tribunal was satisfied that the Respondent was entitled to come to the conclusion that the Claimant's failure to disclose an unspent conviction was a matter of serious misconduct based upon the evidence that the Respondent considered as part of its investigation. The Respondent had in front of it the letter of appointment with Integrated Cleaning Management of 21 April 2015 in which it was explained to the Claimant that failure to disclose a conviction would lead to dismissal. It also had in front of it the statement of employment particulars at page 13 of the bundle in which the Claimant confirmed that he had no unspent convictions when in fact he had an unspent conviction. In addition, the Claimant as part of the accident reporting stage completed a statement of fact which was at page 29 of the bundle of documents stating that he had no motoring convictions in the past five years when in fact he had an unspent motoring conviction. All of this documentary evidence was sufficient to show gross misconduct as being the reason for dismissal.

19 The Tribunal then had to be satisfied that the Respondent undertook a reasonable investigation in respect of the alleged misconduct in question. The Tribunal accepted that a reasonable investigation was carried out by the Respondent. This involved a review of all of the relevant documentation as specified above as well as giving the Claimant an opportunity to respond to the allegation at a disciplinary meeting as shown by the notes of the meeting at pages 33 – 38. The Claimant argued that the Respondent was obliged to undertake an investigation meeting with him prior to constituting a disciplinary hearing. The Tribunal did not accept that this was a requirement. The disciplinary procedure did not require an investigation meeting with the Claimant and furthermore the salient evidence was put to the Claimant at the disciplinary meeting on 31 October 2017 and he was given a proper opportunity to answer to the allegations. In addition, he had been suspended on 26 October and was aware of the allegation against him so was not surprised as to what was being considered.

20 It was clear to the Respondent after putting the allegations to the Claimant that he had deliberately concealed a criminal conviction and was aware when he was appointed of the requirement to disclose all convictions. He was aware that a failure to disclose unspent convictions could lead to the termination of his employment and the Respondent rightly concluded that he deliberately concealed the conviction hoping that the Respondent would not find out. Unfortunately for the Claimant, he was involved in a minor road traffic collision and the conviction was disclosed as part of the insurance claim

process. Even when the Claimant was given an opportunity to 'come clean', as part of the insurance process, he deliberately attempted to hide his conviction in respect of the statement of fact that he completed which is at page 29 of the bundle of documents. He was specifically asked as part of that statement of fact whether he had any previous motoring convictions in the past five years and answered no to that question. This the Respondent found to be a deliberate attempt to mislead it and a breach of trust and confidence especially for an employee holding the position of trust that this employee held. As a consequence of the Claimant's failure to tell the truth, the Respondent incurred an excess in respect of its insurance policy of £1,000. Given the serious nature of the matter, the Respondent felt that it had little choice but to terminate the Claimant's employment summarily for gross misconduct. This appeared to the Tribunal to be a decision that was open to the Respondent and fell within a band of reasonable penalties open to it. The Claimant as stated above was in a position of trust and managed many cleaning operatives. The Respondent had to implicitly trust that he could do so. The Claimant's conduct in respect of the driving conviction meant that it could not trust him and therefore gross misconduct was a reasonable penalty to impose.

21 The Respondent gave the Claimant an opportunity to appeal against his dismissal which he exercised and the Respondent conducted a fair appeal. The Claimant sought to give the Respondent the impression that he was ignorant of his position in respect of the criminal conviction. The Respondent did not accept the Claimant's level of ignorance and nor did the Tribunal. It appeared to the Tribunal that the Claimant was an intelligent man holding a responsible position and knew very well that he had an obligation to disclose his conviction to the Respondent and that it was an unspent conviction. He deliberately attempted to mislead the Respondent in regard to his ignorance and with regard to his obligations. Furthermore, he deliberately answered no to the question that was asked of him several times as to whether he had any motoring convictions. The Tribunal was satisfied that the Respondent undertook a reasonable and fair investigation putting the relevant charges to the Claimant at a properly constituted disciplinary and appeal meeting and considered his defence to the allegations. The Respondent came to the conclusion that the Claimant deliberately misled it and dismissed the Claimant for gross misconduct. Accordingly, the Claimant's claim for unfair dismissal was dismissed by the Tribunal.

Employment Judge Hallen

11 April 2017