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EMPLOYMENT TRIBUNALS

Claimant: **Mr R Jenkins**

Respondent: **UK Power Networks**

Heard at: **East London Hearing Centre**

On: **12 & 13 April 2018**

Before: **Employment Judge Ferguson**

Representation

Claimant: Ms S Valentine, Lay Representative

Respondent: Mr J P Waite, Counsel

JUDGMENT

The judgment of the Tribunal is that the Claimant's complaint of unfair dismissal is dismissed.

REASONS

INTRODUCTION

1 The Claimant (DOB: 23 March 1981) worked for the Respondent from 4 January 2005 until his summary dismissal on 12 July 2017. By an ET1 presented on 28 November 2017 the Claimant brought a complaint of unfair dismissal. The Respondent defended the claim.

2 The agreed issues to be determined are:

LEGAL ISSUES

2.1 Did the Respondent's reason for the dismissal relate to the Claimant's

conduct (working while on sick leave) for purposes of s.98(1) of the Employment Rights Act 1996 ("ERA").

2.2 If so, did the Respondent genuinely believe that the Claimant was guilty of the alleged misconduct (behaving dishonestly and in breach of policy by working whilst on sick leave)?

2.3 If so, was the belief based on reasonable grounds?

2.4 Did the Respondent carry out as much investigation as was reasonable in the circumstances?

2.5 Did the decision to dismiss for gross misconduct fall within the range of reasonable responses open to the Respondent for purposes of s.98(4)?

FACTUAL ISSUES

2.6 Did the Respondent make a decision to dismiss the Claimant prior to the fact-finding hearing having been conducted (as alleged at para 3 of ET1 section 8.2)?

2.7 Was the Respondent entitled to infer from the evidence (including the information which prompted the investigation) that the Claimant worked while on sick leave on days other than that upon which he had been filmed? If not, was the Respondent nonetheless entitled to reasonably conclude that the Claimant was guilty of gross misconduct based on investigation/surveillance evidence of him working while on sick leave (in particular on 31st May 2017)?

2.8 Was the reason provided by the Claimant for doing scaffolding work at height on 31st May 2017 (that he was doing it to deal with stress) such that the decision to dismiss him was not within the range of reasonable responses?

3 The Claimant claims compensation only.

4 On behalf of the Respondent I heard evidence from Lee Craddock, Steven McCormilla, Ken Melia, Tony Barratt and Matthew Webb. I also heard from the Claimant and from his partner, Sarah Valentine, who also acted as the Claimant's representative

FACTS

5 The Respondent is responsible for the maintenance of the electricity network and employs approximately 5,600 people. The Claimant was employed as a Distribution Service Technician. This involved attending the properties of members of the public who had reported a loss of electricity supply, investigating the problem and reporting it. He worked on a 24-hour rota.

6 In February 2017 the Claimant commenced a period of sickness absence due to

stress caused by the fact that his partner Ms Valentine had recently been diagnosed with breast cancer. The sick notes he submitted at least for the first six weeks (later certificates not being in the bundle) stated "stress at home" as the reason for not being fit to work.

7 In early April 2017 the Respondent's Dispatch and Faults Manager Clive Harrison heard that the Claimant might have been working during his sick leave, running a scaffolding business. He asked Lee Craddock, head of physical security to investigate.

8 Mr Craddock first conducted some internet research of publicly available material and established that the Claimant was the sole director of a company called 300 Scaffolding Limited, established in October 2015. The registered address for the company was 86 Broad Walk, an address previously given by the Claimant to the Respondent as his home address. It is not in dispute that is the home address of the Claimant's parents. The company had a website and Facebook page, which included photographs of scaffolding projects uploaded on 25 March 2017. Mr Craddock also discovered that the Claimant's partner, Ms Valentine, had appeared in several media articles in the local and national press relating to her cancer diagnosis and treatment methods.

9 Over the next few weeks the Respondent sought to establish whether the scaffolding business was active and if so, from where it was operating. On at least three occasions, Mr Craddock or his colleague Mr McCormilla did a "drive-by" of the Claimant's home address, the Old Mill. Nothing was seen except that the Claimant's transit van was parked nearby.

10 On 13 April Mr Craddock called the published mobile phone number for 300 Scaffolding posing as a potential customer. A recording of this call was played during the Tribunal hearing. At the start of the call, the Claimant said that he would be able to meet the caller at the property or go over and have a look. After Mr Craddock asked the Claimant for his name and started trying to arrange a time in the next week or two, the Claimant said it would be a colleague Jason who would attend, that his partner had cancer and he was looking the kids. Mr McCormilla called the number on two further occasions, on 17 May, when there was a foreign ringtone and the calls were not answered, and on 22 May when the Claimant answered and said he was unable to discuss scaffolding work as he was abroad returning on 28 May 2017.

11 On 17 May a drive-by of the Broad Walk address took place, two vehicles that appeared to be intended for scaffolding work were seen nearby, one of which had a sticker saying 300 Scaffolding Ltd on the bonnet. On the basis of that investigation the Respondent decided to engage a professional surveillance company to conduct physical surveillance of the Claimant from the Broad Walk address on 30 and 31 May 2017. The Claimant was due to return to work with the Respondent on 1 June.

12 The surveillance report was sent to Mr McCormilla on 1 June 2017. It confirmed that on the first day, 30 May, nothing of note was seen and the team was stood down at 2pm. On 31 May the Claimant was seen driving away from the Broad Walk address in a vehicle fully loaded with scaffolding at around 7.30am. Another vehicle also loaded with scaffolding was driven away by another man at the same time. Both vehicles attended the same address where the scaffolding was erected. The report states that the Claimant was

seen unloading scaffolding from the vehicles but the work initially took place at the rear and side of the property and the surveillance team were unable to get any photographs of the Claimant working on the scaffolding. By around 4.15pm the scaffolding work had moved to the front of the house and the Claimant was seen at the top of the scaffolding securing scaffolding poles. Video footage was obtained. By 5pm work was still continuing and the surveillance team were stood down.

13 Mr McCormilla produced a summary version of the surveillance report and sent it to Mr Craddock who then produced an investigation report concluding that during his period of sick leave, the Claimant was taking an active part in the management of and physical execution of work by the scaffolding company including taking phone calls, arranging visits and carrying out physical work on scaffolding sites.

14 In summarising the early part of the investigation the report states that during the phone call on 13 April the Claimant said his colleague Jason would attend "as he was looking after the kids during the school holiday as his wife was currently ill". This is not an entirely accurate summary of the call, in that it was Mr Craddock who mentioned the school holidays and the Claimant did not say anything about that; he simply said that his partner had cancer and therefore he was looking after the kids. I do not accept the Claimant's suggestion that Mr Craddock was deliberately seeking to mislead and in any event the recording of the call was played at the disciplinary hearing so there cannot have been any doubt about what was said.

15 The report was sent to Mr Harrison, Ken Melia (HR Advisor) and Tony Cohen (Head of Network Operations London) on 2 June 2017. On the same date the Claimant was invited to a fact finding meeting to discuss an allegation that he had been undertaking work outside of his employment with the Respondent whilst submitting medical certificates saying he was unfit to work and receiving full company sickness benefit. The meeting took place on 21 June 2017 conducted by Clive Harrison. The Claimant attended with his union representative John Souster.

16 It is not in dispute that prior to this meeting, Mr Melia spoke to Colin Smith, the Senior Unite steward, to inform him that the Claimant was being investigated for gross misconduct. He said that if the Claimant chose to resign the company would not pursue the disciplinary process. I accept Mr Melia's unchallenged evidence that the Respondent's normal practice was to conclude the disciplinary process even if the employee chose to resign and that he had made this offer on compassionate grounds because of the Claimants partner's illness. Mr Smith asked Mr Melia to relay the offer to Mr Souster and he did so.

17 It is also not in dispute that the Respondent had collected the Claimant's van from outside his house shortly before the fact finding meeting.

18 During the fact finding meeting the Claimant was asked whether he agreed with the allegation. He said he was not prepared to comment. Mr Harrison then asked the Claimant again whether he had been working while off sick. The Claimant said he couldn't really comment. He then said he had been out a few times but had not been paid. In his evidence to the Tribunal the Claimant did not deny saying this but claimed it did not refer to working. Mr Harrison asked the question a third time and the Claimant said he was not prepared to answer it at the moment. The Claimant raised a number of

complaints about copies of emails he had requested and the fact that the Respondent had not believed his partner was ill until they saw it in the newspaper.

19 When asked again about the allegation of working while off sick, the Claimant said he was unfit to do his job at the Respondent because of the medication he was on, namely betablockers and sleeping tablets. He also said that the Respondent knew he had his own company. The video footage of the surveillance on 31 May 2017 was then played. The Claimant confirmed that it was him in the video. When asked to comment, the Claimant said he had returned from holiday and was stressed so he had gone out to clear his head. He said he does not get paid for his work with the company but instead receives dividends at the end of the year depending on how well the company is doing. He confirmed it was his company but that he had a silent partner.

20 A further meeting took place on 28 June 2017 at which Mr Harrison informed the Claimant that he had concluded the matter should proceed to a disciplinary hearing. Mr Harrison produced an investigation report in which he recognised that the Claimant has a difficult personal situation at home but concluded that the Claimant's actions were in breach of the sickness absence management policy, which prohibits any work paid or unpaid while on sick leave. He rejected the Claimant's explanation that he had left the house in order to clear his head.

21 A disciplinary hearing took place on 6 July 2017 conducted by Tony Barratt. The Claimant attended again with Mr Souster. The video surveillance and the recording of phone call of 13 April were both played during the meeting. The Claimant's case was that what he had done on 31 May did not constitute work.

22 The hearing was reconvened on 12 July 2017. Mr Barratt read out his decision. He concluded that the 31 May was not a one-off occasion; it was unlikely that the 2-day surveillance coincided with the only occasion the Claimant was working during the period of sickness absence. This was in breach of the sickness absence management policy, which states that employees:

> "*should not undertake any other employment, whether paid or unpaid, or engage in any activity which is inconsistent with the nature of their illness or injury. Inappropriate behaviour in this regard may result in disciplinary action*".

He concluded that the relationship of trust between employer and employee had broken down irretrievably and therefore decided to dismiss the Claimant without notice. The decision was confirmed in a letter dated 12 July 2017.

23 Mr Barratt's evidence to the Tribunal was that in concluding 31 May was not a one-off occasion, he took into account the evidence obtained during the investigation, which suggested the business was active during the whole period of sick leave. As to the phone call on 13 April he noted that the Claimant had initially said he could come out to view the job and he suspected that the Claimant had only mentioned his colleague Jason because he had become suspicious after Mr Craddock asked the Claimant for his full name. Mr Barratt said he also took into account the fact that in the fact-finding meeting the Claimant had initially declined to answer whether he had been working. In any event Mr Barratt said he probably would have dismissed the Claimant even if he had reached the view that there was only one instance of working while on sick leave on 31 May. He

rejected the Claimant's explanation that he was getting out of the house to clear his head. The Claimant had chosen to carry out heavy manual work in circumstances where he had told the Respondent he was incapable of working. He noted that the Claimant had at no stage accepted responsibility for his actions but instead chose to advance a series of excuses and complaints, which were largely irrelevant to the allegations against him.

24 The Claimant appealed. His appeal was heard by Matthew Webb on 14 August 2017 and the decision to dismiss was upheld.

THE LAW

25 Pursuant to section 98 of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

26 In misconduct cases the Tribunal should apply a three stage test first set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 to the question of reasonableness. An employer will have acted reasonably in this context if:-

26.1 It had a genuine belief in the employee's guilt;

26.2 based on reasonable grounds

26.3 and following a reasonable investigation.

27 The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal in respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

CONCLUSIONS

Issue 1 – Did the Respondent's reason for the dismissal relate to the Claimant's conduct (working while on sick leave) for the purposes of Section 98(1) ERA?

28 The reason for dismissal, working while on sick leave, clearly related the Claimant's conduct and was therefore a potentially fair reason for dismissal.

Issue 2 – If so, did the Respondent genuinely believe that the Claimant was guilty of the alleged misconduct (behaving dishonestly and in breach of policy by working while on sick leave)?

29 The Claimant has sought to suggest that there was a vendetta or witch hunt against him and, by implication, that the Respondent did not have a genuine belief in his guilt. I do not accept this. There is no evidence on which I could conclude that Mr Barratt acted other than in total good faith. The Claimant has sought to suggest that he was not supported during his sickness absence and that various managers had a negative opinion of him. It is unnecessary to make specific findings on those allegations because I considered there is no evidence of anything of that nature having influenced the disciplinary process.

30 I do not accept the Claimant's suggestion that the decision to dismiss was predetermined before the fact-finding meeting. I have accepted that the offer not to continue with the disciplinary process if the Claimant resigned was made on compassionate grounds. It did not indicate that Mr Melia, let alone Mr Barratt, had predetermined the disciplinary charge. For the avoidance of doubt, nor do I consider that the removal of the Claimant's company van indicated that the Respondent had predetermined the issue. As part of the investigation the Respondent had established that the van had not been used for several months because of the Claimant's long-term sick leave. It is not surprising in those circumstances that the Respondent would want to collect it from outside the Claimant's house.

31 The Claimant claimed that three managers had been caught playing golf when they should have been at work and were only fined £1,500. The Respondent denies dealing with any such allegation and denies any such fines being issued. There is no evidence on which I could make any finding about this.

32 Given the strength of the evidence against the Claimant and the absence of any evidence of an ulterior motive I accept that the Respondent genuinely believed that he had behaved dishonestly and in breach of company policy by working while on sick leave.

Issue 3 – Was the Respondent's belief based on reasonable grounds?

33 I consider there were ample grounds for the Respondent's belief. The surveillance suggested that the Claimant had done a full day's work on 31 May. It was reasonable for the Respondent to reject the claim that this was not work but merely a way for the Claimant to clear his head. The Claimant attended the job in company branded clothing and carried out heavy manual labour at height. He was on site all day. It was reasonable to conclude that the Claimant carried out this work for the financial benefit of his company and therefore, indirectly, himself. It was irrelevant whether he was being paid for the day's work. It was also reasonable for Mr Barratt to conclude that it was not a one-off occasion. Apart from noting the inherent unlikelihood of the two days' surveillance coinciding with the only day that the Claimant was working, the most significant evidence was the Claimant's behaviour at the fact-finding interview. He refused to answer the allegation other than saying that he had been out a few times, a concession he later sought to resile from until after seeing the video evidence. His failure to admit that he had been working on 31 May until after seeing irrefutable evidence seriously damaged his credibility and it was reasonable for Mr Barratt to conclude that, given the business was active during the whole period of the Claimants sick leave, it was more likely than not that he had worked on other jobs. The Claimant did not say at any stage during the disciplinary process what he says now, that his colleague Jason was running the business during this time and he had no practical involvement other than answering calls. It was

reasonable for Mr Barratt to conclude that the Claimant had acted dishonestly by being on sick leave in receipt of sick pay while working elsewhere.

34 The Claimants suggestion that he was unable to carry out his job for the Respondent because of medication he was taking is not relevant. He had never suggested this to the Respondent or to occupational health before the disciplinary process and had he done so, they might have considered him being temporarily redeployed. As far as the Respondent was aware, the Claimant was unfit for any work due to his partner's illness. His conduct in working for his own scaffolding company was inconsistent with that and was evidence of dishonesty.

Issue 4 – Did the Respondent carry out as much investigation as was reasonable in the circumstances?

35 The Claimant does not argue that the investigation was inadequate. His complaint is that it was intrusive, in particular because it involved investigation of Ms Valentine, including looking at her Facebook account.

36 I accept that where an investigation involves an interference with an employee's or their family's right to respect to family and private life under Article 8, that the Tribunal must consider whether that interference pursued a legitimate aim and was proportionate. I have no doubt that the investigation in this case was proportionate to the Respondent's rights to protect its own interests and to prevent dishonest conduct. The initial investigation was limited to searching publicly accessible information online and it gave rise to a reasonable suspicion justifying the use of directed covert surveillance. The drive-bys were a necessary part of that process to identify the best location for the surveillance. The surveillance operation itself was limited in scope and did not continue for longer than was necessary. The phone calls were also a proportionate means of establishing the Claimant's level of practical involvement in the business.

37 Ms Valentine also complained in submissions about the fact that a photograph showing her breasts had been included in the bundle for the hearing. To put this in context, the photograph appeared as part of an article in the Mirror newspaper about Ms Valentine's illness and her intended treatment methods, published around the 31 January 2017. The photograph was taken by herself and presumably voluntarily given to the newspaper. At the time the article was published, the Claimant was under investigation for unauthorised absence and Mr Melia sent a copy of the article to Clive Harrison suggesting that in light of the article, the fact find meetings scheduled for the following week should not take place. Mr Harrison agreed. The email and the attached article are produced in the bundle, presumably because the Claimant had complained about the Respondent's treatment of him in general since Ms Valentine's diagnosis. I do not consider that this was inappropriate or, given that the photograph appeared in a national newspaper and online with her consent, that it interfered with Ms Valentine's privacy.

Issue 5 – Did the decision to dismiss for gross misconduct fall within the range of reasonable responses open to the Respondent?

38 The Respondent's finding was that the Claimant had worked for his own company whilst signed off sick and in receipt of sick pay. This was in breach of the Respondent's sickness absence management policy and was dishonest. It is disingenuous for the

Claimant to suggest that he has not been adequately supported during his sickness absence. He was allowed a substantial amount of time off on full sick pay because of stress associated with his partner's illness. The Respondent found that he abused that by using the time to work for the benefit of his own company. Further, the Claimant did not acknowledge his behaviour and was uncooperative with the fact-finding process. This was serious misconduct and it was clearly within the reasonable range of responses for the Respondent to dismiss the Claimant.

Employment Judge Ferguson

17 May 2018