



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MARTIN sitting alone

**BETWEEN:** Mr Philip Johah Claimant

AND

Axis Security Service Ltd Respondent

**ON:** 04 October 2018

## **APPEARANCES:**

**For the Claimant:** Did not attend

**For the Respondent:** Mr P Paget - Solicitor

## **JUDGMENT**

The judgment of the Tribunal is that the Claims for unfair dismissal, age discrimination and breach of the Working Time Regulations 1998 fail and are dismissed.

## **REASONS**

1. By a Claim Form lodged at the Tribunal on 3 August 2017 the Claimant contends that he was unfairly dismissed. I had written witness statements from Mr N Lowe and Mr W Eltayib on behalf of the Respondent. There was not written evidence from the Claimant. I have considered documents in the 103-page bundle.
2. The hearing was listed on 3 October 2017 at a preliminary hearing and directions made. The Claimant did not comply with any of the directions which included further information about his claims, disclosure of documents and exchange of witness statements. The day before this hearing, the Claimant sought a postponement on the basis that he had parted with his legal advisor and had difficulty finding other legal

representation. This was refused by the Regional Employment Judge on the basis that a postponement in the seven days prior to a hearing is only permissible under Rule 30A(2) Employment Tribunal Rules of Procedure in the event of consent, act or omission of another party or the Tribunal or in exceptional circumstances, none of which applied to the Claimant's application. This decision was communicated to the Claimant by email on 31 January 2018 at 15.23.

3. The Claimant did not attend the hearing. The Tribunal waited until 10.15 and then tried to telephone him. He did not answer the call made. The Tribunal therefore convened, and the witnesses took the oath and confirmed that the contents of their witness statements were true. The Tribunal had and their witness statements and supporting documentation in the bundle.
4. The Claimant was employed as a security guard with the Respondent between 31 August 2007 until his dismissal for gross misconduct on 21 April 2017 for sleeping on duty.
5. The Claimant also alleges that he was discriminated on the grounds of age as he alleged he was paid less than younger colleagues. He was ordered to provide further information about this claim, but this was not done. The Respondent's evidence was that the Claimant was paid the same as other security staff on that site. On this basis and in the absence of any particulars or evidence from the Claimant, the Claimant's claim of age discrimination is dismissed.
6. The Claimant also claims breaches of the Working Time Regulations 1998 Regulation 24. The Claimant did not attend to give evidence and the Respondent's evidence was that it did not breach this Regulation. In the absence of any evidence to the contrary the Respondent's evidence is accepted and this claim is dismissed.
7. In relation to the unfair dismissal claim, it is for the Respondent to show that there was a potentially fair reason for dismissal. In this case the Respondent asserts that it was for a conduct reason. Once that reason is established I have to consider section 98(4) of the Employment Rights Act 1996 to consider whether in all the circumstances of the case the Respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the employee whilst considering the equity and the substantial merits of the case.
8. I remind myself that it is not for me to substitute my own view for that of the Respondent but only to consider whether or not the processes and the decision to dismiss fell within a band of reasonable responses. In conduct cases I am to be guided by the case of ***British Home Stores v Burchell [1980] ICR 303***, and that I need to consider whether the Respondent held a genuine belief in the Claimant's misconduct on reasonable grounds following a reasonable investigation.
9. The Claimant was a security guard working at a site in Woolwich. Only

one security officer is on site at a time. The Claimant was seen apparently sleeping on duty on 8 April 2017 and Mr Pacey was appointed the investigation officer. The person reporting the Claimant was not from the Respondent but from the building which the Claimant worked at. Mr Pacey interviewed the Claimant, had a statement from the complainant with photographs that the complainant had taken and CCTV footage. Mr Pacey's general observations were that *"Phillip Johah admits to dozing while on duty and not seeing the vehicle coming on to site. He also states that he did not see anyone taking photos of him asleep even though it was dark at 23.30 at night and the flash was on. It would not be possible to not see this unless he was asleep. He also did not see the car come into the property as the barrier was up during this time and he had made no attempt to monitor the entrance more carefully and had his lap top computer on during this period"*. He recommended disciplinary action.

10. The Claimant was invited to a disciplinary hearing on 18 April 2017 by letter dated 12 April 2017. He was given the right to be accompanied at the hearing. The disciplinary hearing was heard by Mr Nick Lowe – Account Manager. I had a witness statement from Mr Lowe and am satisfied that he reviewed the evidence from the investigation and the Respondent's disciplinary procedure. At the Claimant's request the disciplinary hearing was postponed until 20 April 2017 when his union representative was available. In the event the Claimant attended alone but confirmed he would go ahead. In the hearing, Mr Lowe asked questions of the Claimant and reviewed the CCTV footage with him which showed the Claimant with his head resting between 23.22 to 23.52. The Claimant was able to put his case fully. The Claimant had a current final written warning.
11. Mr Lowe adjourned the meeting to consider his response and his witness statement sets out the matters he considered. He considered the explanations given by the Claimant but considering the photographic and CCTV evidence did not find them to be credible. He considered any mitigating factors and how other instances of sleeping on duty had been dealt with by the Respondent. Those employees had been dismissed for gross misconduct. He confirmed his decision to summarily dismiss the Claimant for gross misconduct by letter dated 21 April 2017 which also gave the Claimant a right to appeal.
12. The Claimant exercised his right to appeal by letter dated 27 April, 2017. The Claimant was invited to an appeal hearing on 5 May, 2017 to be heard by Mr Waleed Eltayib – Key Account Director. I had a witness statement from Mr Eltayib. This hearing was rescheduled at the Claimant's request to 16 May, 2017. Prior to the appeal hearing, Mr Eltayib, familiarised himself with the paperwork from investigation and disciplinary hearing and spoke to Mr Pacey to clarify certain matters. Again, the Claimant attended unaccompanied and said he would go ahead anyway. The Claimant was asked to provide him with his version of events on the CCTV footage was viewed by Mr Eltayib and the Claimant. During the course of the hearing, the claimant admitted that he had been sleeping and acknowledged that sleeping on duty was very serious that it was hard for him to admit it. Mr Eltayib adjourned the hearing for about 20 minutes to consider his decision

and in that time reflected on the case and reviewed the evidence. He upheld the decision to dismiss the Claimant. The Claimant was notified orally, and this was confirmed in a letter dated 18 May, 2017.

13. I conclude that the Respondent has showed that the Claimant was dismissed for a conduct reason. The procedures carried out within the final disciplinary process were in accordance with the disciplinary policy and within ACAS guidelines. The Claimant was given every opportunity to defend himself against the allegations and did so, finally admitting he had been sleeping on duty. I am satisfied that the investigation was reasonable and that following on from that investigation and the hearing there were genuine grounds upon which the Respondent held their belief that the Claimant was guilty of gross misconduct. I am satisfied that the decision to dismiss fell within a band of reasonable responses in the same way that I am satisfied that the process was reasonable.
14. Accordingly, I dismiss the claim for unfair dismissal.

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Employment Judge Martin  
Date: 1 February 2018