EMPLOYMENT TRIBUNALS

Claimant: Mr Sean Todd

Respondent: EDF Energy (Energy Branch) plc

Heard at: Nottingham

On: 23 and 24 May 2018
4 June 2018 (in chambers)

Before: Employment Judge Ahmed (sitting alone)

Representation
Claimant: Mr J McCracken of Counsel
Respondent: Ms A Mayhew of Counsel

RESERVED JUDGMENT

The Judgment of the tribunal is that:–

1. The Claimant was not unfairly dismissed.

2. The Claimant was dismissed in breach of contract.

3. The issue of remedy in relation to damages for breach of contract is to be listed at a separate hearing if requested by the parties.

REASONS

1. Mr Sean Todd was employed by the Respondent as a Team Leader from 1 August 2002 until his dismissal on 20 March 2017. In these proceedings he brings complaints of unfair and breach of contract.

2. The Respondent (hereinafter 'EDF') is a well-known supplier of gas and electricity to businesses and consumers. It has a number of sites in the UK. Mr Todd was employed at the Burton CCGT (also known as West Burton). In addition to their own staff, the Respondent also engages other contractors at Burton who work closely with EDF employees. One of those is Work Place Solutions ('WPS'). Whilst there is a 'one team philosophy' at Burton the distinction as to who works for whom is clearly understood.

3. As part of its operations at West Burton the Respondent uses fencing known

as Heras panels. This type of fencing is made of steel and typically used to barrier areas around the power station as a health and safety measure. The panels are large and heavy and usually require more than one person to move and install. They are only required from time to time and are a temporary measure so it is quite possible that they may not be required for weeks or months at a time. There are only around 100 Heras panels available at the West Burton site. Unless they were required it is possible that their absence may not be detected.

4. EDF's disciplinary rules are, relevantly, divided into sections A and B. Section A is framed in very general terms requiring employees to "observe all Company policies, procedures and directions issued by management including local rules and instructions". Section B gives examples of misconduct that could lead to dismissal. They include:

> "*Theft, attempted theft or unauthorised use of the Company's property … if using it for personal business.*"

5. Incorporated within the Company rules is a 'Code of Conduct' (the 'Code'). Paragraph 4.22 of the Code states:

> "*Company property and resources available to an employee must be used only for work purposes unless clear arrangements are in place regarding their availability for personal use.*"

6. On 7 and 8 December 2016, two employees of WPS transported 22 Heras fencing panels to the Claimant's home, some 15 miles away, and erected a fenced area. There is no dispute that this fencing was for personal use and that the fencing was installed at the Claimant's request. Mr Todd sought and obtained permission from Mr Mark Logan, an employee of WPS. The panels belonged to EDF not WPS. It is common ground that Mr Logan had no power to authorise the fencing to be delivered and installed at Mr Todd's home. The two workers who undertook the delivery and installation of the panels were both engaged by WPS and did so under the direction of Mr Logan. They later claimed and were paid overtime for the delivery and installation. The payment ultimately came from EDF.

7. In late December, Mr Chet Mistry, a Maintenance Manager at West Burton, discovered that EDF equipment in the form of the Heras panels and associated material to install those panels had been removed from the Station and placed on Mr Todd's personal property. The matter came to his attention quite by chance. Mr Mistry made brief enquiries and discovered that permission had not been given by an EDF manager. Pending an internal investigation he suspended Mr Todd from his duties.

8. The subsequent disciplinary investigation was undertaken by Mr Jason Bryant, a Project Manager. Mr Bryant's investigation report, which runs into some 8 pages, concluded that there was a breach of the EDF's Code. Mr Todd was invited to a disciplinary hearing which was to take place before Mr Michael West, an Operations Manager. Before the disciplinary hearing took place, Mr Todd submitted a grievance. The grievance related to substantially the same issues that would ordinarily be part and parcel of the disciplinary process. The Respondent decided that the issues raised in the grievance were best dealt with in the disciplinary process rather than separately.

9. The disciplinary hearing before Mr West took place on 2 March 2017. The Claimant was represented by his trade union representative. Following the hearing Mr West decided that Mr Todd's conduct amounted to gross misconduct and that he should be dismissed summarily without notice or notice pay. Mr West's dismissal letter of 20 March, which runs into 4 pages, sets out in detail the rationale for his decision. It may be summarised as follows:

9.1 That the Heras fencing was removed from site for the Claimant's own personal use;

9.2 That the fencing was removed from the Respondent's site following a request to Mr Mark Logan and was borrowed for a period of approximately 2 - 3 months;

9.3 That the transport of the Heras fencing from EDF to the Claimant's house involved work over 2 days which resulted in a cost to EDF as it was done during work time. This led to Mr Todd "achieving a personal gain" in that Mr Todd did not need to hire fencing during the relevant period privately;

9.4 That Mr Logan did not form part of the Respondent's team given that he was not an EDF manager and it was not reasonable for the Claimant to assume that he had permission to loan out EDF equipment;

9.5 That Mr Todd had previously demonstrated knowledge of the correct process by speaking to an EDF Manager to borrow equipment. However, he failed to follow the same procedure on this occasion;

9.6 That the loan was considered 'long-term' and involved the use of Company vehicle and labour which was in stark contrast to previous experiences of borrowing small pieces of equipment for short-term purposes.

9.7 That it was inconceivable that Mr Todd would not have realised that there would be a cost involved in the delivery and installation (which was estimated between £3,000.00 to £5,000.00);

9.8 That the Claimant's conduct was in breach of EDF's disciplinary rules and he concluded that such conduct had resulted in a breakdown of trust and confidence;

10. Mr Todd appealed against the decision. The appeal hearing took place on 20 April 2017 was dealt with by Mr Owen Forster, Head of Renewable Operations. Mr Forster dismissed the appeal. His rationale in doing so was as follows:

10.1 That the Claimant was in breach of disciplinary rules and had misused EDF's physical assets;

10.2 That as a team leader the Claimant was expected to have a high standard of integrity and he had fallen short of expectations in that respect;

10.3 That whilst there was no local policy as to borrowing or removing from site, the matter was adequately covered by EDF's Code of Conduct. In this case there did not appear to be evidence of a 'clear arrangement' being put in place and there was no evidence to support Mr Todd's claim that it was widely known

that he was borrowing the equipment in question.

10.4 That there was no custom and practice of borrowing items from site;

10.5 That the Claimant had not been treated inconsistently in relation to other similar situations;

10.6 That the process of investigation and dismissal had been appropriately undertaken.

11. It is agreed that the effective date of termination was 20 March 2017. Mr Todd began early conciliation with ACAS on 15 June 2017. He submitted his claim to the Employment Tribunal on 1 August 2017.

THE LAW

12. The law in this case is uncontroversial. Sections 98(1) and (2) of the Employment Rights Act 1996 ('ERA 1996') state that:

> "(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—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,"

13. Section 98(4)(a) and (b) ERA 1996 state:

> "(4) 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."

14. In **HSBC Bank plc v Madden** [2000] ICR 1283, the Court of Appeal, approving the guidance originally set out **in Iceland Frozen Foods Ltd v Jones** [1983] ICR 17, set out the correct approach in applying section 98(4) ERA 1996 namely that:

> "(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.
>
> (2) In applying the above section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.
>
> (3) The Tribunal must not substitute its decision as to what was the right course to adopt.

> (4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.
>
> (5) The function of the Employment Tribunal [as an industrial jury] is to determine whether in the circumstances of each case 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. The range of reasonable responses test applies equally to the investigation as it does to the decision to dismiss (**Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23).

16. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out the criteria to be applied in cases of dismissal by reason of alleged misconduct. Firstly, the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the tribunal must consider whether the employer had reasonable grounds on which to sustain that belief. Thirdly, at the stage at which the employer formed its belief, the Tribunal should decide whether the employer had carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made to the burden of proof in unfair dismissal cases, the three-step process is still helpful in determining cases involving dismissal for misconduct. Whilst the correctness of the **Burchell** test has recently been the subject of comment by the President of the Supreme Court in **Reilly v Sandwell MBC** (2018) UKSC 16, it nevertheless remains good law.

17. In relation to breach of contract claims, the classic test as to what constitutes conduct by an employee justifying summary dismissal for gross misconduct was set out in **Laws v London Chronicle** [1959] 1 WLR 698. There it was held that the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. This was further clarified in **Sandwell v West Birmingham Hospitals NHS Trust** [2009] UKEAT 0032/09/1712, where HH Judge Hand QC (after setting out the relevant authorities) explained that to justify dismissal at common law misconduct must "amount to a repudiation of the contract of employment by the employee" and "must be a deliberate and wilful contradiction of the contractual terms."

THE ISSUES

18. The issues to be determined in this case are agreed as follows:

18.1 Was the reason for dismissal a potentially fair reason for dismissal under section 98(1) and section 98(2) ERA 1996?

18.2 Was the dismissal unfair pursuant to section 98(4) ERA 1996, in particular:

> 18.2.1 did the Respondent genuinely believe that the Claimant had committed the misconduct alleged against him;

18.2.2 did the Respondent have reasonable grounds for that belief;

18.2.3 did the Respondent carry out a reasonable investigation;

18.2.4 in all respects did the Respondent act within the range of reasonable responses in deciding to dismiss the Claimant?

18.3 Was the Claimant wrongfully dismissed, that is dismissed in breach of contract?

CONCLUSIONS

The reason for the dismissal

19. I am satisfied that the Respondent has established that the reason or the principal reason for the dismissal was 'conduct'. This is a potentially fair reason for dismissal under section 98(1) ERA 1996.

20. I have gone on to consider whether the reason for the dismissal was 'fair' having regard to the provisions of section 98(4) ERA 1996. In doing so I have considered both the wording of that section and the guidance in **Burchell**, that is the reasonableness of the investigation, the honest and genuine belief of the Respondent, the reasonableness of the belief and whether at the time of that belief the Respondent had undertaken a reasonable investigation.

The investigation

21. The requirement is of course to undertake a *reasonable* investigation, not one that covers every conceivable aspect or argument. The range of reasonable responses test applies as much to the investigation as the decision to dismiss.

22. I am satisfied that Mr Bryant undertook a reasonable investigation. He held a meeting with the Claimant at which Mr Todd was given the fullest opportunity to have his say. He also held investigation meetings with the two WPS workers who installed the fencing. He also spoke to a Mr Paul Woodall. Mr Woodall provided a witness statement for this hearing on behalf of the Claimant but did not actually attend to give oral evidence. I have taken his statement into account insofar as it is relevant. Mr Woodall was not in fact an EDF but a WPS employee. He says in his statement that he is aware that various EDF employees have borrowed items without authority though the most significant item he is aware of being borrowed was a van to move some items. He does not say how long the van was borrowed for.

23. Mr Bryant also obtained written statements from two EDF Mangers in relation to the usual procedure on borrowing tools and equipment. Whilst Mr Bryant expresses an opinion in his investigation that the Claimant's conduct could potentially be viewed as theft, this was not an allegation that was ultimately proceeded with. Mr Bryant correctly focussed his enquiries on managers as it is only they who would have the authority to give permission to borrow.

24. Mr Bryant's investigation concluded that it was not common practice to borrow items over a long period (by which he means a week or longer) and certainly nothing to suggest borrowing over several months. He expressed concern that there was no written record as to what was taken, how long it was

going for or indeed whether everything that was borrowed was in fact returned. He concluded that all those involved (not just the Claimant) had acted inappropriately.

25. Mr Bryant's investigation was thorough and detailed. The investigation cannot reasonably be criticised. The Claimant's objection of the investigation relates more to its findings rather than the process itself. I am satisfied that the investigation was reasonable.

The Respondent's belief in misconduct

26. In coming to my decision, I am conscious that it is not for the tribunal to substitute its views for those of the Respondent but to determine whether the views were held reasonably and whether they fell within a band of reasonable responses open to a reasonable employer. Whilst bearing in mind the three-step test in ***Burchell,*** the touchstone is of course always the test of reasonableness in section 98(4) ERA 1996.

27. I am satisfied that Mr West held an honest and genuine belief in the misconduct alleged. The genuineness of his belief is not seriously challenged. There is no reason to think that his belief in misconduct was not an honestly and genuinely held view.

28. I am also satisfied that the belief in misconduct was based on reasonable grounds and that Mr West was entitled to dismiss for the detailed reasons he sets out. In coming to my conclusion, I also take into account the following:

28.1 That the Claimant was in a supervisory role as a Team Leader and would have appreciated the importance of obtaining permission from the correct source;

28.2 That he would have known that Mr Logan was not in any position to authorise the loan of the equipment;

28.3 That the Claimant did not seek permission from a manager at EDF when he could easily have done so;

28.4 That the Claimant acknowledged that the request was "a favour" from Mr Logan which would leave both him and EDF exposed to the possibility that a Contractor may require the favour to be returned at some point;

28.5 That the delivery and installation of the items being borrowed involved a significant use of manpower and time. The installation took place over 2 days. The Claimant could not have been in any doubt after the first day's installation (when he saw only a partial installation) that this was not a simple matter of just delivering the panels but that they would require a fair degree of time to deliver and install which would be at more than a trivial cost to his employer. Even if he did not appreciate that the employees concerned would be seeking overtime for it, he ought reasonably to have realised that this was considerable use of Company resources and expenditure for his own personal purposes;

28.6 That neither he nor Mr Logan kept any written record of what was being borrowed and thus there could be no certainty of what was taken and returned

28.7 That the items borrowed were on an entirely different scale to anything that had ever been borrowed in the past;

29. I am satisfied that the Claimant's conduct violated the relevant EDF Code both in letter and spirit. It cannot reasonably be said that there were "clear arrangements" in place for personal use of equipment of such substantial items or for such a long period. Dismissal fell within a range of reasonable responses open to a reasonable employer.

Custom and practice

30. The Claimant argues that it was custom and practice for items to be borrowed and that the dismissal was therefore in breach of existing custom and practice. This is allied to his argument that dismissal amount to inconsistent treatment.

31. What sets this borrowing apart from other examples was firstly its high value and secondly the very lengthy borrowing period. All the examples the Claimant gives of items being borrowed relate to much smaller items and for much shorter periods. Mr Todd was borrowing something in the region of 20% of the entire Heras fencing stock over several months.

32. What also differentiates this incident from the majority of others is the absence of any written record. The loan was not recorded in any register nor documented in any way. It is agreed that there is no local established practice or a pre-printed form. However, there is usually some documentation for anything other than very minor items. Sometimes a small chit is prepared. On other occasions forms are adapted for identifying precisely what is being borrowed and when. Even at an early stage, there were inconsistent accounts as to how many panels were delivered and returned.

33. I am satisfied that what the Claimant borrowed on this occasion was wholly exceptional and unprecedented. The Claimant would or ought to have recognised that this went beyond any previous scenario. This borrowing involved substantial effort and time. I have not been taken by the Claimant to any previous instance where overtime payments have been necessary on a loan of equipment to an employee. There were also clear dangers in seeking permission from a manager of a Contractor in terms of maintaining his independence in ongoing dealings. The suggestion that WPS and EDF were effectively working as 'one team' is extremely tenuous. Mr Todd would have been aware of the boundary lines.

34. Mr Forster as part of the appeal process enquired as to who had borrowed EDF equipment for personal use in the past. One employee explained that a chit would be used to record any borrowed tools. In one instance a goods despatch note was used until the item was returned and the goods despatch note was then destroyed. Another said that a note would be used to keep track of items going off site but that items would certainly not be lent out for months at a time. One employee did borrow a van to take a fridge home but brought the van back the next day. All of these examples were across different teams. The Claimant's borrowing was not in line with anything that had happened in the past. As there is no previous comparable situation there cannot be inconsistent treatment.

35. Mr McCracken on behalf of the Claimant argues that in the context of a conduct dismissal an employer is expected to clearly spell out rules and procedures for employees to follow and in failing to do so the Claimant was unfairly dismissed. I am satisfied that the Code is tolerably clear. The general

principle is that items belonging to EDF are not to be borrowed unless clear local arrangements are in place. There were no clear local arrangements. Section B of the disciplinary rules makes it clear that unauthorised use of Company property can be a ground for summary dismissal.

36. Mr McCracken also argues that EDF harboured ungrounded suspicions that Mr Todd had stolen fences and that theft was the real reason for the dismissal. I do not accept that submission. Mr Bryant considered that there may well be grounds for alleging theft because it was not clear when the items were going to be returned but that was not a reason for dismissal. Mr Bryant's concerns were nevertheless legitimate because there was no agreement with Mr Logan as to the precise date of return of the fencing. As it was the Company did not proceed on any allegation of theft.

37. Although not formally identified as an issue, the Claimant has criticised the length of time the entire process took prior to dismissal. I am satisfied that whilst there was some delay it was not unreasonable nor was it all caused by the Respondent. The issue of potential misconduct was identified by Mr Mistry in January 2017. The very detailed and thorough investigation was concluded by the end of the same month. The disciplinary hearing was postponed and re-arranged but some of the delay was due to the unavailability of the Claimant's trade union representative. If the Respondent had accepted the Claimant's invitation to suspend the disciplinary process and deal with the grievance, as it now appears to be suggested, the process would have taken even longer. I am satisfied there was no unreasonable delay such as to affect the fairness of the decision.

<u>Breach of contract claim</u>

38. The Claimant was dismissed without notice or notice pay. He therefore claims damages in respect of the period of notice he should have had under his contract.

39. The test in respect of breach of contract claims is different to the test for determining whether a dismissal is unfair. The band of reasonable responses test has no relevance to breach of contract claims. As was made clear in ***Sandwell,*** to justify dismissal for gross misconduct there must be a repudiatory breach of the contract of employment by the employee and the relevant conduct must be a "deliberate and wilful contradiction of the contractual terms".

40. I am satisfied that the Respondent has failed to establish that the Claimant's conduct was a deliberate and wilful contradiction of the contractual terms. Mr Todd had no intention of doing anything which amounted to a *deliberate* and wilful contradiction of his contractual terms nor did he set out to behave in a manner which demonstrated that he did not wish to maintain the relationship of employer and employee. Rather, his position throughout has been to maintain the employment relationship. Mr Todd had every intention of fulfilling his contractual obligations. As such he was wrongfully dismissed, or put another way, the dismissal was in breach of contract. He is entitled to notice pay for the length of his contractual notice.

41. There is some disagreement as to the correct amount of the Claimant's net weekly pay. As the issue was not fully explored at the hearing, which was limited to the issue of liability only, it is not possible for me to assess the total amount damages for breach of contract in this decision. I am confident however that the

parties should be able to agree following discussion. In the event that they are unable to do so the matter will be listed for a remedy hearing in due course. The parties should inform the tribunal as soon as possible if a remedy hearing is required.

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Employment Judge Ahmed

Date: 24 July 2018

JUDGMENT SENT TO THE PARTIES ON

30 July 2018

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FOR THE TRIBUNAL OFFICE

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