EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr JS Basi	**v**	LHR Airports Limited

Heard at: Reading **On:** 12 September 2018

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Mr S Buskell (Lay representative)
For the Respondent: Mr M Salter (Counsel)

RESERVED JUDGMENT

The Claimant's complaint of unfair dismissal is not well founded and is dismissed.

REASONS

1. In a claim form presented on 7 September 2017, the Claimant brought a complaint of unfair dismissal. The Respondent admits that the Claimant was dismissed. The parties agree that the reason for the Claimant's dismissal was conduct. The Respondent contends that the dismissal was fair. It is the Claimant's case that the dismissal was unfair because he had previously received a 12-month final warning in March 2017 which he says was too harsh and subsequently led to his being dismissed.

2. The Claimant gave evidence in support of his own case; the Respondent relied on the evidence of Mr Lee Ribolla (Project Manager) and Mr Tom Willis (Director of Security). I was provided with a trial bundle containing 156 pages of documents. From these sources, I made the following findings of fact.

3. London Heathrow Airports Limited, the Respondent, is the operator of Heathrow Airport. The Claimant was employed at Heathrow from November 2007 until his dismissal. He was employed by the Respondent as a security officer. At the time of his dismissal was working in Terminal 3.

4. The role of a security officer is to protect passenger safety and airside security. It requires the security officer to adhere to correct protocols and procedures. There are approximately 645 security officers working in

Terminal 3. In his role as a security officer, the Claimant, from time to time, underwent training. On 31 January 2017, the Claimant requalified his mandatory NXCT training for x-ray duties.

5. On 23 February 2017, the Claimant received a "green card". A green card is a reference to a record made on the Claimant's file of a discussion that he has with a manager which falls short of taking any disciplinary action. The entry on 23 February 2017 relating to the Claimant reads as follows:

> *"Observed Jaswinder talking to a colleague over several minutes whilst he was screen reading. Impacts of being distracted whilst on screen discussed."*

6. On 28 March 2017, the Claimant was given a 12-month final warning for using an e-cigarette in a non-designated smoking area. The Respondent has a smoking policy which confirms that breaches of the policy can result in a gross misconduct situation. The Claimant did not appeal the sanction.

7. The Claimant now complains that the sanction imposed was too harsh. In his witness statement, the Claimant states that he did not appeal as he was led to believe that the outcome could have led to him being dismissed. During the course of questioning, the Claimant accepted that the policies and procedures relating to disciplinary did not give him that impression. He did not suggest that any member of management gave him the impression that if he appealed, he could be dismissed. I do not accept that that was the reason why the Claimant did not appeal.

8. In his witness statement, the Claimant stated that the company Smoking in the Workplace Policy is incomplete and he disputes its validity. The Claimant says it had no author on the front page and it was not signed off by the trade union security side. I do not accept this evidence either. It was clear from the Claimant's own evidence during the course of questioning that the policy, a copy of which was provided in the trial bundle, had been signed off by the trade union side. The Claimant confirmed that the signatories on the policy included the convenor for the union.

9. The conclusion that I arrive at is the Claimant did not appeal the disciplinary for vaping in breach of the smoking policy. I make no findings as to what his reasons or motivation were for not appealing but I do not accept the reason put forward in his witness statement on which he backtracked during his oral evidence.

10. On 14 May 2017, a redline test was carried out. A redline test is a process where the Respondent with a third party tests the resilience of the security procedures. One aspect of that is for the third party to attempt to get restricted items through security. This can take the form of a bag which has a fake explosive device concealed within it or a person attempting to pass through security carrying a prohibited item.

11. The redline test on 14 May involved the Claimant. The Claimant failed. When a security officer fails a redline test, it does not automatically result

in a disciplinary issue. The Respondent looks into the reasons for the failure of the test and decides what the appropriate action to take is on the basis of what the investigation finds.

12. If a security officer simply fails the test as a result of human error which is not down to any inappropriate action on the part of the security officer, it will often be dealt with as a training issue. However, if the investigation finds that the reason for the failure of the redline test was because of inappropriate actions by the security officer, then the matter may be taken forward as a conduct issue under the disciplinary procedures.

13. An initial review of the CCTV footage of the redline test fail on 14 May 2017 indicated that the Claimant was not paying due attention to the x-ray screen when screening bags coming through the staff search point at which he was working. An investigation was conducted under the procedures followed when there is a redline fail. A report was completed by Mr Kuljit Gill, a security manager.

14. The investigation report established that the Claimant had admitted to talking whilst screen reading and that he had been distracted before, during and after the process of the test bag. The test bag had not been rejected and was allowed to pass through security. The Claimant had demonstrated that he understood his responsibilities around screen reading and the standards that were expected of him in terms of communicating with his colleagues whilst on post and the need to avoid distractions.

15. The investigation revealed inconsistencies between what the Claimant said and what his colleague said about the topic of discussion when the Claimant being distracted. The Claimant stated that he was asking his colleague questions about bags that had been rejected at the search point, i.e. a discussion about the role that he was performing, whilst his colleague had stated that the Claimant was talking about his dissatisfaction about matters at work and a recent unauthorised absence on his record.

16. In the course of his evidence to the Tribunal, the Claimant state that he was talking to a colleague but his concentration was on the screen. The Claimant was referred to the notes of the factfinding meeting which took place. In the course of that, he had stated that he had been asked a couple of questions about one or two bags that had been rejected and it was whilst he was talking to his colleague about this that he may have been distracted. The Claimant insisted that what he said in the factfinding meeting was correct. The Claimant was pressed on this and eventually agreed that his discussion with his colleague was about “FUA and issues at home”. FUA is a reference to unauthorised absences. The Claimant accepted that the account given by his colleague that he was talking about dissatisfaction about matters work and a recent unauthorised absence on his record was a correct description of the topic of conversation.

17. The Claimant was asked about the report which is prepared by Mr Gill. He said that he had no complaints about the report and accepted that there had been no unreasonable delay in preparing that report.

18. Although the evidence gathered in the report revealed inconsistency between the Claimant and colleague, Mr Lee Ribolla conducting the disciplinary hearing did not consider the discrepancy about what exactly the Claimant was speaking about to be material. From his point of view, the Claimant should not have allowed himself to become distracted from his screen reading duties, whatever was the subject matter of the conversation.

19. On 29 May 2017, Mr Ribolla wrote to the Claimant inviting him to a disciplinary hearing. Mr Ribolla's letter set out the charges of misconduct, failure to follow security procedures and policies and breach of trust and confidence. The letter stated, because the Claimant had a final written warning that was live to 16 March 2018, if the charges were proven, dismissal was a possibility. The Claimant was informed of his right to be accompanied at the disciplinary hearing. He was provided with a copy of the disciplinary procedure and an investigation pack. Mr Ribolla had had no involvement with the matter previously.

20. The Claimant makes no complaint about Mr Ribolla's involvement in the disciplinary. The Claimant stated that he does not criticise Mr Ribolla's conduct of the disciplinary meeting or the procedure that he followed during the meeting.

21. During the disciplinary meeting, the Claimant had the opportunity to answer the employer's case. He was represented by a trade union representative, Mr Manoj Dadral. The Claimant stated that he had no criticisms of the representation that he had. The Claimant and Mr Dadral accepted that the Claimant should not have been talking while carrying out screen reading duties.

22. During the disciplinary hearing, Mr Ribolla explained to the Claimant that the issue was not the fact that the Claimant had failed the redline test but the reasons why he had failed. The question was whether Mr Ribolla could have confidence in the Claimant to do his job to the level expected in the future.

23. During the hearing, the Claimant admitted that he was in the wrong and that he should have stopped the belt before speaking to anyone. Mr Ribolla considered the CCTV footage. He did not consider that it showed any external pressure causing the Claimant to be distracted. He formed the view that the Claimant had willingly participated in a conversation or had initiated a conversation whilst appearing to be very relaxed as he reclined in his seat. In coming to his conclusions, Mr Ribolla took into account that the Claimant had admitted that his actions were inappropriate, that he had apologised and offered an assurance that it would not happen again.

24. After an adjournment, Mr Ribolla reconvened and delivered his decision. Mr Ribolla was satisfied that the conduct charges were proven on the balance of probabilities. He decided to terminate the Claimant's employment. Mr Ribolla took the view that on the day in question, the Claimant had deliberately chosen not to focus on the task in hand and allowed himself to become distracted from his screen reading duties. This was despite receiving specific advice a few months earlier (the green card) and being provided training. In Mr Ribolla's view, there was a risk that he may repeat the action. Mr Ribolla did not have confidence in the Claimant performing his duties to the required standards in the future.

25. Mr Ribolla took into account that the Claimant was the subject of a live final warning. The disciplinary policy with which the Claimant had been provided confirms that when a final written warning has been issued, if there are any further acts of misconduct, this will lead to dismissal.

26. Mr Ribolla took into account the security-critical environment in which the Claimant operated and taking that into account determined that dismissal was the appropriate sanction notwithstanding that the Claimant had shown remorse over the incident and had given assurances that it would not happen again. Mr Ribolla did not believe that these assurances and remorse justified a lesser sanction than dismissal.

27. The decision to dismiss the Claimant was confirmed in a letter dated 12 June 2017. The Claimant's last day of service was 12 June 2017. He was to be paid up to and including that date. The Claimant was informed of his right to appeal against the decision under the disciplinary procedure.

28. The Claimant appealed the decision to dismiss him. The Claimant's grounds of appeal included the contentions that the decision to dismiss him was too harsh, that the final warning which he was subject to should not have been a factor in reaching the disciplinary decision, that the Claimant had been remorseful and apologetic for the incident, that other members of staff who had for instance been asleep whilst on shift had not faced punishment, that a colleague had also failed a redline test and had not been dismissed and that the contention that Mr Ribolla lacked confidence in the Claimant's ability to carry out his duties was not justified bearing in mind that the Claimant had been allowed to work for a further four weeks after the incident.

29. The Claimant's appeal was considered by Mr Tom Willis, the Director of Security. He wrote to the Claimant on 4 July 2017 inviting him to attend an appeal meeting. At the appeal meeting, the focus was on the decision to dismiss the Claimant being too harsh and inconsistent with other cases. At the time that the appeal hearing took place, Mr Willis had not viewed the CCTV footage. Prior to the Employment Tribunal hearing and after the appeal, Mr Willis has viewed the CCTV footage and his evidence is that nothing that he has viewed on the CCTV footage would have affected the decision that he had reached on the appeal.

30. At the appeal hearing on 1 August 2017, the Claimant was accompanied by Mr Stephen Buskell. During the appeal, the Claimant set out the grounds on which he wished to appeal against the decision to dismiss and during the course of his appeal he asked to be reinstated and promised that there would be no further similar incidents in the future.

31. Mr Willis took time to consider the Claimant's representations, the appeal points and then after considering the available information wrote to the Claimant to confirm his decision on the appeal. In his letter dismissing the Claimant's appeal, Mr Willis addressed each of the Claimant's grounds of appeal in turn.

32. Dealing with the Claimant's assertion that his previous 12 months' final warning was for an unrelated issue and should not have had a bearing on the outcome of the dismissal, Mr Willis stated that it would not have been the correct process to issue separate warnings for the breach of separate policies and that under the disciplinary policy, an act of misconduct does not need to be directly related to the initial act of misconduct to be grounds for dismissal following a final written warning.

33. In response to the Claimant's assertion that the decision was harsh given that others had failed redline tests and were still in their jobs, Mr Willis explained that the redline test was not itself an automatic disciplinary issue and that the focus is to understand exactly why redline tests were failed and the resulting action is informed by that.

34. Mr Willis dealt with the comparators that the Claimant had relied upon and explained why none of them showed that the decision which the Claimant had been given was inappropriate. I have considered the explanation which has been provided by mr Willis in respect of the various comparators relied on and I accept the evidence that he sets out in paragraph 14 of his witness statement.

35. The Claimant made reference to a colleague, NB. NB had been, what is described as, asleep at the x-ray desk on two occasions and was not dismissed. Mr Willis had been personally involved with the case of NB. Mr Willis explained that NB was not actually asleep, it was more that he was giving the appearance of lack of attention and may have been drowsing, rather than flat out asleep. On the first occasion when NB was "asleep at the x-ray desk" NB gave an explanation which related to a medical condition and his personal circumstances which afforded sufficient mitigation and explanation for Mr Willis to feel able to allow NB to continue in employment. Mr Willis arranged for NB to be provided with appropriate training and support. Mr Willis explained that there was then a second occasion when something very similar occurred with NB. On this occasion following consideration of all the circumstances the decision was made to terminate the employment of NB as he had been in the same circumstances twice.

36. Mr Willis also gave evidence relating to GL. GL was a security officer who was issued with a three-month warning. There was an issue about whether

GL had used an e-cigarette or only had it in her hand at the time. mrWillis was not able to give much information about the background circumstances relating to GL but did not consider that the decision in GL's case suggested that the decision which had been taken in the Claimant's case was inappropriate or unduly harsh.

37. There was also reference made to another employee, NS, who was dismissed for other matters which are unrelated to the circumstances of this case but in the letter that was sent to him by Tom Willis following his appeal, there is included the following comment: "*To confirm, you have not been charged or sanctioned with smoking in a no smoking area. Whilst you admit to this activity as a first time offence, I would expect it to be handled through a corrective conversation."* The Claimant relies on this as indicating that that is how a matter relating to breach of the smoking policy ought to be dealt with, by way of a corrective conversation rather than a disciplinary.

38. Mr Willis explained that the circumstances relating to NS are not comparable to the Claimant's circumstances. In the Claimant's case, the Claimant was smoking or vaping an e-cigarette in a staff restroom. This is not only against policy, it is also unlawful. The comparison with NS is not appropriate. NS was in the forecourt at the front of Terminal 3 where there is an area set aside for people to smoke. The area is demarcated by a line. Mr Willis explained that unfortunately, members of the public and members of staff sometimes smoke in a part of the forecourt which is not in the area set aside. They stand on the wrong side of the line. The case of NS was one such case. It was to that situation Mr Willis considered suitable for a corrective conversation.

39. Mr Willis considered the comparator cases relied upon by the Claimant,he did not find that the Claimant was treated in a way which was either unfair or disproportionate to the circumstances.

40. In evidence, the Claimant confirmed that when he criticises the Respondent, what he criticises is the decision. He accepts that the decision made against him to give him a final warning and to dismiss him in respect of the redline test failure were not made in bad faith. His complaint is that it was too harsh. He does not complain that Mr Ribolla acted otherwise unfairly towards him; merely that he was too harsh. The Claimant accepted that in his hearing with Mr Ribolla, he did not bring forward any of the comparable cases which he subsequently sought to rely on at the appeal.

41. The Claimant accepted that MrWillis's presence in the appeal and the manner in which he had dealt with the appeal did not give rise to any complaints. At one point the Claimant appeared to complain about delay in the process, how long it took to take through the disciplinary process. However, in the course of his evidence, the Claimant accepted that there had not been an unreasonable delay. He did not criticise Mr Willis for delay or for the way that he conducted the appeal. He also accepted that what

Mr Willis said about the case of NB was correct. His only complaint was that he was not treated as favourably as NB was treated.

42. In arriving at my conclusions in this case, I have had regard to the following. An employee has the right not to be unfairly dismissed by his employer. An employee is dismissed by his employer if the contract under which he is employed is terminated by the employer. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or if more than one, the principal reason) for the dismissal and that it is either a potentially fair reason[1] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A dismissal which for conduct is a potentially fair reason.

43. Where the employer has dismissed for a potentially fair reason, the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) 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 sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

44. The Respondent must show that it believed that the Claimant was guilty of misconduct. It had reasonable grounds upon which to sustain the belief. At the stage which it formed that belief it had on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. It is not necessary that the Tribunal itself would have shared the same view of those circumstances.

45. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting its own decision as to what was the right course to adopt for the employer) must decide whether the Claimant's dismissal "fell within a 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." [2] The burden is neutral at this stage. The Tribunal has to make a decision based on the evidence of the Claimant and Respondent with neither having the burden of proving reasonableness.

46. When considering a claim of unfair dismissal based on disparity, the tribunal must focus on the treatment of the employee bringing the claim. If it was reasonable for the employer to dismiss this employee, the mere fact that the employer was unduly lenient to another employee is neither here nor there. An employer's decision made in a truly parallel case may support the argument that it was not reasonable to dismiss the employee, but it will be rare for the facts to be sufficiently similar.

[1] That is a reason specified in section 98(2) of the Employment Rights Act 1996.
[2] Iceland Frozen Foods v Jones [1982] IRLR

47. Where there has been a manifestly inappropriate written warning given to an employee, an employer is not entitled to rely upon the existing final written warning. In general, earlier decisions by an employer should be regarded by the tribunal as established background that should not be re-opened. However, a disciplinary sanction can be re-opened if it is manifestly inappropriate. That is, there is something about its imposition that once pointed out show that it plainly ought not to have been imposed. A Tribunal may consider the reasonableness of a final written warning when assessing the fairness of a dismissal. The essential principle is that it is legitimate for an employer to rely on a final warning provided that it was issued in good faith, that there were at least prima facie grounds for imposing it, and that it must not have been manifestly inappropriate to issue it.

48. Having applied these consideration to the circumstances of this case I have come to the following conclusions.

49. I am satisfied that the Claimant was dismissed because the Respondent believed that the Claimant had failed to follow security policies and procedures on 14 May 2017 and had exhibited reasons which led the Respondent to lose trust and confidence in the Claimant to perform his role of security officer. I am satisfied that this reason related to the conduct of the Claimant. I am also satisfied that the Respondent acted reasonably in treating the Claimant's conduct as sufficient reason for dismissing the Claimant.

50. The respondent carried out a reasonable investigation following a fair procedure. The Respondent made appropriate enquiries to determine the facts; the respondent informed the Claimant of the allegations and that the dismissal was a possible consequence if the allegations were found to be proved. The Respondent gave the Claimant an opportunity to make representations on the allegations and put his case in response before any decision was made. The Respondent allowed the Claimant to be accompanied at all relevant meetings at which the issue was discussed. Following the investigation, the Respondent had reasonable grounds for the belief that the Claimant was guilty of the misconduct. This was a case where the Claimant admitted that he had been talking to a colleague and was distracted from the x-ray screen at the time. The Claimant had failed the redline test and the CCTV revealed that there were no external pressures causing the Claimant to become distracted from his screen reading responsibilities.

51. In the circumstances of this case, dismissal was a reasonable sanction to apply. The Respondent's disciplinary policy defines a failure to follow security policies and procedures as misconduct. The Claimant was subject to a live 12-month final written warning for misconduct. The Claimant had requalified for x-ray duties through retraining in January 2017, some five months prior to the incident in question.

52. On 23 February 2017, the Claimant had received a green card entry when a security manager had cause to speak with the Claimant about an incident of him taking to colleagues whilst undertaking screening duties.

53. The dismissal of the Claimant by Mr Ribolla was made in good faith after he had followed a fair procedure. The Claimant's complaints that his dismissal was unfair because other employees were treated less harshly in similar circumstances was not relied upon at the hearing that took place before Mr Ribolla. Mr Ribolla had no reason to consider any alternative cases as none were argued by the Claimant before him.

54. The Respondent allowed the Claimant to appeal against the decision to dismiss. The Claimant accepts that his appeal was dealt with fairly. The Claimant's appeal was however unsuccessful. All the Claimant's points including the comparator cases that he relied on were considered in the appeal. The Respondent applied and followed its own union-agreed disciplinary procedure in dealing with the Claimant's appeal. The Respondent's appeal procedure complied with the ACAS Code of Practice.

55. The comparator cases that were relied upon by the Claimant do not show that the treatment of the Claimant was unfair because of disparity. Of all the cases that were relied on by the Claimant, there were no cases which were truly parallel to the Claimant's case. When one focuses on the treatment of the Claimant in his own case, it is clear in my view that dismissal was within the range of responses of a reasonable employer in the circumstances. The case of NB may indicate a leniency in relation to that employee but that is neither here nor there and in any event the circumstances of NB's case were wholly different to the Claimant's case in that there were personal circumstances and medical circumstances which gave mitigation allowing the Respondent to act as it did.

56. In respect of the comparator cases that are relied upon by the Claimant in relation to the final warning, none of the comparator cases suggest that the sanction imposed on the Claimant was manifestly inappropriate. The Claimant has not suggested at any time that any of the actions of the Respondent were carried out in bad faith.

57. The conclusion that I have arrived at in relation to this case is that the Claimant's complaints of unfair dismissal are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto
Date: 28 September 2018
Sent to the parties on: 12 October 2018
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For the Tribunals Office