EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr V Lopes Marques	**AND**	In-Depth Services (Cleaning) Limited

Heard at: London Central **On**: 28 September 2018

Before: Employment Judge Norris

WRITTEN REASONS

Background

1. The Claimant was employed from January 2014 until he was summarily dismissed in November 2017 for gross misconduct.

Hearing

2. At the Hearing, the Claimant was represented by a Trade Union official, Mr Traynor. We were greatly assisted by the interpreter, Mrs Pereira-Kolahi. The Respondent was represented by Mr O'Neill, solicitor.

3. At the outset of the Hearing we discussed a piece of late evidence that had been handed up by the Claimant. This was a transcript of a recording made by Mr Durango, another Trade Union official, who had represented the Claimant at the internal proceedings leading up to his dismissal. Mr Traynor indicated that he intended to call Mr Durango to give evidence, notwithstanding that there appeared to be a contradiction (or more than one) in the witness statement submitted on his behalf and his own transcript of the recording. Mr Traynor said that Mr Durango would have an explanation for this.

4. Before we started hearing the evidence, we agreed that the single complaint that was to proceed was for unfair dismissal. The claims of unlawful deductions from wages and a failure to pay holiday pay were withdrawn and I dismissed them on withdrawal. It was confirmed that the issues in the unfair dismissal complaint were:

    a. Was dismissal within the band of reasonable responses? and
    b. Was it procedurally unfair to proceed with a disciplinary hearing in the Claimant's absence?

5. Before I adjourned the hearing so that I could read the witness statements and the documents referred to in the bundle, Mr O'Neill set up some equipment so that I could watch CCTV footage of the incident which led to the Claimant's dismissal. Mr Dudleston, a Regional Manager at the relevant time and the dismissing officer, was sworn and took me through the footage. We then adjourned.

6. After the adjournment, Mr Dudleston was cross examined. We watched the footage again during the course of his evidence. He was re-examined and then released. Before lunch we heard from Ms Williamson, another Regional Manager, who conducted the appeal hearing. She was also cross- and re-examined. We took a short lunch break and then heard from Mr Durango. Although he initially said that he wanted to make some changes to his witness statement, in the event he did not make any. He was cross-examined. There was no re-examination. Finally, we heard from the Claimant who gave evidence via the interpreter. He was cross examined and we watched the CCTV again during the course of that process. There was no re-examination.

7. I heard submissions from both parties. Although I have set out only a small number of examples of Mr Traynor's submissions in my conclusions, I considered them, and the authorities to which I was referred, fully.

8. I sent the parties away while I deliberated on the outcome. The parties returned later in the afternoon and I gave judgment. It appears that the written Judgment was emailed to the parties on 15 October. On 29 September, Mr Traynor had emailed requesting written reasons.

Law

9. This was a "classic" misconduct unfair dismissal claim. The relevant law is at section 98 of the Employment Rights Act 1996 (ERA), which says that I must first consider the Respondent's reason for dismissing, and whether it was a potentially fair reason. In deciding what was the reason I have regard to *Abernethy v Mott Hay and Anderson*: a reason is a set of facts or beliefs known to the employer.

10. Next under Section 98(4) ERA, I have to consider whether the dismissal was fair or unfair having regard to the reason shown by the employer, which depends on whether in the circumstances, including the size of 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.

11. *British Home Stores v Burchell [1978] ICR 376*, reminds Tribunals in the context of a dismissal for a conduct reason, that I must examine whether the reason given was genuine, whether the employer had reasonable grounds for that belief, including conducting a reasonable investigation of the facts on which to base that belief, and finally whether dismissal for that reason was within the range of responses of a reasonable employer. I

must not substitute my own judgment but must consider whether any reasonable employer would dismiss for that reason.

12. I also considered *Taylor v OCS Group Limited*, in that a defect in one stage of the process can be rectified at a later stage; the process should be reviewed as a whole.

Facts

13. On 19 October 2017, the Respondent received a report from an employee, Mr Martinez, that he had been the subject of aggressive behaviour by the Claimant while outside the building where they both worked as cleaning operatives. Mr Martinez said later that this was about the Claimant believing Mr Martinez had reported him to management for use of mobile while working. The Claimant was suspended on the same day and advised of the reason. From 21 October 2017, he was represented by Mr Durango of the union.

14. On 23 October the Claimant was invited to an investigation to take place on 26 October with Ms Naunay, site manager. As a result, he was then invited to a disciplinary hearing. He was sent Ms Naunay's report. She had interviewed Mr Martinez who said that the Claimant had told him to watch his back and threatened to beat him. She watched the CCTV of the area outside the building where the incident had taken place. This comprised video but not audio footage. The CCTV showed the Claimant pointing and appearing angry; she thought Mr Martinez appeared confused. Of her own accord also watched footage later in the day when Mr Martinez was leaving the building. I did not have that footage.

15. The Claimant denied to Ms Naunay that he had pointed at Mr Martinez. He said he told Mr Martinez that he was angry and might have been stressed because of wages but that it was nothing personal to him. He said "I spoke with my gestures because I was feeling stress with everything that happened on that day with Nilza and my wages and when Josue asked me, how I was? I responded to him that I was angry I might have looked upset because of what happened with my wages but nothing personal to him". This was a reference to a colleague Nilza collapsing and the Claimant being underpaid as he saw it, though it became clear in the Claimant's case at least that he had not been.

16. The Claimant denied threating Mr Martinez and did not advance any possible reason why he would make up the allegation. Mr Martinez's complaint was set out in a handwritten note that was in the bundle. He said (making adjustments for misspellings) "I was taking rubbish to the bin when [the Claimant] came out the door and started telling me to watch my back because he is going to beat me outside the building. I asked why, what is going on. He said that I told the manager that he is on the phone. I replied that I never said anything. He left, and told me to watch my back".

17. Ms Naunay decided that there was a case to answer. A disciplinary hearing was scheduled for 2 November but Mr Durango could not attend so it was rescheduled for 9 November. On that occasion, the CCTV footage was not available, so it was rescheduled again for 15 November at 11.00.

18. Prior to that, on 9 November, the Respondent wrote to the Claimant by email and by post making it clear that the CCTV footage was available to collect. Ms Williamson said, "We have arranged for a copy of the CCTV to be available for you which can be collected from ARUP immediately, though we need confirmation of who will collect it beforehand. Can you please contact the office in Warrington via [email address] to confirm who this will be, so we can advise ARUP. ID will be required. I have arranged for the hearing to be held on Wednesday 15th November which should provide sufficient time for you to collect, review and prepare in respect of the CCTV. I am provisionally arranging for the hearing to be held at 11.00 am but there is a degree of flexbility in respect of the time. If this time is not suitable, please contact the communication centre either by phone or email no later than 9.30 am on Monday 13th November 2017. If we do not hear from you we will assume that 11.00 am is acceptable."

19. That email appears to have been forwarded to Mr Durango, because he wrote to the Respondent about it, although he asserted before me that he had not seen it until the morning of 15th. In any event, two things are salient. Neither the Claimant nor Mr Durango went to collect the CCTV, and they did not arrive at the venue for the disciplinary hearing until around 10.50 or 10.55. So, had the hearing been going ahead as scheduled at 11.00, they would not have been ready.

20. In fact, the hearing did not go ahead at 11 because the chair Ms Williamson had been taken ill. The Claimant sat and waited, with Mr Durango emailing at 11.24 to say that it was almost 11.30 and the meeting had not started and he had not seen the video footage. He said, "I can wait only until 12".

21. He emailed again at 11.54. He said that "Donald" (the Assistant Cleaning Manager on the site) had approached them and put them on the phone with Claire [Whitlow, Training/HR Manager]. She apologised and said the chair [Ms Williamson] was unable to attend. Mr Durango said, (again, adjusted for typos) "I suggest to allow me to see the CCTV. She says that it was available for us to collect earlier but today Donald picked up the footage … He passes it to me in a CD and did not provide any laptop to watch it. Claire informed me that the meeting will go ahead anyway today at 2 pm. Decision that is very unfair and unreasonable as we attended on time today for the meeting and I have other compromises in my agenda. I am requesting for today's meeting to be adjourned because of the above reasons and to allow us to see the CCTV in a different location and to prepare the defence."

22. In fact, the transcript produced at the Tribunal Hearing is entirely contrary to those assertions. This confirms that reconvening at 12.00 was actually Mr Durango's idea, after Ms Whitlow suggested 2 pm. She had responded "perfect". The Claimant and Mr Durango had then gone to get the CCTV on disk and left the premises. They did not return at 12.00 or indeed 2 pm, without making further contact with Ms Whitlow or anyone else in the Respondent's management team. The hearing went ahead in their absence, and the Claimant was summarily dismissed.

23. Mr Durango's evidence on these points was extremely unsatisfactory. His witness statement, which was short, was almost completely wrong, although it was along the lines of what he said in the subsequent stages of the process. The transcript shows that he agreed to attend at 12.00. He gave oral evidence that he had gone back to his office with the Claimant to watch the footage. He claimed that he had taken the bus and that this had taken him an hour or so. It was shown on Google maps that he could have walked from the hearing premises to his office in just over half that time.

24. Mr Durango could not confirm in oral evidence what appointments he had had in the afternoon, or when they were due to start, or why he had booked appointments on the afternoon of an appeal hearing due to start around 11 am even though he did not know how long it might last. This was particularly so when he had failed to acquire the CCTV despite the Claimant at least and (I find on balance of probabilities) he himself knowing that it was available for collection and having had the hearing postponed on the previous occasion to enable him to prepare. He gave evidence to the Tribunal that he had had to cancel another hearing that had been due to start at 12.00. I did not believe this, because it would not have been possible for him to have reached that hearing if the Claimant's had not started until 11.00 as expected, and nor would he have suggested at 11.40 starting the Claimant's hearing at 12.00 if he had to be somewhere else at the same time. In the circumstances, his failure to attend the disciplinary hearing at the time he had suggested, explain he and the Claimant had still been unable to watch the footage and ask to have the hearing put back to 2pm as suggested by Ms Whitlow was mystifying.

25. I was also unclear why Mr Durango put such store by Donald saying there were no facilities in the building for him to watch the CCTV footage. If that was in fact the case, Mr Durango could have gone to the disciplinary hearing to see if the managers had a laptop with the footage on it or on which the disk that he had been given could be played.

26. Mr Durango later said at 15.18 in an email "If you [had responded] to the initial email earlier and informed us that [you were] going to take the decision in [the Claimant's] absence, I would cancel all my meetings and attend the disciplinary hearing." Clearly that was not the case.

27. There was then an appeal at which Claimant did attend and was represented by Mr Traynor. He was able to put in his own evidence, which he did. He submitted a statement, although in cross-examination he told the Tribunal that it was not properly translated and hence contained at least one error. That appeal was heard by Ms Williamson and Mr Dudleston was in attendance. Ms Naunay was not, but her report was available. Very lengthy written submissions prepared by Mr Traynor were presented.

28. At the appeal hearing, Mr Traynor indicated twice that he could accept that the CCTV showed the Claimant pointing and that there had been a degree of aggression or he looked slightly aggressive ("I agree that he is pointing and that there is a degree of aggression… [the Claimant] does look slightly aggressive"). Mr Traynor was able to ask a number of questions of Mr Dudleston and make oral submissions to supplement the many pages he had submitted in writing.

Conclusions

29. The ACAS Code of Practice says that employees should make every effort to attend a disciplinary hearing. I am not persuaded that the Claimant did so in this case. The Code says that employees should not unreasonably delay meetings, decisions or confirmation of decisions. Mr Traynor submitted that Mr Durango did not attend the disciplinary hearing and had good reason not to do so as he wanted to watch the CCTV and had been there for an hour already. I consider however that it was unreasonable of the Claimant and Mr Durango not to attend the meeting at midday on 15 November.

30. It was similarly unreasonable (and untruthful) for Mr Durango to emailed later in the day setting out his version of events. He had been recording the discussions, so he knew exactly what had been said and by whom, even if he could have forgotten it in such a short space of time. I considered it very unimpressive that a union representative should be so economical with the truth.

31. In my view, the guidance in the Code about what happens if somebody repeatedly fails to attend is not relevant here. This was a different sort of case, where the Claimant simply did not attend the hearing, the time for which his own representative had set and I conclude that it was open to the Respondent to proceed. It is analogous to the Employment Tribunal fixing a date for a hearing by reference to the parties' availability and then one party does not attend, even though we have confirmed with them the day before that they are proposing to do so. If they then do not attend and make no contact to explain their non-attendance, we may proceed in their absence. I do not see that an employer conducting a disciplinary hearing should be held to a higher standard than a tribunal conducting legal proceedings.

32. I have seen the CCTV footage several times during the course of hearing. It is reasonable to conclude that the Claimant appears to be behaving in

an aggressive manner; Mr Traynor indeed accepts this and I agree. It is not correct for the Claimant to suggest that there is no evidence of it. Mr Martinez's own statement is evidence, as is the oral account he gave to Ms Naunay.

33. Mr Martinez's versions of events are of course the words of the complainant and should not be accepted blindly and without corroboration. They were not. The Respondent looked at the CCTV and it did appear to corroborate Mr Martinez's version of what happened. While the Claimant is not obliged to come up with a reason why Mr Martinez might have falsified his account, it might have assisted if there had been such a reason (e.g. Mr Martinez had a particular grudge against him). In the event, the Claimant's case was that Mr Martinez lied to the Respondent to get him into trouble for, in terms, no discernible reason whatsoever.

34. Lacking a motive for Mr Martinez to lie, it was reasonable for the Respondent to accept that he was telling the truth, given the objective corroborating evidence of the CCTV.

35. Mr Traynor drew my attention to the Court of Appeal's conclusion in paragraph 47 of the *Taylor v OCS* judgment, that to cure a deficiency, an appeal panel must ensure it is open-minded and that the overall process followed was fair notwithstanding the early stage deficiency. I conclude that there is no evidence that the Respondent in this case had a closed mind at the appeal. The appeal was a complete re-hearing of the case, even if they did not address every point raised in the comprehensive appeal document submitted by Mr Traynor. For instance, the Respondent did not need to address the point about a woman who appears fleetingly in shot on the CCTV during the incident itself. There has never been any suggestion that anyone even knew who she was to be able to question her. In any case, the body language of the Claimant is, as I have found, consistent with Mr Martinez's statement. He can be seen pointing his finger and waving it at Mr Martinez. He walks away and turns to point again. Even though Mr Martinez also raises his arm, and moves to the side, he does not appear to be threatening the Claimant.

36. There is also the Claimant's explanation of having a flat hand raised towards Mr Martinez as he started speaking. The Claimant said in the appeal hearing that this could be explained by him not wanting to take a holiday as Mr Martinez had suggested. He denied having said this in the hearing before me, but then reverted to it. Even allowing for possible interpretation errors (though with apologies to the interpreter as this was not actually suggested), this contradiction even in the few minutes of his cross-examination is still inexplicable

37. Mr Traynor submitted that the Respondent was aware in the appeal hearing of the details about the Claimant's colleague collapsing just before the incident took place, but that the Respondent did not take these significant mitigating circumstances into account when taking the decision to dismiss. However, in my view it could not have done so; the Claimant

flatly denied that the incident had happened in the way described by Mr Martinez.

38. Mr Martinez said that the Claimant was not telling him about a colleague collapsing, but threatening him about reporting the Claimant to management for use of the phone. In the claim form, the Claimant accepts that he was discussing the phone and the report to management with Mr Martinez and also says he was upset because he had been underpaid. At the investigation Claimant denied having said anything about a phone to Mr Martinez ("NO, I didn't say anything about a phone to him").

39. The Respondent was entitled to believe Mr Martinez's version of events, not least because the Claimant now accepts that there **was** a discussion about the phone and the Claimant's belief that he had been reported to management by Mr Martinez. There were therefore no mitigating circumstances for the Claimant's behaviour, notwithstanding his length of service.

40. Accordingly, I conclude that the reason for the Claimant's dismissal was his conduct. The Respondent had conducted an investigation which was within the band of reasonableness. The process was not unfair, for the reasons I have stated. The decision itself was also within the band of reasonable responses, and accordingly the claim is not well founded and is dismissed.

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Employment Judge Norris

Dated: 19 October 2018

Reasons sent to the parties on:

6 November 2018

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For the Tribunal Office