EMPLOYMENT TRIBUNALS

Claimant: **Mr P Roberts**

Respondent: **FCC Environment**

Heard at: **Port Talbot** **On: 11 September 2018**

Before: **Employment Judge Ward**

Representation:
Claimant: Mr Dunn (lay representative)
Respondent: Ms Connolly (counsel)

RESERVED JUDGMENT

1. The claim is dismissed.

2. The dismissal of the claimant on 6 April 2018 was fair.

REASONS

The issues

1. The claimant contends that he was unfairly dismissed on 6 April 2018. It was accepted that the claimant was an employee with the requisite service and had presented his claim in time. The sole issue for the Tribunal to determine, therefore, was whether the respondent unfairly dismissed the claimant. The respondent resisted the claim and contended that the dismissal was fair and reasonable in all the circumstances. The matter came before the Tribunal for a one-day Hearing. Written submissions were requested and provided subsequently by the parties for consideration.

The applicable law

2. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in

Section 98(2) of the Employment Rights Act 1996 (ERA). The respondent states that the claimant was dismissed by reason of conduct; see Section 98(2)(b) ERA. If the respondent persuades me that the claimant was dismissed for a potentially fair reason, I must go on to consider the general reasonableness of the dismissal under Section 98(4) ERA.

3. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

4. The well-known decision of the EAT in *British Home Stores Limited v Burchell* [1980] ICR 303 gives guidance conduct dismissals.

5. As the decision to dismiss was in reliance upon a live final warning for conduct on the claimants employment record, the Tribunal had to consider whether the warning was issued in good faith, that there were at least prima facile grounds for imposing it and that it was not manifestly inappropriate to issue it, following the decisions in *Wincanton Group Plc v Stone [2013] IRLR 178 and Davies v Sandwell Metropolitan Borough Council EWCA civ 135 [2013] 374.*

6. The Tribunal hearing the case was also mindful that it must not put itself in the position of the respondent and assess the reasonableness of its actions by reference to what the Tribunal would have done in the circumstances. It is not for the Tribunal to weigh up the evidence that was before the respondent at the time of its decision to dismiss and substitute it's own conclusions as if it were conducting the investigation. Employers have at their disposal a range of reasonable responses to the alleged misconduct of an employee and it is instead the Tribunal's function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that range.

The evidence

7. The Tribunal heard evidence from Ms J Glease the Senior HR Business Partner, Mr P Smith the Contacts manager that dismissed the claimant, Mr M Stass, the Area Manager who heard the grievance and dismissal appeal, Mr D Hemming a Contracts Manager who issued the final written warning, Mr P Morris a Contracts Manager who heard the claimants Grecian W. The claimant gave evidence and submitted two further written statements from Mr M Toms and Ms T Roberts that was admitted in evidence and read. The parties provided and worked with an agreed bundle of documents.

The relevant facts

8. The claimant was employed for eight years as a site attendant at a small household waste and recycling centre with other three members of staff.

9. The Respondent was advised via a near miss report that the claimant had been using his mobile phone whilst on duty. The matter was investigated by the claimants supervisor and the claimant was invited to a disciplinary hearing on 11 September 2017. At this meeting the claimant admitted to Mr Hemming that he had been on the telephone. Mr Hemming was aware that the claimant had used his phone at work on previous occasions and that the claimants supervisor had spoken to him previously about being in the cabin and not undertaking his work. The claimant was able to accept that he had been spoken to previously but only once. I do not find this credible as this was not raised in the disciplinary hearing or grievance. Although there was a lot of evidence about the respondents policy on the use of mobile phones and what use is reasonable and allowed. The basic fact is that the claimant is employed to work and being in the cabin or on his phone is time spent when he is not undertaking his duties. It is reasonable for the respondent to find such behaviour unacceptable.

10. Mr Hemming explained that the reason he issued a final written warning to the claimant who previously had a clean employment record was purely because of the number of times the claimant had been caught on his phone and therefore not working. The informal approach of a quiet word had not produced the conduct the respondent expected. Ms Glease explained that a file note such as the one Mr Hemming referred to in making his decision is used where there is repeated problem that is recorded so it can be relied upon in the future. This is entirely appropriate. She also explained that the respondents policy did not require a sequential approach only requiring a verbal warning or first written warning but the decision of the manager to decide the level appropriate. There was no restriction in the policy not enabling a final written warning to be issued for a first disciplinary matter. The final written warning explains that the reason for the final written warning is for a consistent failure.

11. The claimant did not appeal this warning. But he did query why he had been given a final written warning given his clear employment record and sought copies of the meeting notes from HR.

12. Whilst the disciplinary issues relating to the use of the mobile phone in work time were progressing the claimant on 4 September refused to move some mattresses from site.

13. The mattress had been on site for sometime and needed to be removed. There was some inconsistency about what exactly the claimant was told, but, on being asked to move them into a skip so they could be removed from site, he

refused. They were dirty and smelly mattresses and in Tribunal the claimant explained that his reason for refusing were because he was unable to lift them on his own, it required two persons under the manual handling risk assessment and he had a bad back plus he was concerned that a growth on his face that he was under the hospital for might have got worse.

14. The refusal to undertake the task resulted in an investigation and a further disciplinary hearing. As at the time of the hearing as a live record was on the claimants record it was taken into account in deciding to dismiss the claimant. The claimant was warned in the invitation to a disciplinary meeting that this might be the outcome.

15. Mr Smith decided that the instruction to remove these mattresses was an entirely reasonable one within the role of a site attendant. He was not made aware at the time that the claimant had a bad back. He did consider the state of the mattresses but was satisfied that protective gloves were available and washing facilities at the farm house were available for after the task had been completed. Mr Smith was not aware of the claimants concerns about his face.

16. Mr Smith found that the claimants had refused three times to undertake the task, firstly to the site operative Mr Price then to Mr Adams the Site Supervisor and then to Mr Hemming the Site Manager.

17. Taking HR advice Mr Smith, found that the request was reasonable and that the reason for refusal, namely that the mattresses were wet and smelly was not a reasonable refusal. He decided that this conduct would result in a final written warning. However because of the live warning for conduct that was already on the claimants employment record, the warning was relied upon and the claimants employment for misconduct was terminated with pay in lieu of notice. In the absence of that warning the respondent would not have dismissed him.

18. The claimant submitted a grievance on 8 September 2017. Mr Morris considered this. Although this was not an appeal against the warning as this was not issued until 11 September, the final written warning was one of the matters considered. Mr Morris explained in evidence that he had considered the respondents disciplinary policy and had found that the three stages of warning can be skipped depending on the severity. Mr Morris was concerned if the claimant understood the difference between a grievance and an appeal and the claimant confirmed at the grievance hearing that he did.

19. Mr Morris did not find the grievance to be valid and advised the claimant of this on 3 October 2017. The claimant appealed this decision.This was unsuccessful.

20. The claimant appealed against his dismissal. This was not successful.The claimant raised concerns in writing about the way he had been treated and the outcome.

21. At the appeal meeting the claimant was given the opportunity to explain and discuss what had happened. Mr Stass went through the points of the appeal but found they made no difference to the decision to dismiss.

Conclusions

22. The facts in this case are not in dispute. The Respondent had asked the claimant not to excessively use his phone whilst at work and issued a final written warning. When asked to move mattresses from site into a skip he refused. It is understandable that the claimant felt unfairly treated if he felt his conduct was being questioned. That said the Tribunal cannot find that the conduct expected by the respondent and therefore the instructions given were unreasonable. Both instructions were about the claimant undertaking the duties expected of him. Employees are employed to work and although this employer allowed some personal use of mobile phones, the employee is there to work and when on a mobile phone they are not working. The instruction to move the mattress again is one which is within the normal course of events at a household and recycling centre and was a reasonable instruction. If the claimant had concerns about the help he would get in completing the task he should have asked, to refuse to move them because they were wet and smelly which were the reasons given at the time were not reasonable given the duties of a site attendant. In my judgement these were both legitimate and reasonable instructions to make.

23. Although the Tribunal can understand given the claimants previous clear employment record why the claimant might feel he has been treated harshly it does not make the claimants refusal to carry out these instructions reasonable.

24. The respondent has therefore proved, on a balance of probabilities, that the claimant was dismissed for conduct as set out in Section 98(2)(b) of the Employment Rights Act 1996 (ERA).

25. In the Tribunal's view, it is clear that the respondent did have a genuine belief that the claimant had committed an act of misconduct in refusing to move the mattresses and that because there was a current final written warning on file it was relied upon to dismiss the claimant.

26. The final written warning was essential to the decision. It was a valid decision. At the time of the disciplinary hearing about the mattresses the final written warning had been issued and had not been appealed. The final written warning was not issued in bad faith nor was it manifestly inappropriately issued. There were reasonable grounds for issuing it.

27. The Tribunal finds that Mr Smith's genuine belief was based on reasonable grounds. The claimant never denied that he had refused to move the mattresses, but provided explanation.

28. Did the respondent carry out a reasonable investigation upon which to sustain that belief? It did. Although there was no evidence before the Tribunal about any flaw in the disciplinary process the Tribunal is satisfied in the process followed.

29. The Tribunal has ensured that the above three limbs of the *Burchell* test are not exhaustive of the enquiries; the Tribunal has had regard to the specific statutory provision in Section 98(4) ERA as to whether the respondent acted reasonably or unreasonably in treating conduct as a sufficient reason to dismiss. The respondent found that the act of misconduct together with the final written warning would result in dismissal. The Tribunal finds that it was reasonable for the respondent to treat conduct as the reason taken together with the relevance of a final written warning. The Tribunal's function following *Wincanton* has been to apply the objective test of reasonableness to determine whether it was reasonable for the respondent to take into account the final written warning. The Tribunal in this case finds that it was legitimate

30. On this basis the Tribunal concludes that the dismissal fell inside the range of reasonable responses that an employer can take and that therefore the respondent fairly dismissed the claimant.

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Employment Judge Ward
Dated: 14 December 2018

REASONS SENT TO THE PARTIES ON

……14 December 2018……...

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS