



EMPLOYMENT TRIBUNALS

Claimant: Mr A Watts

Respondent: Conlon Construction Limited

Heard at: Manchester **On:** 21 and 22 January 2019

Before: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Miss J Ferrario of Counsel

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's claim for unfair dismissal fails and is dismissed.
2. The claimant's claim for unlawful deduction of wages relating to holiday pay has been agreed. The respondents accept that they owe the claimant six days' holiday pay, and the claimant agreed that that was correct at the end of the first day of the hearing. The amount due to the claimant in terms of holiday pay is £819.40 net. That sum has been calculated from the claimant's P45 at page 542 in the bundle.
3. The claim with regard to any motoring expenses relating to the claimant's BMW car was withdrawn by the claimant during the course of the hearing.

REASONS

1. The claims before the Tribunal were claims of unfair dismissal and unlawful deduction of wages.
2. The claimant was dismissed for conduct and the facts relevant to that issue are as follows.

3. The claimant was a Project Manager with the respondent and was employed on 14 July 2015. He site managed various sites in and around Preston, but on 8 December 2017 he was dismissed for gross misconduct.
4. An incident occurred on site on 17 August 2017 which I shall deal with further below, but it was not until 10 November 2017 that the respondent company commenced an investigation into various matters which had come to light, including subjecting other members of staff to bullying, being absent from the site without permission and failing to carry out his duties, in particular health and safety matters concerning the dismantling of scaffolding on site improperly and not carrying out site inductions and a weekly health and safety checklist in the appropriate way.
5. Under the respondent's disciplinary policy bullying and breaches of safety rules and procedures or actions that may seriously endanger the health and safety of others, and breach of company policies and procedures, and failure to carry out the employee's duties of the job, are all classed as gross misconduct.
6. Matters came to a head in November 2017 when one of the directors, Guy Parker, spoke with a general labourer, Matthew Hayes, who had been working with the claimant on 17 August 2017. Mr Parker asked Mr Hayes why he had moved sites and was managed no longer by the claimant.
7. I find that Matthew Hayes, as the claimant suggested, did not instigate the whole process but it was because of the conversation with Guy Parker that the matter was escalated to the HR Director, Maureen Bowland. She carried out a full and detailed investigation into certain allegations and concluded that the matter should move to a disciplinary hearing to be heard by the Chairman of the Directors, Mr Michael Conlon.
8. The allegations were set out for the claimant in a letter of 24 November 2017. He was under no illusions as to the allegations against him. He was told he had allegedly bullied Matthew Hayes and Francesca Mason, the Site Manager of another site, he was absent without permission. Simon Brown had discovered that the claimant had left site on 25 August 2017 early. Mr Brown had found the site locked at 3.00pm. That was a Bank Holiday weekend. The claimant said that he had got permission from Simon Brown to go early but Mr Brown was so annoyed that the site was locked up because he wanted a handover discussion with the claimant that he videoed the locked-up site on his phone. Mr Brown did not inform senior management until asked about it. Mr Conlon was not happy that Mr Brown failed to inform the directors of that absence.
9. The claimant was also accused of being absent from the site on another occasion on 15 August 2017, but Mr Conlon found that that unauthorised absence was not proven.
10. Mr Conlon also had to deal with a health and safety issue with regard to the improper removal of scaffolding on a site by Matthew Hayes under the auspices of Mr Watts.
11. As the investigation before Mr Conlon proceeded, there were further issues which came to light about the abilities of Mr Watts to run the site, in particular relating to poorly kept health and safety paperwork. The claimant had failed to check some

CSCS cards to ensure that all the subcontractors or employees on the site had valid ID cards and construction skills certification cards, proof of training and qualifications and also competence with regard to health and safety.

12. Once the investigation had been completed the claimant was asked to attend a disciplinary hearing on 5 December 2017. He was given the opportunity to have someone with him but declined.

13. At the end of that meeting the claimant was dismissed for gross misconduct. The claimant appealed to Miss Nadine Ng, a Director who is the qualified Chartered Accountant for the company. She looked at all the documentation, went through all the issues the claimant raised and decided that she could uphold the dismissal and found against the claimant. The claimant then issued these proceedings.

14. When Mr Conlon dealt with the disciplinary hearing, he found that the claimant had looked through private WhatsApp messages of Matthews Hayes whilst Matthew Hayes' phone was briefly in his possession on 17 August, and that that was an invasion of privacy which upset both Mr Hayes and Mr Hayes' partner.

15. Mr Conlon did not accept the claimant's explanation that having taken the phone from Mr Hayes in order to speak to one of the employees of the company who was tasked to take down the scaffolding he then found a WhatsApp entry between Matthew Hayes and a work colleague criticising the claimant.

16. For the rest of that day Mr Conlon found that the claimant goaded Mr Hayes and tried to get from him information as to why Mr Hayes had said those things about him to the work colleague. The message to which the claimant was referring was a message from the evening before.

17. Mr Hayes was so upset about the way he was treated by the claimant at that point that he removed himself from the site and then started work on another site and hence, two months later, Mr Parker. asked him why he had moved.

18. Mr Conlon also found that the claimant coerced Francesca Mason on 1 November into agreeing to cover up for the claimant; in other words, to provide site management cover for Monday 6 November because the claimant wanted to take leave. Miss Mason had another site to run but she felt under pressure to accept the claimant's request because she was put under pressure by him and she felt belittled by the way that conversation went on the day. When questioned and giving a statement on events it was clear to Mr Conlon that she was upset about that day. The whole incident with Francesca Mason caused her a lot of worry and stress. She felt that the claimant should not have put her in a difficult situation. She set out in her statement to Maureen Bowland during the investigation that when she arrived on site on 16 November the health a safety representative and Simon Brown arrived causing an awkward situation. Mr Brown did not know that the claimant was not going to be on that site on that day.

19. Other statements were taken, often at the request of the claimant, from other people including other employees and third parties. One of the people spoken to at the claimant's request was an agency worker, Colin Moss, who was told by the claimant to get back in his box as he was only agency.

20. With regard to the absence without permission, Mr Conlon found that the claimant had been absent without permission on 25 August 2017 but did not find that he was absent without permission on 15 August 2017. The claimant said that he had permission from Simon Brown for the 25 August absence, Simon Brown said he did not get permission. Mr Conlon believed Simon Brown and not the claimant.

21. The most serious allegation related to another health and safety issue which was the removal of some scaffolding. Again that issue occurred on 17 August 2017. Mr Hayes arrived on site to find that the company who were to carry out ducting on the site had arrived, but could not get to do the work because scaffolding was still in place.

22. It was Matthew Hayes who spoke to Jez from the scaffolding firm (Lenehan's) who confirmed that they could not come to site to take the scaffolding down. Mr Conlon found that Matthew Hayes started taking the scaffolding down. The claimant denied doing so. However, the investigation showed, and Mr Conlon accepted this, that Matthew Hayes agreed that he had started dismantling the scaffolding improperly, the claimant stated that Matthew Hayes had dismantled it of his own accord and he had nothing to do with the dismantling nor did he help the claimant.

23. Mr Conlon did not believe the claimant and found that the claimant had either given permission to Mr Hayes to take the scaffolding down or realising that Mr Hayes had started doing so helped him complete the dismantling. Without waiting for Lenehan's to arrive on site. This was a serious breach of health and safety.

24. Further investigations took place and the employees of the ducting company were asked what had happened and they said that both Matthew Hayes and the site manager had taken down the scaffolding. The claimant was the site manager.

25. Mr Conlon conclusions that the claimant had assisted Matthew Hayes to take down the scaffolding were confirmed. The claimant therefore did not follow the risk assessment nor the method statement prepared by Lenehan's and took it upon himself to have the scaffolding taken down.

26. The claimant suggests that Mr Hayes himself in his statement suggested that all the scaffolding was taken down by him before (Adam) came up to the roof, but the claimant has ignored what Mr Hayes said later in his statement where he says this:

“I thought it was better [the claimant] did the clips and I handled the poles so I handed the spanner to him. It was whilst he was unclipping the upstands when he started goading me saying ‘maybe you’ll tell me later’.”

27. It was clear to Mr Conlon that the claimant had helped Mr Hayes take down the scaffolding.

28. There were other health and safety breaches which Mr Conlon found. In particular the claimant was not following through his duties with regard to health and safety. The claimant initially brought to Mr Conlon's attention that Matthew Hayes said he often carried out the site inductions for anyone working on site. As a general labourer Mr Hayes should not have been carrying out those inductions, it should have been the site manager who was the claimant.

29. The claimant then suggested that the only time Mr Hayes carried out inductions was whilst he was mentoring Mr Hayes in order to improve the qualifications of Mr Hayes. Mr Conlon found that that was not correct and that the claimant did allow inductions to be carried out by Mr Hayes without the supervision of the claimant.

30. Mr Conlon also found that the CSCS cards were not properly looked at and that there were a couple of occasions when CSCS cards were either out of date or the photograph on the card was not legible. When Mr Conlon carried out his own investigation, he noticed two cards that had expired which the claimant should have spotted.

31. The claimant was asked during the investigation by Miss Bowland to produce weekly checklists for health and safety. He could not produce them on the particular day when it was requested of him but then produced them two days later. During the disciplinary hearing Mr Conlon found that the same responses were given to every form over a number month period, in particular that with regard to the section dealing with slips, trips and falls the claimant suggested that “no materials were stored correctly and tidily, no site traffic was segregated from the pedestrian routes, that walkways were not free of trailing wires, that the accident book was not up-to-date and that not all necessary remedial action had been followed with regard to inspection of scaffolding and excavations etc.”

32. Mr Conlon found that all that the claimant had done was photocopy the same form time after time and simply put a different date on the form. That was not how those forms should have been completed. The claimant's suggestion that they were an aide memoire for him to correct deficiencies on the site was not accepted. If those matters had not been dealt with, as the forms suggested, it was the claimant's role to put the health and safety deficiencies right.

33. Having reviewed all the evidence that had come to light with regard to the way in which the claimant carried out his work, Mr Conlon was shocked. Mr Conlon also found that the claimant had been manipulative and attempted to record investigatory meetings. Mr Conlon found that he preferred the evidence of Simon Brown, Matthew Hayes and Francesca Mason over the claimant's evidence where there was dispute between the facts presented by those four people. Mr Conlon also found that the claimant's way of defending himself was to criticise others and to sully their characters, in particular Mr Hayes. Furthermore Mr Conlon felt that the claimant did not seem, during the disciplinary process, to recognise the seriousness of the allegations against him.

34. Consequently on 8 December 2017 Mr Conlon wrote to the claimant dismissing him, and in a 2½ page letter set out exactly why the claimant was dismissed and offered him a right of appeal, which the claimant took.

35. Miss Ng looked at all the documentation, which was extensive by this stage, including the statements of the employees and the subcontractors who had been asked to give evidence by Maureen Bowland, and concluded that the decision taken by Mr Conlon was the correct one. She did consider whether a lesser sanction should be given to the claimant rather than dismissal but in all the circumstances Miss Ng felt that they she had lost all confidence in the claimant, not only because of the proven allegations against him but also because of the way he conducted himself during the various interviews. Where faced with damning evidence against him the claimant's

preferred option was to criticise other people and blame them for his shortcomings. Miss Ng concluded that there had been an irrevocable breakdown of trust and confidence between senior officers of the company and the claimant, and she based that conclusion on the fact that the claimant was guilty of bullying, that he had been absent without permission and that he had failed to do the duties of his job during his site management of the Foster building project.

36. The claimant was sent the minutes of the disciplinary hearing and all other documents and was also given a full breakdown as to why Miss Ng had come to that conclusion.

37. The finding of Miss Ng included a finding that the claimant had deliberately fabricated the health and safety checklists because it was not plausible that each of the dropdown boxes would be identical and in the negative.

38. With regard to the scaffolding she found that the evidence was more reliable from Matthews Hayes than from the claimant, and she found that Fleetwood Sheet Metals, the company which was going to do the ducting confirmed Matthew Hayes' version of events rather than the claimant's concerning the scaffolding issue. On that basis she felt that it was more likely than not that the claimant had assisted in dismantling scaffolding. The claimant was ultimately responsible for what happened on site and it was a serious breach of health and safety to allow the scaffolding to be dismantled by untrained personnel. Miss Ng was also concerned that the claimant felt that that issue was "inconsequential". Miss Ng thought it was a very serious health and safety breach. Miss Ng, like Mr Conlon, found that the claimant had bullied both Matthews Hayes and Francesca Mason and that the claimant had been unpleasant towards Matthew Hayes over the phone incident; that the claimant had looked at private matters on Matthew Hayes' mobile phone which happened to show a WhatsApp in which Matthew Hayes had criticised the claimant to a colleague, and that the claimant had goaded Mr Hayes about the messages and that Mr Hayes was so upset that he left the site and refused to work with the claimant.

39. Miss Ng found that although the claimant denied bullying Matthew Hayes that the events of 17 August were more likely to be as set out in Matthew Hayes' statement rather than the claimant's statement.

40. Overall, Miss Ng felt that the claimant was not an honest historian (my phrase) and that she preferred the evidence that she heard from Matthew Hayes, Simon Brown, Francesca Mason, Jez Simmons and others who had been interviewed in relation to all the issues of misconduct put to the claimant.

The Law

41. The law with regard to the unfair dismissal claim (I do not need to set out the law with regard to unlawful deduction of wages as that matter was agreed) is relatively straightforward.

42. I have to consider whether Mr Conlon had a genuine belief on reasonable grounds after a reasonable investigation that the allegations of misconduct against the claimant were, on balance, true and that the sanction of dismissal was within the band of reasonable responses, accepting that the band is a broad band. In order to determine whether the dismissal of an employee is fair or unfair the respondent has

to prove to me the reason for the dismissal and that the reason falls within subsection 1 or 2 of Section 98 of the Employment Rights Act 1996 in that it relates to conduct, redundancy, capability or some other substantial reason of the kind such as to justify the dismissal of an employee holding the position which the employee held.

43. Once the respondents, if they can, have discharged that burden then the burden is neutral as to whether the dismissal was fair. The determination of that question 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 shall be determined in accordance with equity and the substantial merits of the case.

44. I must not substitute my views for the views of the dismissing officer, and I have to consider whether Mr Conlon believed the claimant to be guilty of misconduct. If so, did he have reasonable grounds for believing that the claimant was guilty of that conduct and was a reasonable investigation undertaken. I also have to make sure, if I am to find for the respondent, that they followed a policy and process which was fair in all the circumstances, and that there are no flaws in their procedure.

Conclusions

45. Applying that law to the facts of this case I found as follows.

46. First of all I need to deal with credibility.

47. I found Mr Conlon and Miss Ng to be true historians and accepted their evidence where there was a dispute between their evidence and the claimant's evidence.

48. I found the claimant, very much like the respondent's officers found, to be an untrue historian and that he was willing to change his evidence to suit his purposes.

49. Before me he blamed, in the same way he did during the investigation and disciplinary process, other colleagues for shortcomings, even suggesting that one of his colleagues used drugs and that was why he acted in the way that he did. When stuck for an answer he would simply say that other employees or witnesses to the fact were lying and that, in particular Matthew Hayes, had an ulterior motive in order to get rid of the claimant.

50. The simple fact is that Mr Conlon found the allegations against the claimant proven. There had been a thorough investigation by Maureen Bowland. Appropriate statements had been taken from those involved. When the claimant suggested that the investigator should speak to a particular person, Maureen Bowland took a statement from that person, and to the surprise of the claimant, she discovered that there was much criticism of the way the claimant ran his site. She saw that others found the claimant as arrogant and capable of belittling his colleagues and other employees, and that there was more evidence that the claimant had done the things of which he was accused than evidence which backed up the claimant's version of events.

51. Mr Conlon became perturbed about the scaffolding issue and found that against all proper health and safety norms the claimant had assisted Mr Hayes in taking down the scaffolding, and that two of Mr Conlon's employees, Francesca Mason and Matthew Hayes, felt genuinely bullied by the way in which the claimant treated them.

52. The claimant's tone, as evidenced by the interview he had with Maureen Bowland on Friday 17 November (the investigatory meeting), was flippant. For example, at one point he says these words:

“I'm surprised by the way I'm being questioned and that you are listening to the false accusations of bullying by a labourer.”

He then goes on to say:

“I carry out all my duties to the letter. I am dealing with an aggrieved labourer from Blackpool Build-up who is maliciously accusing me of bullying him.”

53. During the course of this hearing the claimant suggested that if we listen to the recording of that investigatory hearing it would be seen that Maureen Bowland had missed out parts of the evidence which supported his version of events.

54. The claimant, however, has not provided a transcript of that meeting which he says suggests that the respondent's minutes are not a true account.

55. In any event Mr Conlon had, in his estimation, sufficient evidence to find the claimant guilty of gross misconduct for the reasons set out above, Miss Ng went through a thorough appeal process and would have given a lesser sanction to the claimant if she had thought it appropriate, but she too found that the claimant's behaviour and conduct was so bad that they had to dismiss.

56. It is not for me to say whether this Tribunal would have dismissed the claimant in the same circumstances. It is simply for me to identify whether the sanction of dismissal was within the band of reasonable responses of a reasonable employer, and I accept that dismissal in these circumstances is within that band.

57. Consequently, in all the circumstances of this case, and recognising that the respondent company is a multi-million pound business with an HR function with the ability to obtain advice from employment solicitors, the way in which they conducted this matter was fair in all the circumstances. They have satisfied the burden placed upon them and shown that they dismissed for conduct. The claimant had every opportunity to defend himself against the allegations but unfortunately for him they were so serious that the respondent officers felt they had to dismiss him. Furthermore, they had lost trust and confidence in him in the way that he conducted himself during the course of the whole disciplinary process.

Employment Judge Robinson

Date__19 February 2019__

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

21 February 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE**THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990**

Tribunal case number(s): **2404105/2018**

Name of **Mr A Watts** v **Conlon Construction**
case(s): **Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **21 February 2019**

"the calculation day" is: **22 February 2019**

"the stipulated rate of interest" is: **8%**

MR S ROOKE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.