



EMPLOYMENT TRIBUNALS

Claimant: Mr M Casey

Respondent: Totally Local Company Limited

HELD AT: Manchester

ON: 27 March 2019

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In Person

Respondent: Mr C Palmer, Security Business Manager

JUDGMENT having been sent to the parties on 1 April 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case by a claim form submitted to the Tribunal on 19 November 2018 the claimant has brought claims of unfair dismissal , and for unpaid holiday pay or arrears of pay. The claims arise out of the employment of the claimant by the respondent from 2015 until his dismissal on 18 October 2018 when he was dismissed without notice on the grounds of misconduct. The respondent admits the dismissal , but contends that it was for the potentially fair reason of conduct , and that it was fair in all the circumstances and further, has answered the other claims by saying that the claimant is not owed any sums, if anything, he owes the respondent in respect of overpayments made to him.

2. The Tribunal , when the claim was first made , issued on 26 November 2018 a Notice of Hearing setting up this hearing date , and also setting out a number of Case Management Orders. The claimant has not complied with those orders , and indeed at the outset of this hearing the respondent had previously made , and maintained , an application that the claims should be struck out for failing to comply with those orders. The claimant explained why he had failed to do so , however ,

and the Tribunal took the view that , with a bit of time , and preparation of a witness statement which he has been able to do during the course of today, it would be inappropriate to strike out his claims, particularly given that he was not seeking any loss of earnings. So in relation to a Schedule of Loss and documents relating to subsequent unemployment , those were not necessary and so all that was really missing from him was a witness statement , which he was able to attend to.

3. On that basis the Tribunal did not strike out his claims but has proceeded to hear them and in doing so it has heard evidence from Mrs Davies, who was the Investigating Officer, Mr Palmer who was the Dismissing Officer and Ms Murray who was an HR Assistant for the respondents . The claimant has given evidence himself. The respondents have produced a bundle which has been used by the Tribunal which contains those witness statements , and indeed all other relevant documents in the case.

4. In terms of the facts found they are as follows.

4.1 The respondent company is one that is owned by Stockport Borough Council, and is used by that organisation to carry out various functions such as street cleaning, parks and gardens, refuse collection and things of that nature. The company has in the past been in the habit of providing mobile phones to some of its operatives, but that has been on a limited basis . This originally was on a day to day basis , with what has been termed “fixed” use whereby only certain pre-programmed numbers could be used , and other use was not provided. That however changed and had certainly changed by September of last year, precisely when is unclear but the respondents have given evidence that that was indeed changed, possibly as long as two years ago.

4.2 Be that as it may, certainly by September 2018 mobile phones provided by the respondent to operatives could be, and indeed were, used to dial any number, and the matters giving rise to these claims started on 3 September 018 or thereabouts when one Daniel Murray who was employed in the Greenspace area of the business lost his company mobile phone. He reported it on or about that date, but no action was taken to disable the phone or cancel it in any way , which is why the sim card that was in it remained active and could subsequently be used. It is accepted by the respondents that that was an error on someone’s part , and that somebody in Greenspace should have acted on that report to decommission the phone That was not done , and , consequently, the phone or the sim card could be used.

4.3 So it was that on 4 October 2018 an anonymous report was made which came to Mrs Davies’ attention that the claimant was using a company sim card and indeed the number that was being used was given to her by this anonymous member of staff. Consequently, Mrs Davies who became the Investigating Officer looked into the matter and made enquiries with Greenspace about this phone. She discovered that it had in fact been reported as lost or missing on or about 3 September 2018. She therefore made further enquiries as to the use that phone, or the sim card, had been put and obtained the necessary print outs for the period from 3 September to the 4 October showing what calls had been made from that sim card, and the subsequent document was produced by her , and is included in the bundle.

4.4 Looking at the various telephone numbers that were dialled from that sim card, her investigation revealed numbers which had links to the claimant, in particular the claimant's father. A telephone number for him was noted because the respondents had that as the claimant's next of kin, and so it was that against that background and having been informed by the anonymous member of staff that the claimant was using this sim card, the investigation then began to reveal other numbers which had connections to the claimant.

4.5 In due course it became apparent that that sim card had been used to make calls to Ryan Stokes and Lee Atkinson, friends and colleagues of the claimant and they indeed were interviewed about that as part of the investigation.

4.6 On 5 October 2018 consequently, the claimant was suspended , and in that suspension discussion (which is not noted specifically, but the claimant accepts) there was discussion about his phones, in fact he had two mobile phones with him at the time and they were discussed between himself and Mrs Davies at that stage. The claimant became a little irate during that meeting , and did leave in a state of irritation but he accepts that he was aware at that time that what he was being suspended for was in relation to the use of mobile phones and the suggestion that he was improperly using a company sim card.

4.7 The investigation continued and consequently Mrs Davies prepared , having interviewed the claimant on 9 October 2018 , a disciplinary statement of case. That interview on 9 October has been noted in both the handwritten form and in typewritten form and the claimant has not disputed the contents of that interview. In the course of that interview Mrs Davies asked the claimant about the use of a company sim card, and went through a number of the telephone numbers that appeared in the print out. She asked him in particular about his father's telephone number appearing in that print out, which the claimant replied to that he had not spoken to his mum or dad for months. He was asked if he could explain why his father's number would be on this print out but he could not explain that, and said he stopped speaking to them around June of 2018. He could not explain why anyone else would call his father , but he said if in effect he had no clue as to why that could be.

4.8 Other connections to him from this print out arose in relation to the Halifax, which is the bank that the claimant used and it was pointed out that there were several calls made to the Halifax from the sim card. There was then a discussion about the phones that the claimant used , and how he had explained that he had difficulty with a service provider , had one phone cut off , and that he was also using a telephone that belonged to his son.

4.9 There was a discussion at some length about the various numbers , and towards the end of the meeting Mrs Davies said to the claimant in terms "so you are denying having any knowledge of these calls to your dad, your bank, Lee or Ryan the two individuals I previously mentioned" to which the claimant said "yes". He said, "I didn't think you could call a mobile from the cab phones" (reference, I think to the fixed sims that used to be in the respondent's phones) and he went on to say that he had tried calling them in the past but they would not work. Basically when asked if he

was denying the knowledge of these calls he answered “yes”. There were further discussions about the various numbers , and how they could be dialled from which phone but the claimant ended with saying that when he left the meeting he would make his own enquiries about how this had come about. It was finally put to him in terms of the numbers would he say it was a coincidence that these numbers had come up on his son’s phone , and he said, “yes it was” and he would be ringing them when he got out of the meeting. He was invited to read through the notes which he did and then signed them.

4.10 In terms of that interview , the essence of it as far as Mrs Davies was concerned , was that the claimant was denying having used the sim card , was not putting forward any other explanation and was not accepting that he had actually used that sim card at all. Consequently, when she prepared her management case, the report that she was then to put forward , she summarised on the second page of that document her findings concluding with this sentence “there are too many coincidences for this not to be a sim used by the claimant”. In her conclusions she referred to the balance of probabilities being that the claimant had used this sim card, and that therefore she recommended that disciplinary action be taken, in fact she recommended that he be summarily dismissed as she considered this to be gross misconduct.

4.11 That report and management statement of case was provided to the claimant, who was then invited to a disciplinary hearing to be held on 18 October 2018 .In the invitation letter that was sent out to him on 10 October 2018 , he was provided with a copy of Mrs Davies’ report and the appendices thereto , and the evidence and information that she had gathered in support of the management case. The letter inviting him to the disciplinary meeting reminded him of his right to be accompanied by a trade union representative or a work colleague and of his right to call witnesses.

4.12 The meeting was then heard on 18 October 2018 by Mr Palmer , and at the outset the claimant was asked if he had anything to say in relation to the process. The management statement of case was presented by Mrs Davies, the claimant did not ask for or have anyone present with him in that meeting.

4.13 In that meeting , which was noted and again has been typed up and is in the bundle , Ms Murray being present from HR, Mrs Davies presented the management case The claimant was asked if he had any questions of it and he had a few, but not very many, and ultimately in terms of what he said in that meeting after the management case was presented he said this:

“I potentially had used it, I wasn’t aware it was stolen, my mate Johnny from Robinsons Brewery said he found it and gave it to me. If process had been followed I wouldn’t be in this position as the sim would have been cut off”.

Then there were further questions put to him about sims being blocked , and his previous experience of work mobiles . Then he was asked specifically by Mrs Davies why he had not mentioned about Johnny , the person that he said had given him the phone at the investigation meeting to which he replied, “that she had not asked him”. She went on to say that the claimant had denied finding the sim and had gone on in the meeting to say he only had the phones that he referred to, one he called his

music phone and his Giffgaff phone , and the other was his son's. She put to him that there was no mention of another sim. He said that he had not found another sim, he had seven or eight sims but he had said that he was between mobile phone numbers.

4.14 When it was discussed further about telephone numbers, he again referred to his friend Johnny , and other friends whose numbers appeared. It was put to him, as the result of the anonymous statement which was at Appendix 10 of the management statement of case , which was indeed a statement from the person who had first alerted Mrs Davies to the claimant using this mobile phone , in which it was said he was bragging about having a work sim that he wanted to know who this witness was. The respondents did not allow him to do so and that witnesses identify has remained anonymous ever since. When asked if he used the sim he said he must have unknowingly or he said he wouldn't have used it if he had known why would he do that if he knew, the meeting then had a break and Mr Palmer considered the position and how to proceed, having had that break he returned into the meeting and announced his decision which was that he was going to dismiss the claimant. In the meeting he said, having heard all the evidence and his mitigation, that the claimant had only admitted using the sim in that meeting and had only said in that meeting how had he allegedly got it, he upheld the recommendation to summary dismiss and went on to deal with outstanding pay matters.

4.15 The claimant did ask as to how he should appeal , and he was given the information but the claimant said he was getting onto ACAS as he had already spoken to them, and indeed he did so because that day he contacted them and it was that day that he embarked on the early conciliation process as one can see from the early conciliation certificate that he obtained. Mr Palmer followed up the meeting however with a letter of the same date, 18 October 2018, in which he set out a summary of the meeting and his findings, he set out on the first page halfway through how the claimant had drawn to his attention that he had used the sim card during the month of September and how he had been given a sim card by his friend Johnny. Neither of which he had disclosed during the investigation meeting, he went on to refer to the claimant's assertion that he wouldn't be in this position if the phone had been cancelled when it was lost and he went on to refer to specific questions that the claimant was asked, firstly did the claimant admit he had used the sim card to which he responded that he had, he was asked why he had not mentioned Johnny in the original investigation to which he responded "I wasn't asked". He was asked why someone would give a statement to say that he was bragging about having a work sim and his response was that he wanted to know who it was and that finally in relation to a number that was dialled over hundred times that this was admitted to be his friend Johnny's number to which he responded, "I just dial the number I don't take any notice of it".

4.16 Those comments were recorded , and then Mr Palmer went on , on the second page, to say how he had considered all the evidence and he upheld the decision . He went on to say that in reaching the decision that he had considered the following points. The first was the claimant had already had a live warning on his file which is right, he had been given a first written warning early in October and that was indeed on his file for a different matter. The second bullet point Mr Palmer made was that at no point during the investigation had the claimant admitted to using the

sim card , and in fact had denied all knowledge why his father's number had been called He also denied all knowledge of the numbers that were repeatedly called and that he did not offer any information that he had been given a sim card. He also then went on in the next bullet point to mention the witness statements from those members of staff who had been interviewed and the one who had overheard the claimant apparently bragging about his possession of the sim card. The next bullet point referred to the claimant's account of events, and how , during the investigation he had not offered any explanation that he was the person using the sim card , and had waited until the disciplinary hearing before admitting that he had done so. The final bullet point that Mr Palmer raised is this, he said as follows:

"I have strong doubts on your last minute version of events in that you had been given the card by a friend who found it outside Robinson's Brewery and I don't believe this to be a creditable (sic) account"

So those were the reasons Mr Palmer gave for reaching his conclusions , and he reminded the claimant of his right to appeal against that decision.

4.17 That was Mr Palmer's evidence. Additionally the Tribunal heard from Ms Murray , but her evidence was more directed at the remaining issues in relation to the claimant's claims for holiday pay or arrears of wages and she took the Tribunal and the claimant through the calculation and the documents at the back of the bundle which showed the claimant's accrued , but untaken holiday entitlement at the date of termination as 38.85 hours. She went on to explain how the pay system, which operates two weeks in arrears and two weeks in advance operated in the claimant's case to overpay him at the date of his termination so that although he was in fact owed potentially 38.85 hours of holiday pay that amount was less than the amount by which he was overpaid by operation of that payment in advance system, which is why there is in fact a balance , the respondents say, due to the other way of some £170.34 which they had written to the claimant about.

4.18 She explained in her evidence how those calculations were made , which the claimant in fact accepted and indicated that he would withdraw that part of his claims but the Tribunal has considered them in any event , and will not just act on his withdrawal , but will actually make a finding in relation to those claims.

5. That is the respondent's evidence in essence. The claimant's evidence, in addition to the brief witness statement he was able to make today , elaborated upon that and he was cross examined by Mr Palmer, and asked questions by the Employment Judge. In terms of the way in which he came about the sim , he confirmed that it was in fact given to him by someone called Johnny Frasier who works at Robinsons. He had not mentioned this in the initial investigation for a number of reasons, he was initially angry after his suspension and as he put it put his head in the sand , and did not start making enquiries about these things , and so did not mention them in the investigation meeting, it was only after that meeting when he began to look into things , and make enquiries that he found out that it was in fact through Johnny that he had acquired this sim card. He also went on to explain something that he had said a number of times in the course of this case , and indeed formed the basis of his claim form , which was that he had issues with the procedure that the respondents had adopted. It became clear in his questioning of

the respondents , and indeed his own evidence that by that “procedure” he was not referring to the respondent’s disciplinary procedure , and the way it was used in his case but rather it was the procedure that should have been followed in relation to the initial loss of the mobile phone. The procedure , which the respondents accept should have been followed, being that , once lost, the phone, or the sim card in it, would be cancelled so that it would not be possible for anybody to use it if they came across it subsequently . It was that “breach of procedure”, as the claimant puts it, that he refers to and has referred to in the course of this case . He has in fact no criticism of the actual procedure followed in terms of his own disciplinary, but in terms of his case , he effectively says he did not know that this was a company sim card, he did not realise that was the case at the time and he did not know where and how he had got it until he made the enquiries before the disciplinary hearing . This is why he mentioned it then and only then for the first time , and that is his explanation for his accounts to the respondents investigation and disciplinary hearings

6. So, in essence that is the evidence before the Tribunal. The Tribunal now has to consider in terms of the unfair dismissal how to approach the matter , and the first thing to make clear to the parties who are not familiar with this perhaps , and certainly not legally represented or experienced in Tribunal matters, is that the Tribunal will not be deciding whether the claimant did or did not commit the act of misconduct in whether he stole or otherwise misused a company sim. That is not the test for unfair dismissal. The test for unfair dismissal is whether, first of all, the claimant was dismissed for a potentially fair reason falling within Section 98 of the Employment Rights Act 1996 and if so, if the respondents establish that reason, the burden being upon them to establish that, and then for the Tribunal to decide whether the dismissal was fair in all the circumstances. In making that assessment the Tribunal does not take its own view, it does not substitute its view for that of the respondents and decide what it would have done in the circumstances, it decides whether the respondent’s decision to dismiss was within the band of reasonable responses open to a respondent in these circumstances.

7. That involves an examination of the process that was followed in terms of was it a reasonable process, and also in a conduct case as to whether or not the respondents had a genuine belief on reasonable grounds after a reasonable investigation in the conduct that is alleged against the employee (the test set out in and applied ever since **British Homes Stores Ltd v Burchell [1980] ICR 303** . If the Tribunal comes to that conclusion , then the next question and the last question would be whether dismissal fell within the band of reasonable responses for the conduct that the respondents believed had happened, but that is not the Tribunal makes it clear, the Tribunal deciding whether the claimant did or did not commit the act of misconduct. there is no reason for the Tribunal to make a finding on that, the simple test is whether the respondents had that reasonable belief , whether dismissal was reasonable in the circumstances, and in terms of the test that is the classic **British Home Stores v Burchell** test the Tribunal has to look at . It has to consider the procedure, which the claimant in fact has no criticism of , and the Tribunal would equally agree as in terms of the process there seems to the Tribunal nothing wrong with it whatsoever in terms of the initial suspension, investigation, compilation of an investigation report, invitation to a disciplinary hearing, provision to the claimant of the evidence that was going to be used against him and an opportunity for him to state his case, both in the investigatory stage and at the

disciplinary hearing stage. Representation or accompaniment by a colleague was offered and declined . So in terms of all the procedural aspects , the claimant makes no criticism of them , but even if he does not the Tribunal of course would still examine them , but the Tribunal agrees that in terms of the procedure there is nothing unreasonable in it.

8. The enquiry now turns now to the investigation and the respondent's belief. Turning that slightly backwards the first question is did the respondents genuinely believe in the conduct , and indeed was that the reason for dismissal. Well in terms of the reason for dismissal, no other reason has been suggested and the Tribunal is quite satisfied that the reason in mind of the respondents was indeed their belief in the misconduct of the claimant, so they have satisfied the Tribunal as to the reason. In terms of the reasonableness and the fairness of the dismissal , one now looks at the investigation. The duty upon an employer in these circumstances is to carry out such investigation as is reasonable in all the circumstances, that will vary . An employer , of course, is not carrying out a criminal investigation and does not have to be satisfied to the criminal burden of proof beyond a reasonable doubt. It cannot ignore the obvious , as it were, when it should make such enquiries as are reasonably necessary to determine the matter and it cannot just turn a blind eye to things that it should enquire into . In terms of the investigation a degree of thoroughness , of course, is needed and the Tribunal has to assess whether the investigation by Mrs Davies satisfied that test.

9. The Tribunal unhesitatingly finds that it did, the investigation was indeed a reasonably thorough one. Having had the initial complaint brought to her she looked into it, made the enquiries of the Greenspace, made the enquiries of the use of the phone, interviewed witnesses and then interviewed the claimant, all of which was perfectly reasonable the Tribunal considers. The claimant did not at the initial stage suggest there was anything more that she should have done. The claimant's own initial interview is one that was carried out entirely fairly and in terms of what the claimant said in that interview, the respondents were entitled to act upon it as we will see they subsequently did. So in terms of the reasonableness of the investigation ,the Tribunal is quite satisfied that the investigation carried out was indeed reasonable.

10. The claimant was provided with the results of it , and then came to the disciplinary hearing. At that point the claimant then raised , the respondents say for the first time and the Tribunal agrees , the provenance of this sim card , and , also the Tribunal accepts for the first time , admitted the use of the sim card. The Tribunal is quite satisfied that Mr Palmer was entitled to take the view having read the transcript of the interview with Mrs Davies , and the claimant's initial responses that the claimant had made in that interview, as indeed Mrs Davies's statement of case makes clear, that he had effectively denied using the sim card. He did not in that initial interview accept that it was him that had been using it, if anything he sought to evade that , and questioned whether or not this was right and suggested various other alternatives, but far from saying "oh yes I recognise these numbers this must have been me, I got it from Johnny" or I can't remember where I got it from but I will look into it", far from that approach the claimant took the opposite approach which was to say "I don't know anything about this, I can't explain why these numbers are being used in connection with this sim card".

11. So that was indeed his initial reaction. When however he came before Mr Palmer in that disciplinary hearing, then for the first time, he mentions Johnny and the phone having been given to him by Johnny, who apparently then later told him that he had found it, that was treated with some scepticism by Mr Palmer as he explains in his outcome letter because it was the first time the claimant had said anything of that nature, and indeed, in terms of whether that was a credible explanation or not, Mr Palmer took into account a number of facts which he set out in his letter, and it is clear to the Tribunal that there is in any event an inherent improbability or unlikelihood in the account that the claimant was giving on that second occasion. That is because, of course, it was asking Mr Palmer to accept that quite coincidentally an acquaintance of the claimant who worked for somewhere else, Robinson's presumably at the brewery, had come by a sim card for a mobile phone which had been lost by a work colleague, or not a direct colleague but another co-worker of the claimant, some three or four weeks previously. No explanation is given as to how that could have come, about but the claimant was effectively inviting Mr Palmer and the respondents to accept what, at the very least, would appear to be an amazing coincidence, because it would of course be highly coincidental that if one employee drops a phone and a friend of another employee happens to find it and then happens also to give it to that employee. That is something that has a degree of unlikeliness about it, but that itself is not sufficient because of course, that is to be contrasted with the claimant's initial account in which he simply tried to deny that he had been using the sim card at all.

12. It may be correct, the Tribunal does not rule it out as something that may never have happened, but in terms of Mr Palmer's position, and as to whether he was entitled within the band of reasonable responses to come to the conclusion that that was something that he could safely reject, the Tribunal considers that it was. He was entitled, given the history of the matter, the investigation by Mrs Davies, the claimant's initial reaction in his first investigation, and the inherent improbability of what he was being told at the eleventh hour, to come to the conclusion that this was not credible.

13. Mr Palmer does not have to be right, he simply has to have reached a reasonable conclusion on the evidence available to him which ultimately came from the claimant. Employers can only act upon what they are told by their employees and if an employee tells them one thing in one meeting, then another thing in another meeting, and does not in the meantime seek to explain or expand upon it, then it is not surprising that an employer says "well, I'm sorry I don't accept that".

14. The Tribunal's task is simply to decide whether or not Mr Palmer was entitled to come to that view, and I find that he was. Whether it was right or not is not a concern of mine, so consequently in terms of the reasonableness of the conclusion that the claimant had indeed been misusing the sim card, whether he stole the phone or not does not greatly matter, it is the use of the sim card that matters. This view is one that Mr Palmer could reasonably come to, and did reasonably come to.

15. That only leaves the question of the sanction of dismissal, and given the nature of the conduct, which is effectively using a company asset for one's personal use, of course the company paying for it, that is serious conduct in any event. Added to that, as an additional fact that the claimant had very recently received a

warning so in terms of his disciplinary record that would not help. Regardless of that it would have been fair the Tribunal considers dismissing for this offence in any event, but given the live warning which had only recently been issued then that rather reinforces the position.

16. Consequently, the Tribunal finds that the claimant was indeed fairly dismissed and his unfair dismissal claim is accordingly dismissed. In relation to the other claims the claimant has virtually accepted, and the Tribunal is now satisfied, even if he was unclear on that, that there is no further sum due to him, Ms Murray's explanation of the payments that were made, and how those exceeded his holiday pay entitlement as set out in the documents, the Tribunal accepts whether withdrawn or not the Tribunal would find that those claims are not made out and consequently they are dismissed as well.

Postscript.

17. Whilst not mentioned in the Tribunal hearing, the Tribunal would add in relation to the claimant's complaints in relation to the procedure followed following the loss of the mobile phone, that the Tribunal does not consider this to be a relevant consideration. As discussed with the claimant, at its highest this is simply an allegation that the failure of the respondents to carry out the appropriate procedures to cancel the sim card simply led to an opportunity for the claimant to continue using it after it had been found. That is not a relevant consideration in whether he was or was not fairly dismissed, and is only relevant to the issue of whether he knew or could reasonably have been believed to have known that the sim card was in fact the property of the respondents. The thrust of the claimant's claim has been that this was some form of "contribution" to his own offence by the respondents which renders his dismissal unfair. The Tribunal does not so agree, and neither did Mr Palmer, whose decision it ultimately was, and with which the Tribunal agrees.

Employment Judge Holmes

Date: 9 April 2019

REASONS SENT TO THE PARTIES ON

25 April 2019

FOR THE TRIBUNAL OFFICE