EMPLOYMENT TRIBUNALS

Claimant: Mr James Watson

Respondent: Steadfast Security Solutions Limited

HELD AT: North Shields **ON:** 3 April 2018

BEFORE: Employment Judge Maidment

REPRESENTATION:

Claimant: In person
Respondent: Mr H Menon, Counsel

JUDGMENT dated 4 April 2018 having been sent to the parties and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. The Claimant's sole complaint is of unfair dismissal. The Respondent contends that the Claimant was dismissed for a reason relating to his conduct.

The evidence

2. The Tribunal had before it an agreed bundle of documents. Having identified the issues with the parties it took time to privately read the witness statements exchanged between the parties and relevant documents referred to. The Tribunal heard firstly on behalf of the Respondent from Mr Bob Hackworth, Contracts Manger, and then from Paul Harbord, Security Director. The Claimant then gave his own evidence.

Facts

3. The Claimant was employed as a security guard at Halls Construction Site in Hartlepool for over two years prior to his dismissal. He commenced his employment with the Respondent on 4 October 2010.

4. The Claimant was responsible for maintaining the security of the fenced site from intruders and for protecting valuable plant and equipment on it. This included dumper trucks, other vehicles and also a power jet wash attached to a water bowser which was easier to move (and therefore more vulnerable to theft) than other equipment.

5. The power wash had previously been stolen from site on 12 June 2017. The security guard on site on that nightshift, Mr Rowley, had carried out his security patrols but had failed to spot that it had gone missing. At the time, it had been situated at the far end of the site, partially obscured behind some heavy machinery. Mr Rowley, who admitted fault in not noticing it was missing, was given a final written warning. The power wash was then moved to a more visible location in the immediate vicinity of the guards' hut.

6. The Claimant had completed an induction checklist on 15 June 2016 and 24 March 2017 both of which referred to him having been shown how to use a 'Diester swipe'. This referred in fact to a fob to be placed on a 'Diester pad' to produce a bleep. This in turn produced an electronic recording to show that the security guard had been at the Diester pad location at the recorded time. Thus, evidence was created that security patrols were being carried out and when.

7. There is some doubt, on the evidence, as to whether or not the fobs were in use prior to the 12 June 2017 theft, but they certainly were shortly afterwards. The Claimant knew he was required to record his patrols using the fobs and knew full well how to do so. This was indeed a most straightforward task. The evidence before the Tribunal is that the Claimant used the fobs, in particular, on the 3 nightshifts he worked prior to 27 August.

8. Early in the morning of 28 August, at 5.01am, the Claimant reported the power wash to have been stolen whilst he was on guard during the nightshift which had commenced at 7pm the previous evening. Mr Hackworth, Contracts Manager, telephoned the Claimant, by now at home, at 10.42am. The Claimant told him that the jet wash had been on site on his previous patrol at 4.30am. A note was kept of this conversation by Mr Hackworth. The Claimant also told Mr Hackworth he did not use the Diester fobs on every patrol. Mr Hackworth told him that 3 Diester points were in place at higher risk areas of the site to record his patrols. The Claimant did not give any explanation for why he had failed to use them.

9. Mr Hackworth then learned from a colleague's viewing of CCTV footage that 2 intruders had entered the site at 12.28am to take the power wash, exiting at 12.34am. The fence at the Diester point referred to as 'fob 1' had been lifted and left at an angle so that it was clearly visible how the intruders had accessed and exited the site. Mr Hackworth could not understand how the Claimant had failed to notice the jet wash missing as it was normally located next to his cabin and he would have passed within 10 yards of it when leaving the cabin to go out on patrol. He saw that the claimant had

completed a 'daily occurrence log' noting at 12.30am, 1.20am, 2.30am, 3.15am and 4.30am that everything was in order. He noted also that the Claimant could have seen the location of fob 1 where the fence was lifted on a CCTV screen in the cabin. The Diester records were reviewed which recorded the Claimant at fob 1 at 8.39pm, fob 2 at 8.43pm and fob 2 again at 9.28pm. There were no other Diester recordings on the Claimant's shift.

10. The Claimant was invited to a disciplinary hearing which took place, following the Respondent's and then the Claimant's request for an alternative date, on 14 September. The Claimant said that he had complied with his duties but when asked why he had failed to notice the fence lifted in the air refused to comment. He asked Mr Hackworth if he could visit the site but Mr Hackworth did not see any purpose in that and the Claimant did not, on the evidence, explain what that might show. The Tribunal rejects the contention that Mr Hackworth repeatedly called the Claimant a liar during the hearing. At no stage does this suggestion appear, for instance, within the Claimant's particulars of claim.

11. Mr Hackworth considered his decision and informed the Claimant of his dismissal for gross misconduct by a letter of 14 September 2017. Mr Hackworth was aware already of the earlier theft in June 2017 but did not see Mr Rowley's case as comparable to the Claimant's as Mr Rowley had carried out his patrols. In contrast, he concluded that the Claimant did not simply fail to observe that a theft had taken place. He concluded that he had inaccurately stated that he had seen the power wash at 4.30am when on patrol in circumstances where the equipment had by then already been missing for 4 hours. The Claimant had therefore failed to notice as missing a key piece of equipment being guarded which was a short distance outside the security cabin. Fundamentally, the lack of Diester recordings after 9.30pm led him to conclude that the Claimant had not undertaken any patrols that night after that time, as was a fundamental responsibility in his job as a security guard.

12. The Claimant appealed against the decision to dismiss him and attended a meeting with Paul Harbord, Security Director, on 25 September. That meeting was brief, as Mr Harbord agreed to visit the site with the Claimant on 2 October together with Halls' site manager, Bill Unsworth. At that point, for the first time, the Claimant referred to and produced a written instruction of Mr Flett of Halls that staff should not go within 10 metres of the sea wall for safety reasons. The Claimant told the Tribunal that Diester fobs 1 and 2 were within such distance, although not fob 3. Mr Flett, however, explained to Mr Harbord that this instruction related to an earlier stage when works were being carried out to replace a metal rail and barrier on the sea wall. That work had been completed some time previously. In any event, Mr Harbord could not understand, if the Claimant felt there to be a conflict in the Diester recording requirements and that instruction, why he had not raised a concern before. He also noted that despite what the Claimant was arguing, he had checked in at fob 1 previously. He upheld the decision to dismiss the Claimant.

Applicable law

13. In a claim of unfair dismissal it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct pursuant to Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the Respondent.

14. If the respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends upon 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*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case".*

15. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

16. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

17. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

18. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to her dismissal – ERA Section 123(6).

19. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal.

20. Applying the relevant legal principles to the facts as found, the Tribunal reaches the following conclusions.

Conclusions

21. The Claimant was dismissed for a reason related to conduct, a potentially fair reason for dismissal. There is no suggestion of any other reason for dismissal by the Claimant or otherwise. The Respondent carried out a reasonable investigation. No additional steps have been pointed to which the Claimant says ought reasonably to have been undertaken. There was no flaw in the disciplinary or appeal process and the Respondent acted in accordance with the ACAS Code of Practice on Disciplinary Procedures.

22. The Respondent believed in the Claimant's misconduct on reasonable grounds. The Claimant was reasonably considered to know all about the requirements to carry out the Diester swipes. He knew how the system worked and was able to complete the swipes. Without those recordings of Diester swipes, there was no evidence that the Claimant had carried out patrols. There was no reason why a security guard would not take a couple of seconds to ensure his patrol was logged on the system. Mr Hackworth was reasonably unaware of any potential safety issue as at the dismissal stage. The Claimant did not raise any instruction to keep away from the sea wall. Mr Harbord was reasonable in rejecting this explanation/justification when raised at the appeal stage, particularly since the Claimant had never raised a concern and there was evidence that he had previously made Diester recordings at fob 1. The Claimant never sought to differentiate how he would perform his duties with reference to high winds or high tides. Before the Tribunal, the Claimant accepted that on 27 August the weather was not adverse and he could not say when it had been high tide or why he had not used the Diester fobs.

23. The surrounding circumstances of the Claimant not noticing the fence lifted, which it was reasonably concluded he would have, had he conducted his patrols, also pointed to the likelihood that the Claimant had not carried out the patrols required of him.

24. It is a fundamental requirement of a security guard that they remain vigilant and carry out patrols of a site they are expected to guard. Dismissal on the basis of a reasonable conclusion that the Claimant had failed to do so falls within a band of reasonable responses. The Claimant was not treated inconsistently when compared to Mr Rowley

as the circumstances were quite different. Mr Rowley had failed to spot a theft but at a time when it was more difficult to notice the missing item and where he had carried out his core contractual duty of observing the site including by a physical patrol of it. The Respondent's reasonable conclusion in respect of the Claimant was that his patrols had not been carried out. The Claimant's claim of unfair dismissal must therefore fail and is dismissed.

Employment Judge Maidment

6 June 2018