



EMPLOYMENT TRIBUNALS

Claimant: Mr A Langerveld

Respondent: Kier Group Limited

Heard at: Welshpool **On:** 4th, 5th and 6th April 2018

Before: Employment Judge Howden-Evans

Representation:

Claimant: In person

Respondent: Mr Campbell, Solicitor

JUDGMENT

JUDGMENT was sent to the parties on 14th April 2018, following the employment judge's decision and oral reasons at the hearing. Mr Langerveld has requested written reasons. The employment judge's reasons for her decision are as follows:

REASONS

The Parties

1. Prior to his dismissal, Mr Langerveld worked as a cleaner at Llandrinod High School working 12 hours each week. Parties agree that he had commenced employment on 28th April 2014; he was employed by Powys County Council at that time; on 11th October 2016 he was TUPE transferred to Kier Group Limited. The effect of the TUPE transfer is that Mr Langerveld has been

continuously employed by Kier Group Limited since 28th April 2014 until his dismissal without notice, for gross misconduct, on 5th April 2017. At the time of his dismissal, Mr Langerveld was aged 33, and had almost 3 years' continuous service with Kier Group Limited.

The issues

2. Mr Langerveld notified ACAS through its Early Conciliation procedures and complied with the requirements of s18A Employment Tribunals Act 1996. By an ET1 claim form presented on 7th July 2017, Mr Langerveld presented a claim for compensation for unfair dismissal and for damages for breach of contract as his contract was terminated without notice.
3. Mr Langerveld asserts he was unfairly dismissed. In particular, he contends:
 - a. His employer should not believe the incident involving hiding the keys to be an act of misconduct.
 - b. The investigation was inadequate:
 - i. Kier should not have accepted Mrs Owen's account of the incident;
 - ii. Kier should have considered evidence from other witnesses; and
 - iii. Kier ought to have paid more attention to Mrs Owens' behaviour and the previous grievances.
 - c. Dismissal was a disproportionate sanction, given Mrs Owens' previous behaviour towards Mr Langerveld and the ongoing difficulty Mr Langerveld experienced in working with Mrs Owens.
4. Kier Group Limited resists this claim in full, contending Mr Langerveld's dismissal was fair and reasonable in all the circumstances. They maintain Mr Langerveld was dismissed for gross misconduct, namely that Mr Langerveld had behaved and acted in an intimidating and threatening manner with a colleague; had broken site security by deliberately hiding keys over the Christmas holiday period and had acted in a manner that could bring Kier into disrepute or cause damage to the relationship between Kier and the school.
5. The matter came before the employment judge for a three-day hearing. Mr Langerveld represented himself; Mr Campbell, solicitor, represented Kier.
6. On day one, for Kier Group Limited, we heard evidence from Mrs Julia Owens (Mr Langerveld's former supervisor who complained about his behaviour). After lunch we started to hear evidence from Mr Chris Richardson (who took the decision to dismiss Mr Langerveld). On the second day, Mr Richardson finished his evidence and we heard evidence from Mr Tully Stott (a former colleague of Mr Langerveld who was called to give evidence on behalf of Mr

Langerveld). After lunch we heard evidence from Mr Anthony Stronghill (who rejected Mr Langerveld's appeal against the decision to dismiss him). Mr Langerveld gave evidence on his own behalf on the final day of the hearing. Each witness had a detailed typed witness statement, which the employment judge read in advance. Each witness gave evidence on oath. With each witness, the employment judge allowed supplemental questions, before the other party questioned the witness. The employment judge then asked questions before allowing the witness's own party the opportunity to ask re-examination questions. The employment judge also had the benefit of an agreed bundle containing approximately 278 pages.

Findings of fact

7. Kier Group Limited has written disciplinary and appeal procedures. Relevant extracts from these documents are:

"C Principles

- (1) *No employee is dismissed for a first breach of discipline except in cases of gross negligence or gross misconduct...*
- (2) *Management will investigate fully to establish the facts of the case before disciplinary action is taken to ensure there is no prejudgment of the issues.*

Gross Misconduct

An act of gross misconduct will usually result in dismissal. Some examples of gross misconduct are listed below but the list should not be regarded as exhaustive:

- *Acts which are hazardous to persons or property*
- *Damage to the reputation of the company*
- *Refusal to carry out reasonable instructions*
- *Fighting, violence including threats bullying or harassment..."*

8. From the evidence I have heard it is clear that Mr Langerveld is a hard-working conscientious cleaner. He and Mr Tully have both explained how Mr Langerveld would routinely work later than contracted to ensure his tasks were completed. In particular, during Autumn 2016, when Kier were short staffed he worked very long hours and went above and beyond to ensure the school was cleaned.
9. Mr Langerveld's enthusiasm to ensure his work was finished, regardless of the time, contrasted with his supervisor, Mrs Owen's enthusiasm to lock up the school on time and sometimes earlier than she ought to be doing. It is quite clear that Mr Langerveld's relationship with his supervisor was hostile

and deteriorated over the years so that by January 2017 they had exhausted all good will. Mrs Owen accepted that she has sworn at Mr Langerveld and there is evidence that she has discussed him in a derogatory manner to other cleaners; he admits he had reached a point of ignoring her instructions. It is fair to say that neither of them respected the other. Mr Langerveld has repeatedly criticised his line manager's work ethic and by all accounts, Mrs Owen was taking far more interest in Mr Langerveld's work than other cleaners. I accept that a good supervisor may ensure her colleagues are not working too late, as they may be concerned about their colleagues' welfare and need to rest. However, I find that Mrs Owen was not hurrying Mr Langerveld to leave out of concern for his wellbeing; rather she wanted to lock up the school and finish her shift and she couldn't do that whilst he was still in the building. Indeed, on occasions, Mrs Owen suggested Mr Langerveld should be locked in and on at least one occasion the alarm was set whilst Mr Langerveld was still in the building.

10. As long ago as November 2015, this difficult working relationship was putting Mr Langerveld under such pressure that he raised a grievance against Mrs Owens. Their then employer, Powys County Council considered the grievance and whilst it was not wholly upheld, David Allen, the investigating manager had concerns about both Mr Langerveld and Mrs Owens's behaviour. For instance, his findings included that Mrs Owens's tone was at times inappropriate and brusque towards Mr Langerveld; Mr Langerveld did not always communicate well with Mrs Owen - there were times he ignored her instructions and walked away; Mrs Owen had spoken to Mr Langerveld's colleagues about him which was "unacceptable"; she had also written "inappropriate" comments next to his name in the signing in book; Mr Langerveld was departing from the work schedule and doing things that were not on the schedule. Mr Allen found that whilst other staff responded well to Mr Langerveld and Mrs Owens as individuals, their working relationship was having a negative impact on the team. He reinforced that Mr Langerveld should only be on site during his contracted hours.
11. Mr Allen concluded that both Mr Langerveld and Mrs Owens played a part in the breakdown of their relationship and that this was not only having an impact on them personally; it was also impacting on their team. This led to him recommending that they urgently undertake a formal mediation with mediators from outside the service.
12. The mediation took place and led to an informal memorandum of understanding dated 5th May 2016 which has been signed by Mr Langerveld. In this memorandum Mr Langerveld's working hours were agreed to be 15.50 to 18.15; Mrs Owens was to make sure that any review of his work would be undertaken in a sensitive and constructive manner without words of undue criticism; Mr Langerveld will follow all reasonable instructions from Mrs Owen and these will be given in a sensitive and constructive manner.

13. Unfortunately, this mediation did not resolve the situation. By 14th July 2016 Mr Holcroft (the HR officer who reviewed the mediation) was reporting *“matters had sunk to a new low”* and that Mr Langerveld had been locked in the Art room and had to leave through the emergency door. Mr Langerveld had been cleaning up the mess caused by a sink collapsing at the time. Mr Holcroft also reports that the language used by Mrs Owens was wholly inappropriate and Mrs Owens admitted calling Mr Langerveld a “gormless tw*t” to his face.
14. Against this backdrop Kier became the new employers when both employees were TUPE transferred in October 2016.
15. Whilst there was a short respite in hostilities, when Mrs Owen broke her ankle and was away from work, upon her return in November 2016 the situation between Mr Langerveld and Mrs Owens was worse than ever. Mr Langerveld was routinely working beyond his hours and Mrs Owens was routinely berating him about working late. On one occasion Mrs Owens turned the lights off before he had the opportunity to sign out and she had locked the key cupboard so that he couldn’t put away his keys for the night. Mrs Owens ended up taking keys home with her.
16. On 24th November 2016 Mr Langerveld submitted a second formal grievance about Mrs Owens behaviour.
17. During the last two working days before the 2016 Christmas holiday a further situation arose with the keys. Prior to the start of Mr Langerveld’s shift, Mrs Owens had locked up particular areas of Mr Langerveld’s part of the school and had taken his keys out of the key cupboard. During the tribunal hearing, her explanation for this action was that she had contract cleaners that would be undertaking a deep clean of certain areas during the holiday, so she didn’t need Mr Langerveld to clean all the areas he would usually clean. Whilst this might have been the reason for her behaviour, the fact she couldn’t explain this to Mr Langerveld at the time demonstrates the state of their relationship – without any explanation she locked up the rooms and took away Mr Langerveld’s keys. When he arrived in school, Mr Langerveld went hunting for and found the additional keys that Mrs Owens had hidden. He used these keys to clean the areas Mrs Owens had locked up. At the end of the final shift before Christmas, Mr Langerveld found himself to be in a predicament; he had the keys but couldn’t return them to the key cupboard as Mrs Owens would know he had used them to clean areas that she had locked up. Mr Langerveld decided to lock himself into the art room and leave through the fire door in the art room. Rather than take the keys home, which he understood to be an act of misconduct he admits he left the keys in the classroom overnight rather than put them back in the cabinet.

18. During the school holiday, the school suffered a flood so emergency contractors were arranged to clean up the damage. On 3rd January 2017, still during the school holiday, Mrs Owens came into school to meet the emergency contractors. She was surprised to find Mr Langerveld was waiting in reception and asked why he was there. Mr Langerveld would not answer, so Mrs Owens phoned her manager Trevor Dougherty. Mr Dougherty spoke to Mr Langerveld on the phone and Mr Langerveld confessed that he had hidden some keys in the art room. Mr Langerveld needed the caretaker to help him access the keys to return them to Mrs Owens. With the help of the caretaker, Mr Langerveld obtained the keys from the art room and gave them back to Mrs Owens
19. Kier investigated Mr Langerveld's second grievance. Kier's letter to Mrs Owens reported that the allegations about her were of a bullying and harassing nature. Mr Langerveld was interviewed as was Mrs Owen. In his letter of 4th Jan 17, Mr Vinen (who investigated the second grievance) found that it was reasonable for Mrs Owens to ask Mr Langerveld to leave on time and that whilst Mrs Owens had locked up Mr Langerveld's area there was no malicious intent, this was because she had reorganised the cleaning schedule as additional cleaners would be working during the recess. Mr Vinen would be speaking to Mrs Owens to remind her not to make comments in the signing-in book. Mr Vinen also wrote to Mr Langerveld reminding him that he should stick to the cleaning schedule and should not work beyond his contracted hours and should not approach teachers in Mrs Owens area offering to clean their rooms.
20. At some point in January 2017 there was the incident in the signing-in room. Mr Langerveld was trying to get Mrs Owens's attention and Mrs Owens ignored him. By his own admission, Mr Langerveld stood in the doorway to the signing-in room preventing Mrs Owens from leaving the room. He admits he made a "uh-uh" gesture by wagging his first finger and he put his foot up to block her exit. Mrs Owens repeatedly asked him to let her past. Shortly after the incident Mrs Owens phoned her line manager Trevor Doughty to complain.
21. On 23rd January 2017, Mr Langerveld was suspended on full pay pending investigation into three allegations, namely that he had:
- a. behaved and acted in an intimidating and threatening manner with a colleague;
 - b. broken site security by deliberately hiding keys over the Christmas holiday period; and
 - c. acted in a manner that could bring Kier into disrepute or cause damage to the relationship between Kier and the school.

22. On 2nd February, David Bell, investigating officer, undertook interviews with Julia Owens and Mr Langerveld. During his meeting, Mr Langerveld admitted hiding the keys in school and admitted standing in the doorway. Mr Langerveld accepted that Mrs Owens could perceive this to be intimidating as someone else was exercising control over her. To his credit, Mr Langerveld honestly admitted that Mrs Owens had asked him to move but he had refused.
23. Mr Bell concluded Mr Langerveld's actions were inappropriate and recommended there be a disciplinary hearing.
24. In meantime, Mr Langerveld had appealed the outcome of the second grievance. His appeal was considered, but the outcome of the grievance was upheld.
25. On 15th March 2017, Mr Langerveld was invited to attend a disciplinary hearing.
26. The disciplinary hearing took place on 28th March 2017 and was conducted by Mr Chris Richardson. Again, at this hearing, Mr Langerveld was completely honest and accepted he had hidden the keys and had deliberately blocked Mrs Owens in the signing-in room.
27. In his letter of 5th April 2017, Mr Richardson explained he had upheld all three allegations (stated in paragraph 21 above) but his reason for dismissal was the severity of the first allegation. He considered the act of blocking Mrs Owens to be an act of gross misconduct for which there was insufficient suitable mitigation. In his evidence during the tribunal hearing, it was clear that Mr Richardson had carefully considered his decision to dismiss Mr Langerveld at length. He was clearly concerned that Mrs Owens brought out the worse in Mr Langerveld (and vice versa) and that Mr Langerveld's action in blocking in Mrs Owens could have been frightening for Mrs Owens.
28. Mr Langerveld appealed the decision to dismiss him. On 10th May 2017, Mr Anthony Stronghill conducted Mr Langerveld's appeal hearing. Mr Stronghill explained he had only read Mr Langerveld's appeal letter, prior to meeting Mr Langerveld. Mr Stronghill used the appeal meeting as an opportunity to discuss fully with Mr Langerveld the objections to the disciplinary process and outcome. Then Mr Stronghill looked at all the documents relating to the disciplinary proceedings and properly investigated Mr Langerveld's concerns before reaching his conclusion.

29. As part of the appeal, Mr Stronghill received a glowing character reference for Mr Langerveld from Ms Snooke who had worked as a cleaner with Mr Langerveld. She praised Mr Langerveld for being *“polite”* and *“making every effort to speak to everybody, he got on with his work and put 110% into it...he was the only one that offered to help me finish my cleaning...he also got told off by [Mrs] Owens for that and told he wasn’t allowed to.”*
30. By letter dated 24th May 2017, Mr Stronghill explained his decision to uphold the decision to dismiss Mr Langerveld. He had accepted the background with Mrs Owens provided a context to the incidents, but ultimately found that the decision to dismiss was correct. In evidence, Mr Stronghill explained he found the incident with Mrs Owens to be very serious misconduct as she was a lone woman and it must have been frightening being blocked in by a man.

The law

Unfair dismissal (liability)

31. In an unfair dismissal case, the employer bears the burden of proving, on a balance of probabilities, that the employee was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). In this case, Kier states that Mr Langerveld was dismissed by reason of misconduct. If the employer persuades me that the employee was dismissed for a potentially fair reason, I must go on to consider the general reasonableness of the dismissal under Section 98(4) ERA.
32. 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 employer's size and administrative resources) the employer acted reasonably or unreasonably in treating this misconduct as a sufficient reason for dismissing the employee. There is a neutral burden of proof for s98(4).
33. The well-known decision of the Employment Appeal Tribunal in *British Home Stores Limited v. Burchell* [1980] ICR 303 gives guidance on these matters. All the ‘limbs’ of the Burchell test are in dispute in this case: the genuineness of the employer’s belief; whether there was a reasonable basis for that belief; and the reasonableness of their investigation. However, the Burchell test is not exhaustive of my inquiries under Section 98(4) ERA. The main point of reference should always be the wording of Section 98(4) ERA itself.
34. I must not put myself in the position of the employer and assess the reasonableness of their actions by what I would have done in the circumstances. It is not for me to weigh up the evidence that was before the employer at the time of its decision-making and substitute my own conclusions as if I was personally conducting the investigation. Employers

have at their disposal a range of reasonable responses to the alleged misconduct of an employee. I must ask myself whether, in the circumstances, this employer's decision to dismiss this employee fell within that range of responses. Further, when I consider the reasonableness of the investigation the employer conducted, I must ask myself whether the investigation was within the range of reasonable investigations that an employer might conduct in the circumstances.

Conclusions on liability

35. In my view, it is clear that both Mr Richardson and Mr Stronghill did have a genuine belief that Mr Langerveld had committed three acts of misconduct. In particular they both considered the incident with Mrs Owens to be a serious act of misconduct given that she was female and he was male.
36. From this point onwards, the burden of proof is neutral. I then looked at whether this genuine belief was based upon reasonable grounds and again I agreed that it was.
- a. Mr Langerveld had admitted blocking Mrs Owens into the room and that this might have been intimidating for her.
 - b. Mr Langerveld had admitted hiding the keys.
 - c. They had both Mr Dougherty and Mrs Owens's evidence as well.

So the employer did have a reasonable basis on which to form a genuine belief that Mr Langerveld had committed the misconduct in question.

37. Did the employer carry out a reasonable investigation upon which to sustain that belief? ie was this an investigation that a reasonable employer could regard as being reasonable? Again, I concluded it could - whilst Mr Langerveld has referred to the evidence of the caretaker and the other cleaner, it was reasonable for Kier to not interview these people. Mr Langerveld wanted their evidence to be considered as they would be able to talk about the difficulty Mr Langerveld was experiencing with Mrs Owens. However, they were not witnesses to the actual events (other than the caretaker let Mr Langerveld in to collect the keys). Their evidence would only be further evidence of Mrs Owens's behaviour which in itself does not fully excuse Mr Langerveld's behaviour. In short, the caretaker and other cleaner's evidence could not have any impact on the outcome of the disciplinary proceedings.
38. For the sake of completeness, having considered the three limbs of the *Burchell* test, I considered the specific statutory provision in Section 98(4) ERA as to whether the employer acted reasonably or unreasonably in treating this conduct as a sufficient reason to dismiss. Both Mr Richardson and Mr

Stronghill had the difficult relationship with Mrs Owens in mind, but felt the blocking-in act was so serious that dismissal was appropriate. This is a view that a reasonable employer could reach. Whilst another employer might have decided on a lesser sanction, in the circumstances, dismissal was within the range of responses of a reasonable employer and Mr Langerveld was fairly dismissed.

39. I then went on to consider Mr Langerveld's claim for breach of contract in respect of his notice pay. An employer does not have to give notice or pay notice pay if the employee has broken the employment contract by committing an act of gross misconduct. So I considered whether Mr Langerveld had committed an act of gross misconduct. Here I reached a slightly different conclusion from the employer. Whilst I find that the act of blocking Mrs Owens was an act of gross misconduct I did not consider the act of hiding the keys to be an act of gross misconduct, nor did I find that Mr Langerveld had acted in a manner that could bring Kier into disrepute or cause damage to the relationship between Kier and the school to any great extent.
40. I did not consider the act of hiding the keys to be gross misconduct, as Mrs Owens had previously hidden keys in the school and it had not been viewed as gross misconduct when she did it. When Mr Langerveld hid the keys, he did so as he was placed in an impossible position. He was careful to hide the keys inside the school, so they were locked within the building. He deliberately did not take them home as he was mindful of the school's security. This is to be contrasted with Mrs Owens's behaviour when she had previously deliberately taken school keys home (that should have remained in school) and had previously deliberately hidden keys in school. Mr Langerveld's hiding of the keys was not gross misconduct. I do not accept these actions were likely to bring Kier into disrepute, nor did his hiding the keys cause any damage to the relationship with the school. In theory, a cleaner hiding keys could cause damage to the relationship, but the reality was Mr Langerveld had a very good relationship with the school employees – he would regularly voluntarily clean teachers' classrooms when other cleaners had not been able to do them properly. Against this context, Mr Langerveld hiding the keys on a single occasion was highly unlikely to damage Kier's relationship with the school and would not amount to gross misconduct.
41. I did find that the act of blocking Mrs Owens into a room was an act of gross misconduct. Whilst I accept there was a history of Mr Langerveld being treated inappropriately by Mrs Owens, in this single incident, Mr Langerveld went too far. I understand Mr Langerveld did this, simply to get Mrs Owens's attention – Mrs Owens had been deliberately ignoring him when he was trying to speak to her. If Mr Langerveld had blocked her for an instant and then let her go when she objected it would not have been gross misconduct, but Mr Langerveld blocked her and then realised she wanted to leave and continued

to keep her trapped in the room. I can understand that after years of being powerless and having to endure her behaviour, it was tempting to exercise control over Mrs Owens. However, it went too far and Mr Langerveld appreciates he went too far. Mrs Owens did become scared. It was an act of gross misconduct that broke his contract with Kier and enabled them to dismiss him without notice. I hope Mr Langerveld has learnt from this mistake; it is clear he has lots to offer future employers and away from Mrs Owens, I am sure he will be a hardworking employee, popular and respected by his colleagues.

Employment Judge L Howden-Evans
Dated: 7th July 2018

REASONS SENT TO THE PARTIES ON

.....12 July 2018.....

.....
FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS