THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Anthony Raine**

Respondent: **ISS Facility Services Limited**

Heard at: **Teesside Justice Hearing Centre** **On:** **Wednesday 17th April 2019**

Before: **Employment Judge Speker OBE DL sitting alone**

Representation:

Claimant: **Mr Crammond of Counsel**
Respondent: **Mr Anderson of Counsel**

RESERVED JUDGMENT

1. The claimant was fairly dismissed and accordingly his claim for unfair dismissal is refused.

2. The claimant was dismissed for gross misconduct and accordingly his claim for notice payment is refused.

3. The respondent was entitled to withhold payment of wages for one day during the claimant's suspension but the respondent must pay to the claimant outstanding wages due from the suspension period, amounting to five days pay in the sum of £500.00 the failure to pay having been unauthorised.

REASONS

1. This was a claim for unfair dismissal brought by Anthony Raine against his former employer ISS Facility Services Limited. He also claimed payment for notice on the basis that he challenged the respondent's case that he was dismissed for gross misconduct. He also claimed wages for part of the period during which he was suspended, as part of his wages were withheld during the suspension.

2. A draft list of issues was provided. The respondent's case was heard first as customary in unfair dismissal cases where dismissal is admitted.

3. Two witnesses gave evidence on behalf of the respondent namely Alan Lisle, the respondent's contract manager for the City of Sunderland contract and Gwen MacKenzie Account Manager, responsible for the respondent's sites in Scotland and the north-east of England. The claimant gave evidence himself and on his behalf written statements were tendered from Kay Sandham, formerly support manager for worldline rail operations formerly ATOS based at Equinox House in Darlington, Jason Higgins, formerly employed as security officer at ATOS between January and September 2016 and Gavin Theaker, another former employee of the respondent who had worked at the ATOS building Equinox House. Those three witnesses did not attend to give oral evidence. A bundle of documents and supplemental bundle were provided which ran to 238 pages.

Facts

4. I find the following facts:

4.1 The respondent is a national company providing a range of facilities management services throughout the UK. This includes providing under contracts to various organisations, security services and it was within this sector of the respondent company that the claimant was employed. He commenced working for the respondent as a lone-working security officer from 5th October 2012 at ATOS, Faverdale Industrial Estate, Darlington. The security service was provided pursuant to a contract between the respondent and the City of Sunderland. Another section of the respondent company had a contract to provide other facilities within the same building, but these were managed separately with different line management.

4.2 From the commencement of the claimant's employment until March 2018, the claimant performed his duties to the satisfaction of the respondent with no evidence of any contraventions or the requirement for disciplinary action.

4.3 On 23rd March the claimant was requested to attend an investigation meeting to discuss allegations from events on 14th and 15th March it being alleged he had failed to complete a reasonable request as to operation of the blinds of the first floor of the building during night-shift and also had failed to complete handover sheets from nightshift to dayshift. The investigation meeting was conducted by Alan Lisle, City of Sunderland Contracts Manager as Investigating Officer on 4th April 2018. It was found there was a case to answer. A formal disciplinary hearing was conducted by Tim Atkinson, Area Support Manager North-East on 16th April 2018 and the outcome was that Mr Atkinson imposed a first written warning in accordance with the company's disciplinary procedure and this was to remain on the personnel file for three months. The warning was imposed for not following managerial instructions to complete takeover sheets on a shift by shift basis and the claimant was asked to improve by completing all the required paperwork and generally to complete his duties as laid down in the assignment instructions. The claimant appealed against the warning and his appeal was heard by Gwen MacKenzie. She dismissed the appeal and upheld the written warning because the claimant had accepted he had not followed instructions.

4.4 On 27th April 2018 Gwen MacKenzie issued an e-mail stated to be an attempt to bring into line the service standards across the ATOS portfolio and this was sent to all relevant employees including the claimant. It stated as follows:-

"*The security officer, whether on day or nightshift, must never leave the premises during their shift. We have a service commitment to delivery to 24/7 security to the site and therefore cannot fulfil that if officers are absent from site, no matter how short a time that may be. If there is any case where there is an emergency and you need to be relieved from your duty, then please follow the normal absence reporting procedure by calling COMMS or Tim/myself, so we can make the necessary arrangements. Please do not approach ISS Facilities team directly with a request as it is ourselves who will authorise any officer leaving their post.*

Every time you step away from the desk, this must be noted in the DOB-the time and reason for departure and time of return. This will allow a clear understanding of when we are/are not present at the desk should any incident occur. You will be aware the reasons for leaving the desk would be

- *toilet breaks*
- *humidity checks (eleven o'clock and 14.30)*
- *lunch*

In relation to your lunch break – to allow you a period of time away from the desk, the facilities co-ordinator will take ownership of monitoring the cameras whilst you go for a fifteen-minute lunch break away from the desk. Please take this before 12.00-13.00. As per the two previous points, this cannot be off site and you must advise the FC when you are leaving for your break and when you are returned".

4.5 The above e-mail followed discussions which had taken place between Gwen MacKenzie, Michelle Hussain and Cheryl Stephenson, the facilities personnel on the site and it had been mentioned that the claimant had been known to be leaving the site regularly. Gwen MacKenzie made enquiries and found that of the ten sites for which she had responsibility, no other sites were being left without a security presence in this way.

4.6 On 8th June 2018 Cheryl Stephenson contacted Gwen MacKenzie and informed her that the claimant had gone off site. She asked Gwen MacKenzie not to disclose to the claimant that she had reported this to Gwen MacKenzie, the reason given being that she found the claimant intimidating. Gwen MacKenzie endeavoured to call the claimant on his mobile and when there was no answer she sent him an e-mail indicating that she was aware that he had left the site and asking that he contact her immediately. The absence was between 11.00am and 12 noon. On his return to the site the claimant was informed by Cheryl Stephenson that Gwen MacKenzie was seeking to contact him and this led to a heated discussion between the claimant and Cheryl Stephenson, the former suggesting that Cheryl Stephenson should have "covered" for him and suggested that for example he had only been to the toilet.

4.7 The claimant was suspended from work for having left his place of duty without permission and in relation to his conduct and he was told that during his suspension he must not contact work or any of the fellow employees. Terms of

suspension were confirmed in a letter dated 8th June from Tim Atkinson. During the suspension meeting the claimant stated that he had received permission from Cheryl Stephenson to leave the site in order to go to the shops. Following the suspension letter the claimant did approach Mr R Barwick one of the employees in order to discuss what occurred.

4.8 A second suspension letter was sent by Tim Atkinson on 14th June requesting that the claimant attend a further investigation meeting on Saturday 16th June with Tim Atkinson when the matters were discussed in detail. On 17th June Tim Atkinson wrote to the claimant stating that the outcome of the investigation was that there was a case to answer and the claimant would be invited to a disciplinary hearing. He was provided with details of the findings which referred to a pattern of deliberately failing to adhere to instructions issued to him in writing.

4.9 On 17th June Alan Lisle wrote to the claimant inviting him to a disciplinary hearing to take place on 19th June and with that letter were sent out details of the charges. Enclosed were written and typed notes from 8th June and 16th June as well as relevant e-mails and other correspondence and an e-mail from Cheryl Stephenson. The claimant did not appear on 19th June. His suspension pay was withheld as a result of this pursuant to a clause in the employment contract. The disciplinary meeting was reconvened on 22nd June 2018 by Alan Lisle. The claimant chose not to be accompanied or represented. The decision made was that the claimant had left his place of duty without prior permission and had suggested that Cheryl Stephenson should have lied and covered up for him; that he had failed to devote all of his time to his duties and had left the site unmanned by a professional security officer, that he had been rude to staff namely Cheryl Stephenson and Tim Atkinson and that this conduct was in the context of a written warning having been issued on 18th April 2018, that he had failed to follow instructions including not to contact the site or staff and had displayed an attitude of not complying with instructions. The claimant was informed that he was being dismissed without notice as summary dismissal.

4.10 On 6th July 2018 the claimant indicated by e-mail to Gwen MacKenzie that he wished to appeal his dismissal. An appeal hearing took place on Monday 16th July. The appeal was heard by Gwen MacKenzie. During the hearing the claimant maintained that Cheryl Stephenson had “sorted” the issue of the claimant being allowed to leave the premises for his lunch breaks despite the April e-mail. He also suggested that needing his refreshment break could be described as an emergency. He stated that the written warning he had received was “a bit of joke” and he used obscene language during the appeal hearing. By letter of 21st July Gwen MacKenzie informed the claimant that his appeal had been dismissed and the original decision to dismiss him was upheld. She made specific reference to the wording of her April e-mail, the absence of any approach by the claimant to herself or Tim Atkinson to discuss the matter, his previous warning as to failure to adhere to management instructions and the fact that he had approached the Facilities Co-ordinator even though this was directly in breach of the instruction in the April e-mail.

Submissions

5. On behalf of the claimant, Mr Crammond suggested that the dismissal was unfair. The decision to dismiss the claimant was predetermined and was not justified. There was no gross misconduct. This was the first occasion that the claimant had been taken to task with regard to leaving the site for his lunch. He had been assured by Cheryl Stephenson that she had "sorted" the situation as to taking his lunch break off site and she had given him the impression that in future he could leave with authority from Cheryl Stephenson which had been the position which had been applied during the time when Cheryl Stephenson's predecessor had been the Facilities Manager. The impression from Cheryl Stephenson to the claimant was that she had spoken to the company about the April e-mail and that therefore it was in order for the claimant to leave the site with permission from Cheryl Stephenson.

6. Mr Crammond further submitted that this was not a case of gross misconduct and that accordingly the claimant should not have been dismissed. The respondent should have considered the alternative of a final written warning. He also submitted that the investigation carried out in relation to the alleged misconduct was flawed. The "statement" from Cheryl Stephenson was in e-mail form and was unsigned and not sufficiently detailed. There was no challenge to her version and nothing was put to her arising out of the matters which had been raised by the claimant. Also it was suggested that the investigation was inadequate and flawed because of conflicts in that the persons who were involved had had previous involvement in the hearing of the disciplinary matter which led to the written warning in April and that they therefore had not approached the matter with an open mind. Furthermore Gwen MacKenzie herself was effectively a witness in relation to the claimant having left the site but it was she who heard the appeal. He suggested that the disciplinary process was rushed and the conclusion to be drawn was that this was a pre-determined decision in order to secure the removal of the claimant from his post, because it had been decided that his "face did not fit".

7. On the question of gross misconduct, Mr Crammond pointed to the fact that Mr Lisle stated in evidence that he did not feel that the claimant's conduct was repudiatory and therefore that the claimant should receive his full contractual notice. He also submitted that the decision to withhold the suspension pay was without authority and this should be refunded.

8. Finally Mr Crammond suggested that there was no basis for finding of contributory fault and also that there should be no Polkey reduction because if the disciplinary process had been carried out in a fair manner, the claimant would not have been dismissed.

9. On behalf of the respondent, Mr Anderson submitted that this was a straightforward case of unfair dismissal. He relied upon the test set out in the well-known case of *British Home Stores Limited v Burchell 1980 ICR303EAT*. He submitted that the employer believed that the claimant was guilty of misconduct, that it had reasonable grounds upon which to sustain that belief and it carried out as much investigation into the matter as was reasonable. The e-mail instruction

received by the claimant was unambiguous as to the fact that he should not take his lunch break off site and that he must not approach the Facilities Managers for authority but must go to his line manager namely Gwen MacKenzie or Tim Atkinson for authority. He emphasised that the role of the security officer was very important and assurances given to the contracting parties that there would be a constant security presence. This was also raised in the context of the working time regulations whereby the security industry is an exception when interpreting the periods of rest breaks where a continuous security presence is required.

10. Mr Anderson further submitted that a decision to dismiss was within the band of reasonable responses. It was also submitted that the claimant's continuous failure to ignore firm management instructions was gross misconduct and therefore it was appropriate for summary dismissal and for notice to be withheld.

The Law

11. The relevant law relating to unfair dismissal is as follows:

Employment Rights Act 1996
Section 94 Right not to be unfairly dismissed
Section 95 Circumstances in which an employee is dismissed
Section 98(1) and (2) Potentially fair reason for dismissal
Section 98(4) Statutory tests of unfairness

Working Time Regulations 1998
12 Rest breaks (1) where a worker's daily working time is more than six hours, he is entitled to a rest break
(3) "an interrupted period of not less than twenty minutes and the worker is entitled to spend it away from his workstation if he has one"
21 Other special cases
Subject to regulation 24, regulation 6(1), 6(2) and 6(7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker –
(b) where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons as may be the case for security guards and caretakers or security firms

Findings

12. Under section 98 of the Employment Rights Act 1996, where dismissal is admitted, the first issue for the tribunal is to determine under section 98(1)(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Under section 98 (2) the potentially fair reasons include conduct. It is for the employer to prove the reason for dismissal and the reason stated in this case is conduct. On the basis of the evidence I find that the claimant was dismissed for his conduct. No other plausible explanation was given other than the suggestion made by and on behalf of the claimant that this was a pre-determined decision to

remove him from his post because for some reason "his face did not fit". I found no evidence to support that suggestion and accordingly I find that the claimant was indeed dismissed by reason of his conduct.

13. In conduct dismissals and applying the Burchell test referred to the employer must show that:-

    i) it believed the employee was guilty of misconduct
    ii) it had in mind reasonable grounds upon which to sustain that belief and
    iii) at the stage at which the belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances

    This means that the employer is not required to have conclusive direct proof of the employee's misconduct but have a genuine and reasonable belief which has been reasonably tested.

14. I have in mind other relevant authorities including *W Weddell and Company Limited v Tepper 1980 ICR 286* and *Panama v London Borough of Hackney 2003 IRLR 278CA* as to the application of the appropriate burden of proof, to the effect that only on the first of the three elements of the Burchell test must this be proved by the employer and that as to steps 2 and 3 these are neutral.

15. I find on the basis of the evidence provided that the employer, acting through Alan Lisle as the dismissing officer, believed that the claimant had been guilty of the misconduct specified namely failure to follow specific instructions regarding not leaving the site for his lunch and failure to obtain the appropriate authorisation from the relevant personnel and a pattern of failing to follow instructions. As to the second limb I find that there were reasonable grounds upon which to sustain the belief. The claimant acknowledged that he had left the site on 8th June 2018 and that he did not have authority from the appropriate personnel within the respondent company. The attitude displayed by the claimant with regard to these instructions and others was also relevant in relation to the respondent having reasonable grounds upon which to sustain their belief in the misconduct.

16. As to whether the investigation carried out by the respondent was reasonable in all the circumstances, I find that the investigations carried out by the respondent in this case were reasonable and in compliance with their own procedures. At each stage matters were investigated and the claimant was made aware of the material which had been produced. He was given the opportunity to attend at the investigation stage which was thorough. He was then invited to attend the disciplinary hearing and offered the opportunity of being accompanied which he declined. He was given the opportunity to state his case. He was also given a full appeal hearing, even though his notice of appeal had not set out any details of the aspects of the process which he found to be unfair.

17. Although it was noted that Alan Lisle, Tim Atkinson and Gwen MacKenzie had been involved in the disciplinary processes in April 2018 leading to a written warning were then involved in the disciplinary process in June, I do not find this to be unfair. From the documentation and the evidence it appeared that each

conducted their role in an appropriate manner even though they would have been aware of the history with regard to Mr Raine.

18. On the basis of the findings of misconduct it is appropriate for me to consider whether under the statutory test of unfair dismissal, dismissal fell within the band of the range of reasonable responses open to the respondent in this case. This was the approach approved in the Court of Appeal in *British Leyland UK Limited v Swift 1981 IRLR* which referred to the band of reasonableness within which one employer might reasonably take one view and another quite reasonably take a different view. This test was applied in the case of *Iceland Frozen Foods Limited v Jones 1983 ICR* where Mr Justice Browne-Wilkinson summarised the law and emphasised that the starting point should be the words of section 98(4) and that the tribunal must consider the reasonableness of the employer's conduct and not whether the tribunal itself considers the dismissal is fair. In judging the reasonableness of the employer's conduct the tribunal must not substitute its own decision for what was the right course to adopt for that employer and must remember the issue of the band of reasonable responses. I take into account the judgment in that case, emphasising that the tribunal must determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band it is fair: if the dismissal falls outside the band it is unfair.

19. Applying that approach to this case I find that for the claimant to have been dismissed in all of these circumstances was a decision which a reasonable employer could take. This is in the context of the employer's occupation being in the security industry and the contractual obligation of the company to provide a continuous security presence. It was referred to in evidence that the claimant as security guard would be situated inside the entrance of the building where sensitive material was stored. Any person who was observing the building would be aware of the security officer recognisable by his attire, leaving the building. In the present case the claimant had indicated that he was intending to leave the premises in his car not only to go to purchase his lunch but to attend at a cash dispenser to obtain money. For a security officer to leave a building in these circumstances would entail there being no security presence for the period of his absence. The respondent company was entitled to take this into account with regard to the impact it could have upon the security of the building and upon the company's contractual obligations and its reputation. The conduct of the employee in behaving as he did without authority and specifically contrary to direct and explicit instructions he had received and the attitude that he evinced in relation to these matters when questioned during the disciplinary process, produces a conclusion that dismissal was within the band of reasonable responses. The fact that some employers might have taken a more lenient view and have imposed a final written warning is not the test but it is, as stated, whether dismissal was within the range.

20. As to the claim for wrongful dismissal, this is a separate matter for me to determine whether this was a case of gross misconduct, therefore entitling the respondent to withhold notice payment rather than to dismiss him but pay him for notice to which he was entitled under his contract of employment and under the law. Whilst in

some respects the wording used in the dismissal letter and appeal notification are less explicit than they might be, I find that actions and conduct of the claimant did amount to gross misconduct. This again is in the context of this being a security occupation and the claimant needing to understand how essential it was that he, as the sole security officer on site, fulfilled his and the company's obligations to ensure that there was a constant presence. For him to willingly leave the building for fifteen minutes or longer during the middle of the day, and to fail to appreciate why this was unacceptable, amounts to a flagrant and significant breach of his obligations as an employee. Alongside this is his failure to appreciate this or to show any remorse or to give any assurance that his attitude towards explicit employer instructions in the future would be any different. His conduct was repudiatory. My finding therefore is that this was indeed gross misconduct and the claimant is entitled to no notice.

21. Finally there is the issue with regard to the fact that the claimant during his suspension had his wages stopped for failing to attend at the first disciplinary hearing. Mr Lisle conceded in evidence that the pay should have been withheld only for one day rather than for a period of approximately one week. The relevant provision was in the suspension section of the ISS disciplinary policy at page 63 in the bundle. It is stated that during suspension the claimant will receive full pay unless the terms of the suspension are breached. It is then stated "pay will be withdrawn if the employee fails to attend any meetings with the company". The claimant had failed to attend the first arranged disciplinary meeting and although he suggested there had been some confusion with regard to the date, I find that it was justified for the employer to withhold pay for that day. This was as conceded by Mr Lisle.

22. As to withholding a further pay during suspension because of another breach namely the claimant contacting one of the other employees, I do not find that such withholding was reasonable. Accordingly the claimant should be paid the balance of the pay which was withheld during suspension. The evidence provided to me with regard to the amount wrongfully withheld from the complainant was unclear. It was stated in the schedule of loss at page 30c that the amount was two weeks at £280.00 per week a claim of £576.00. However this should be reduced by one day's pay if indeed that is the correct figure. Doing the best that I can and without adequate documentation, I have made an order that the payment to be made to the claimant is in the sum of £500.00. If it is felt that that figure is inaccurate, then the parties are invited to send in brief submissions to the tribunal within fourteen days of receiving this decision and I will consider whether there should be reconsideration of that part of the judgment.

EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 15 May 2019

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Case Number: 2503187/2018

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2503187/2018**

Name of case(s): **Mr A Raine** v **ISS Facility Services**

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: **16 May 2019**

"the calculation day" is: **17 May 2019**

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

MISS K FEATHERSTONE
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.