EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Lazaros		**MDJ Light Brothers (SP) Ltd**

Heard at: London South Employment Tribunal **On:** 26 September 2019

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:
For the Claimant: In person
For the Respondent: Ms J Patel (Trainee Solicitor)

RESERVED JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed

REASONS

Claim

1. By a claim form presented to the Tribunal on 19 March 2019, the Claimant brings a claim of unfair dismissal against the Respondent.

2. At the commencement of the hearing the Claimant confirmed that there was no claim of wrongful dismissal notwithstanding that he was dismissed without notice.

Law

3. Section 94 of the Employment Rights Act 1996 ("ERA") provides a statutory right not to be unfairly dismissed. Generally, this is subject to a requirement that an employee has two years' service. Section 98 of the ERA provides: -

> ***(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(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.***
>
> ***(2) A reason falls within this subsection if it:***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***

4. Section 98(4) ERA 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 on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

5. The burden of proving the reason for the dismissal is on the Respondent, but beyond that, when looking at the fairness of the dismissal, the burden is neutral.

6. When dealing with a conduct dismissal, it is clear from the case of **British Home Stores v Burchell [1978] IRLR 379 EAT** that it involves a consideration of three aspects of the employer’s conduct:

    a. Did the employer genuinely believe that the employee was guilty of the misconduct complained of?

    b. Did the employer have reasonable grounds for that belief?

    c. Did the employer conduct such investigation into the matter that was reasonable in the circumstances of the case?

7. If the answer to each of those questions is “yes”, that is not the end of the

matter because the Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, and whether the dismissal was procedurally fair. The ACAS Code of Practice on Disciplinary and Grievance Procedures can be relevant to procedural fairness.

8. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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, the dismissal is fair; if the dismissal falls outside the band, it is unfair.

9. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

10. It is also clear that an investigation must be "even-handed" in order to be reasonable. In cases that may result in dismissal, particularly where the employee has been suspended and therefore has no access to witnesses during the investigation, the investigation should not simply be a search for evidence against the employee but should also include evidence that may point towards innocence. On the other hand, it is not necessary for an employer to extensively investigate each line of defence advanced by an employee. What is important is the reasonableness of the investigation as a whole.

11. The Court of Appeal in **London Ambulance NHS Trust v Small [2009] IRLR 563** warned that when determining the issue of liability, the Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the employee's dismissal for misconduct. In **Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82** the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

12. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. Employers must not assume that dismissal will always follow where gross misconduct is alleged, as there may be mitigating factors.

13. Exactly what type of behaviour amounts to gross misconduct will depend on the facts of the individual case. In **Sandwell & West Birmingham**

Hospitals NHS Trust v Westwood UKEAT/0032/09 the EAT summarised the case law on what amounts to gross misconduct and found that it involves either deliberate wrongdoing or gross negligence (paragraph 113). In cases of deliberate wrongdoing, it must amount to wilful repudiation of the express or implied terms of the contract (**Wilson v Racher [1974] ICR 428 (CA)**). It is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract).

14. The ACAS Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal (see para 24). The Code suggests this might include theft or fraud, physical violence, gross negligence or serious insubordination. Although there are some types of misconduct that may be universally seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organization and what it does. A failure to list certain types of behaviour as gross misconduct may mean that the employer cannot rely on them to dismiss summarily.

Hearing

15. The Tribunal was referred to documents in a hearing bundle extending to 179 pages.

16. Witness evidence was provided by the Claimant and, on behalf of the Respondent, Jonathan Light (Managing Director), Joseph Light (Finance Director) and Peter Green (Office Manager).

Findings of fact

17. The Respondent is a waste management and recycling business operating from four different sites. It is a relatively small business with 120 employees. It does employ someone in HR but takes much of its advice on matters such as disciplinary issues through its contract with Peninsula which also represents the Respondent at today's hearing.

18. Until his dismissal, the Claimant was employed as a recycling operative at the Respondent's site on the Cliffe Industrial Estate in Lewes, East Sussex. This particular site dealt with the recycling of computer components.

19. In January 2019 the Respondent received information, from a source wanting to remain anonymous, that components and central processing units (CPUs) were being stolen from the site. CPUs are commonly sold on internet auction sites and can be sold for in excess of £200 each, causing loss to the Respondent

20. The 'tip off' did not name anyone responsible for the thefts and therefore on Thursday 24 January 2019, a search of various areas on site was conducted, including the washrooms, which was also where staff lockers

were located and where employees left their belongings whilst working, such as coats. During the search of the washroom the Respondent found an item of property, belonging to the Respondent, which should not have been there. They believed that limited surveillance of that area would provide more information on who had placed the property there and for this reason they installed CCTV that was directed on the lockers and cloakroom area.

21. The CCTV was installed in the washrooms on 26 January 2019. Whilst employees were aware of the presence of CCTV onsite, they were not informed of the new installation. At the end of Monday 28 January 2019, a search was undertaken of the washroom/cloakroom and two CPUs were found in the pocket of a jacket hanging up on a coat stand. It was not known who this coat belonged to. The search was undertaken by Mr Green and a colleague. Mr Green reviewed the CCTV and the only two people seen near the jacket with the stolen CPUs was the Claimant and a colleague, Danny Alkins.

22. Mr Green decided to leave the CCTV installed for a further day – on Tuesday 29 January 2019. On Tuesday, when the same coat was inspected, a total of 5 CPUs were found, to include the two from the previous day that Mr Green had decided to leave there. When Mr Green reviewed the CCTV on Tuesday, he said that he saw the Claimant going near the coat (where they found the CPUs) and placing something in the pocket. As the Claimant and his colleague, Mr Alkins, were the only employees that went near the coat, they were both suspended on suspicion of theft and invited to investigatory interviews.

23. At the investigatory interview the Claimant was interviewed by Mr Green who informed the Claimant that CCTV had been installed in the washroom/cloakroom and the Claimant was informed what had been seen. The Claimant was not at that point during this meeting shown any CCTV footage or given any stills.

24. On 31 January 2019 the Respondent wrote to the Claimant inviting him to a disciplinary hearing to answer an allegation of theft of CPUs. The letter stated that if the allegations were substantiated that they would be regarded as gross misconduct and that the Claimant's employment could be terminated without notice. Enclosed with the letter was a copy of the minutes from the investigatory interview with Mr Green and three still photographs. All three show the Claimant near the jacket where the CPUs and two of them show the Claimant touching the jacket.

25. On 4 February 2019 the Claimant attended a disciplinary hearing that was chaired by Mr Jonathan Light. The Claimant chose not to be accompanied to this hearing. Mr Light explained the process and asked the Claimant to provide his comments and version of events in answer to the allegations of theft. The Claimant responded by saying that he had said everything he needed to, which Mr Light interpreted to mean that he had said everything

he needed at the investigatory meeting. Mr Light felt it important to obtain the Claimant's response and proceeded to show the Claimant the stills and proposed that they watch the CCTV footage together. However the Claimant refused to do so. They did however review the stills which in Mr Lights view showed the Claimant placing items in to the pocket of the jacket where the CPUs were discovered.

26. Following the hearing, Mr Light reviewed all of the evidence and considered that on the basis of the evidence, including the Claimant's response, that he was responsible for the attempted theft of the CPUs. Mr Light considered the matter so serious that he decided to dismiss the Claimant with immediate effect for gross misconduct. In parallel proceedings, Mr Light also dismissed Mr Alkins.

27. On 12 February 2019 the Claimant appealed against his dismissal. He relied on two grounds: firstly that he was not provided with the CCTV evidence before the disciplinary hearing; secondly that he was informed that Mr Light (a director) would not be involved in the decision making process.

28. The Claimant's appeal was heard by Mr Joseph Light at a hearing on 21 February 2019. Mr Light explained that the company had not sent the Claimant the CCTV evidence prior to the disciplinary hearing because the company had been advised not to for data protection/GDPR reasons. During the appeal hearing the Claimant did watch the CCTV evidence and admitted going into the jacket pocket, albeit he had denied doing this when he was interviewed by Mr Green as part of the investigation. In addition, the Claimant did not deny the allegations during the appeal; he simply questioned whether the evidence was strong enough to prove that he did it.

29. In relation to who the decision maker would be, the Tribunal finds that there had been some confusion about this on the Claimant's part.

30. By letter dated 25 February 2019 the Claimant's dismissal was upheld by Mr Light.

Analysis and Conclusions

31. The Tribunal concludes that the Respondent genuinely believed that the Claimant was responsible for attempting to steal CPUs from his place of work and dismissed him for this reason. The Tribunal concludes therefore that the Respondent has proved the reason for dismissal falls within one of those reasons set out under s.98(2) ERA.

32. The Tribunal concludes that the second and third limb of the Burchell is satisfied in that the Respondent's belief was based on reasonable grounds and after having conducted a reasonable investigation. The only challenge to the investigation by the Claimant was why the Respondent had not questioned others who had come in to the washroom but the Tribunal finds the reason the Respondent did not do so was because they did not go near

the jackets. The Tribunal finds this explanation to be perfectly reasonable and within the band of reasonable responses.

33. In terms of procedural failings, the only procedural defect identified by the Claimant was that the Respondent did not send a copy of the CCTV evidence prior to the disciplinary hearing. The Tribunal accepts the reasons for not sending the CCTV evidence fell within a band of reasonable responses. In any event the Claimant was given the opportunity to look at the CCTV evidence during the disciplinary hearing and failed to do so. It seemed that during questioning of the Claimant at the hearing that his complaint was that the Respondent sought to rely on, and wanted to show the Claimant, the CCTV evidence during the hearing and that if they had not done so, he would have had no complaint.

34. Mr Jonathan Light, who conducted the disciplinary hearing, accepted that the Claimant could have viewed the CCTV and sought an adjournment of the disciplinary hearing if he wanted to. However the Claimant chose not to do so. To the extent their was any unfairness, the Tribunal concludes that the appeal corrected this because the Claimant was shown the CCTV evidence during the appeal hearing and the appeal officer decided to uphold the appeal.

35. The Tribunal concludes that dismissal as a response fell well within the band of reasonable responses open to an employer in these circumstances given the gravity of the allegations the Claimant faced. Gross misconduct is listed as an example of conduct for which the Respondent could dismiss with immediate effect and the Tribunal concludes that it was reasonable for the Respondent to do so.

36. In all the circumstances and for the above reasons the Tribunal concludes that the complaint of unfair dismissal is not well founded and is dismissed.

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Employment Judge Hyams-Parish
4 October 2019

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