IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No: 4110206/2019 Heard at Edinburgh on 4th December 2019

Employment Judge J G d'Inverno

Mr C Graham	**Claimant** **Appearing in person**
ICTS (UK) Ltd	**Respondent** **Represented by** **Mr W Laing, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

(First) That the respondent's decision to dismiss the claimant for reason of conduct, effective as at 15th May 2019 by payment of two weeks' pay in lieu of notice, fell within the band of reasonable responses available to a reasonable employer in the circumstances; and that the dismissal falls to be regarded as fair, in terms of section 98(4) of the Employment Rights Act 1996.

(Second) The claimant's complaint of unfair dismissal fails and is dismissed.

(Third) The claimant's complaint of unauthorised deduction from wages is not made out and is dismissed.

REASONS

1. The issues for determination in this case were:

   (First) Whether the respondent's admitted dismissal of the claimant, effective as at the 15th of May 2019 through the mechanism of two weeks' pay in lieu of notice and for the accepted reason of conduct, which is a potentially fair reason, fell to be regarded as fair, in terms of section 98(4) of the Employment Rights Act 1996 or alternatively, as substantively and or procedurally unfair; and

   (Second) Whether the respondent had made unspecified unauthorised deduction from the claimant's wages at or about the Effective Date of Termination of his employment.

2. The claimant appeared on his own behalf. The respondent company was represented by Mr Laing, Solicitor.

Oral Evidence

3. The Tribunal heard evidence on affirmation from Mr Scott Hansen, the Internal Appeal Manager (the Dismissing Officer Mr Dickson having been TUPE transferred to the employment of another company following the loss, by the respondent, of the contract to provide security at the site on which the claimant had previously been employed.)

4. The claimant gave evidence on oath on his own behalf. At the outset of the Hearing the claimant confirmed that he sought re-engagement which failing re-

employment by the respondents by way of remedy with compensation only in the alternative.

Documentary Evidence

5. The respondent lodged a Bundle of Documents extending to some 65 pages and to the majority of which reference was made in the course of the hearing of evidence and or submission. The claimant did not lodge any documents but took no objection to and for his part relied upon, the documents produced by the respondent.

Findings in Fact

6. On the oral and documentary evidence presented, the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the determination of the issues before it.

7. The respondent company is engaged in the business of provision of security services and solutions at various locations throughout the United Kingdom. One of the respondent's major contracts is with a third party, Amazon, to whom it provides security services at a large number of locations throughout the United Kingdom.

8. The claimant was employed by the respondents as a security guard to provide security services at the Amazon site in Fife, Scotland (site ED14). The claimant was employed from 21st October 2016 until 15th May 2019 on which latter date he was dismissed with payment of two weeks' pay in lieu of notice.

9. The Effective Date of Termination of the claimant's employment was 15th May 2019.

10. On 23rd January 2019 the claimant was invited to attend an investigation meeting following an informal complaint from an employee of a third party contractor that the claimant had called an Asian work colleague and fellow employee of the

respondent a "fucking monkey" in a public area of the Amazon warehouse and in the presence of the third party contractor's employee.

11. The claimant admitted to the conduct and was invited to a disciplinary meeting which proceeded on 31st January 2019. In the course of the disciplinary meeting the claimant again admitted using the language of which he was accused but sought to justify the same by stating that it was purely "banter", a position supported, on that occasion, by the Asian colleague to whom the description "fucking monkey" had been addressed. The Disciplining Officer, accepting that explanation, in the context of the colleague's confirmation, as being to a degree mitigating, found established a charge of serious misconduct, the same being conduct which was potentially racially abusive and discriminatory and which had the potential to bring the respondent's organisation into serious disrepute, in breach of section 4 of the respondent's Employee Handbook.

12. At the outset of his employment the claimant had acknowledged receipt of a copy of the Employee Handbook.

13. On 8th February 2019 the claimant was issued the first and final written warning, to be placed in his personnel file for 12 months. The warning letter reiterated that there should be no repeat of similar conduct within the workplace or of any conduct affecting the professional image of the company and that were any such conduct to occur within the 12 month period, the same would entitle the respondent to take further action against the claimant being action which could result in his dismissal.

14. On 15th February 2019 the claimant exercised a right of appeal against the imposition of the sanction of the written warning on the grounds that a complaint from a third party had not been disclosed to him and that after the disciplinary meeting he had not received a copy of the Minute of the meeting.

15. On 20th February 2019 the Internal Appeal Officer, having heard the appeal, upheld the Disciplining Officer's decision to issue a first and final written warning.

16. On 27th April 2019, a date falling within the 12 month warning period, the respondent received a letter of complaint from a cleaner employed by a third party contractor. The complaint narrated that the claimant had told a colleague, subsequently identified as the same Asian colleague whom he had previously described as a "fucking monkey", to "fuck off" in the presence of the third party's employee. A further investigation was conducted during which the claimant, while admitting to using the phrase "fuck off", denied that he had said anything beyond that which might be characterised as racial. He specifically denied any suggestion that on that second occasion he had used the phrase "monkey bastard" or "black bastard".

17. At or shortly after the time of the second incident, the claimant's Asian colleague to whom the remarks were addressed told the claimant that he intended to report him. The claimant, desiring, as he put it "to get in first", himself advised his Managers of the occurrence of an incident between himself and his colleague and stated that he anticipated that his colleague intended to make a report or complaint about the incident but in so doing to exaggerate or to be untruthful about what the claimant had actually said. He asked the 3rd party employee to provide a statement to the respondent recounting what he had witnessed. The witness did so in a letter of complaint dated 27th April which is produced at page 42 of the Bundle.

18. At the conclusion of the investigation the Investigating Officer considered that there was a disciplinary case to answer.

19. On the 15th of May 2019 the claimant was invited to a Disciplinary Hearing to answer a charge of serious misconduct and was informed, in light of the live warning still present on his file, that his employment could be terminated in accordance with the company's disciplinary procedure.

20. During the Disciplinary Hearing the claimant confirmed that he had used the phrase "fuck off" to his Asian colleague, Mr Abdelmajed Omer, but went on to say that many colleagues regularly engaged in banter which occasionally consisted of

swearing of that sort. The respondents' Disciplining Officer considered that explanation to be unsatisfactory in the context of the claimant having been disciplined for similar conduct only some three months earlier and of the existence, on the claimant's file, of a live final written warning.

The Dismissal

21. Having given consideration to the matters before him, including the claimant's explanation, the Dismissing Officer concluded that the claimant was guilty of the serious misconduct of using unprofessional language, the phrase "fuck off" towards a colleague in the work place being language which, used in the presence of a third party employee, had the potential to bring the respondents into disrepute.

22. Having given consideration to the appropriate sanction and in light of the live first and final warning, the Dismissing Officer determined, in the circumstances, to dismiss the claimant with notice. He did so by letter dated 15th May 2019 in which he communicated the outcome of the Disciplinary Hearing.

23. On 28th May 2019, the claimant appealed the decision to dismiss him on the basis that, although he accepted that he had used inappropriate language, this was common amongst his colleagues.

24. The claimant was invited to attend a disciplinary appeal meeting which proceeded on the 6th of June 2019 before Mr Scott Hansen who also gave evidence before the Tribunal. The grounds upon which the claimant appealed his decision were:-

- That whereas he believed he was being investigated in respect of his having allegedly made a racial comment in fact it transpired that he was ultimately disciplined for having (only sworn at another colleague)

- That while he accepted that he had used the phrase "fuck off" the phrase wasn't intended to give offence or to communicate any threat

- In the past he had witnessed other work colleagues and even members of the respondent's management team using phrases such as "fuck off" to other work colleagues albeit in a humourous manner and that they had not been reprimanded for this

- That the final written warning had been inappropriately taken account of by the respondents because it was in respect of his having used potentially racial language and behaviour, as opposed to simply foul language which was all that he had been guilty of on the second occasion.

- That insufficient weight had been applied by the Dismissing Officer to his potential commercial value/usefulness as an employee to the respondent and that effectively they had made him the subject of a "witch hunt" because of what was an anticipated TUPE transfer and loss of the contract

25. Having given consideration to the matters raised at appeal the Internal Appeal Officer Mr Scott Hansen wrote to the claimant on 10th June 2019. In that letter he advised the claimant that he had upheld the decision to dismiss him while also setting out his reasons for doing so. The reason communicated in the letter of 10th June were:-

    (a) That the claimant had admitted to using inappropriate language towards a colleague while on duty at ED14 on 27th April 2019 which incident followed upon a final warning, still live on his file, which was issued on the 11th of February 2019.

    (b) He concluded that the claimant had not learned from the first incident or alternatively had wilfully chosen to ignore the written warning he had been given in February.

    (c) On either view he considered that this demonstrated a pattern in the claimant's behaviour which was unacceptable in the workplace.

(d) He noted that the claimant had admitted making an inappropriate remark to a colleague in a public area which was overheard by a third party.

(e) He considered that the claimant's pattern of behaviour was such that he now represented a real risk to himself and to the reputation of the company.

(f) He concluded that the claimant, either in his grounds of appeal or at the Hearing, had failed to advance or set forth any reason upon which he could properly uphold his appeal and he confirmed the sanction of dismissal.

26. Following his dismissal the claimant obtained alternative employment on or about the 8th of July 2019, the same being a zero hours contract as had been his contract with the respondent company. With the respondent company he had been paid at an hourly rate of £8.40 whereas in his new employment he was paid at a rate of £8.35 per hour. In his employment with the respondent he was offered regular shifts. In his employment in his new job he was offered intermittent shifts and was only really called upon if other members of the work force to whom work was first allocated, did not turn up to work a shift.

27. The claimant submitted in evidence that he had attempted and continued to attempt to find alternative employment which would remunerate him at the same level as he had had with the respondents but, thus far, had been unable to secure such employment.

28. The claimant had in fact at the outset of his employment acknowledged receipt of a copy of the company Handbook which included the disciplinary procedures, the claimant, in the course of the Hearing acknowledging that the signature appearing on an electronically exhibited receipt form was indeed his own in that regard. Further, the Internal Appeal Officer, in recognition of what the claimant had

asserted in those regards had, in advance of the Appeal Hearing furnished him with a further copy of the disciplinary procedure and had sent to him the Minutes of the Disciplinary Hearing. Let it be assumed that unfairness had in fact resulted from either the accepted admission in relation to the Minutes or the asserted omission in relation to the disciplinary procedure, any such unfairness had been remedied in advance of and in the course of the internal appeal process.

Submissions for the Respondent

29. Under reference to the relevant statutory provisions and the case authorities set out at paragraph (36) below the respondent's representative submitted, on the oral and documentary evidence presented, that the Tribunal should hold:-

    (a) That the claimant had been dismissed for the potentially fair reason of conduct

    (b) That at the points of imposition of the sanction of the first and final written warning and subsequently of the sanction of dismissal, both the Disciplining and Internal Appeal Officers had entertained a genuine belief that the claimant had conducted himself as accused

    (c) That at the time of holding that belief they each had reasonable grounds upon which to hold it, not least the claimant's admissions

    (d) That at the point of forming that belief the respondent had conducted what was in the circumstances a sufficient and reasonable investigation. And that accordingly

    (e) the principles and the test set out in the case of **British Home Stores Limited v Burchell** were applicable and had been met.

30. Under reference to the case of **Iceland Frozen Foods Limited v Jones**, the respondent's representative submitted that the decision to dismiss was one which

fell within the band of reasonable responses available to a reasonable employer in the circumstances, viz;-

(a) The claimant's first and final written warning dated 8th February 2019 was live at the time of the commission of the second offence

(b) The content of the first and final written warning had clearly put the claimant on specific notice that further misconduct could result in his dismissal

31. Under reference to **Davies v Sandwell MBC** [2013] EWCA Civ 135, he went on to submit that it was legitimate for an employer to rely upon a final written warning which had been issued in good faith in circumstances where there were *prima facie* grounds for imposing it and it was not manifestly inappropriate. In his submission all of those qualifications were met in the case of the final written warning issued to the claimant and Mr Laing further submitted that there was no requirement that the Tribunal look behind the written warning but rather, need only take note of its terms.

Procedural Fairness

32. Regarding procedural fairness the respondent's representative submitted that the respondent could be seen, on the evidence to have operated a fair procedure in keeping with the ACAS Code. Specifically the respondent had:-

- Carried out an investigation to establish the facts of the case;
- Had given the claimant advance notice of the allegations against him;
- Had held a disciplinary meeting at which the claimant was allowed to be accompanied;

- Had advised the claimant of its decision in writing; and

- Had provided the claimant with an opportunity to appeal

33. Regarding the issue of consistency, under reference to **Hadjioannou** Mr Laing submitted that a lack of consistency could only render a dismissal unfair in the following specific circumstances:-

    - Where the employer had previously treated similar matters less seriously, so that employees had been led to believe that such conduct will be condoned;

    - Where the employer had previously treated similar matters less seriously, so that it can be inferred that the employer's asserted reason for dismissal is not the real reason; and

    - Where employees in "*truly parallel circumstances*" arising from the same incident are treated differently

34. In his submission, and again based upon the evidence presented, none of the exceptions above applied in the instant case. The respondent's representative concluded by inviting the Tribunal to dismiss the unlawful deductions claim as misconceived and not made out and to dismiss the complaint of unfair dismissal. In the alternative, let it be assumed that the Tribunal determined that the dismissal was substantively unfair, he invited it to hold that the claimant had materially contributed to his dismissal by his culpable conduct to that 100% apportionment.

35. Further in the alternative, let it be assumed that the Tribunal were to hold that the dismissal had been procedurally unfair then, under reference to **Polkey v A E Dayton Services Limited** [1987] ICR 142, the respondent's representative submitted that the claimant would have been in any event dismissed had a different procedure been followed and that any award should be reduced to reflect that fact pursuant to **Polkey**.

36. In relation to the remedy of re-engagement/reinstatement the respondent's representative submitted that the same was no longer practicable or possible standing the fact that the respondent, having lost the contract for the provision of security services to EDI14, the claimant's former work colleagues had been TUPEd across to the new contract holder who now supplied the security services at that site.

Submission for the Claimant

37. In submission, Mr Graham focused on the fact that although accepting that he had not raised it at the Disciplinary Hearing, in the internal Appeal Hearing he had pointed out to the Appeal Officer that the Disciplining Officer had sworn in the course of the Disciplinary Hearing. His submission was to the effect that the Disciplining Officer had no business dismissing him for swearing in circumstances where he himself swore. He separately submitted that the swearing was a common part of the language used between many employees in the particular workplace and it was unfair that he should be disciplined for it when other people weren't. He did not identify any other instances of complaints for swearing which he asserted the respondents had failed to investigate.

38. He submitted, in relation to the incident that ultimately led to his dismissal, that he himself had asked the cleaner Mr Walsh to write to the respondents' Managers stating what he had heard the claimant say to his colleague on that occasion. He explained that his motive in doing so had been to "get in first" and alert the respondents to the likelihood, in his view, that his colleague would lie in the course of any complaint which he made embellishing or making worse the language which he said the claimant had used. He accepted that the respondents had treated the letter from Mr Walsh as a complaint and had investigated it as such subsequently progressing the matter to a disciplinary hearing in the light of the claimant's existing final written warning.

39. He invited the Tribunal to hold that the dismissal had been unfair. Although he did not expressly say so, it could reasonably be inferred from Mr Graham's submissions that he also took issue with the procedural fairness of the process in that:-

    - he had not been informed initially of the identity of the third party complainer in relation to the incident that had led to the issuing of the final written warning,

    - that in advance of the Disciplinary Hearing in relation to the second incident he had not been provided with a copy (an additional copy of the company's disciplinary procedure) and,

    - that following the Disciplinary Hearing he had not been provided with a copy of the Minutes of the Disciplinary Hearing.

40. The respondents' position in the face of those submissions was:-

    - firstly that the claimant had in fact at the outset of his employment acknowledged receipt of a copy of the company Handbook which included the disciplinary procedures, the claimant, in the course of the Hearing acknowledging that the signature appearing on an electronically exhibited receipt form was indeed his own in that regard.

    - Further, that the Internal Appeal Officer in recognition of what the claimant had asserted in those regards had, in advance of the Appeal Hearing furnished him with a further copy of the disciplinary procedure and had sent to him the Minutes of the Disciplinary Hearing and that thus, while not accepting that any unfairness had in fact resulted from either the accepted admission in relation to the Minutes or the asserted

omission in relation to the disciplinary procedure, any such unfairness had been remedied in advance of and in the course of the internal appeal process.

Applicable Law

The complaint of unauthorised deduction from wages.

41. In terms of section 13 of the Employment Rights Act 1996, and subject to certain defined statutory exceptions, a worker is protected against the making by his employer, of unauthorised deductions from his wages. Upon analysis and as confirmed in submission, the essence of the claimant's complaint was that whereas on the day of his dismissal he had received his full salary for the preceding month's work, he had had to wait for a period of 48 hours before receiving his 14 days' pay in lieu of notice. He accepted however that the respondents had, within 48 hours of what was now treated as the effective date of his dismissal, made payment to him in lieu of the 14 days' notice to which he would otherwise have been entitled to work. The substance of his complaint in this regard, as he saw it, lay not in the fact that the respondents had delayed making that payment for a period of 48 hours but rather that their doing so and opting then to make a second payment to him in the same month in which he was dismissed, had resulted in him having effectively received wages for the whole of that month and, in consequence, he had had to wait until the following month before qualifying for and receiving Universal Credit.

Unfair Dismissal

42. The complaint of unfair dismissal proceeded in terms of section 94 of the Employment Rights Act 1996 (the "ERA").

43. Where there is in issue between the parties as to what was the reason for dismissal, the onus sits with a respondent to establish, on the preponderance of the evidence and on the balance of probabilities, what was the reason, or if more than one the principal reason for their dismissal of a claimant.

44. The claimant contended in the internal proceedings that he had been dismissed by reason of a “witch hunt” because of the impending loss of a contract and TUPE transfer of staff.

45. Where an employee has been dismissed for a potentially fair reason, including that of conduct, the question of whether the dismissal falls to be regarded as fair or unfair is one which is regulated by the terms of section 98(4) of the ERA which is in the following terms:-

> “(4) 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.”

46. On the issue of whether a dismissal is fair or unfair the onus is neutral as between the parties.

47. The following seminal case authority provides relevant guidance to the approach to be taken by Employment Tribunals in determining the issue of fairness in cases of conduct dismissal:-

   1. **British Home Stores Limited v Burchell [1980] ICR 303**
   2. **Iceland Frozen Foods Limited v Jones [1983] ICR 17**
   3. **Davies v Sandwell MBC [2013] EWCA Civ 135**
   4. **Hadjioannou v Coral Casinos Limited [1981] IRLR 352**

Discussion and Disposal

48. I was satisfied on the evidence and arguments presented that the claimant's complaint of unauthorised deduction from wages was ill founded and not made out such consequential loss as could be shown to have resulted from the dismissal falling, in the event of the dismissal being unfair, within the normal compensatory award.

49. On the oral and documentary evidence presented I was satisfied that the respondent had discharged their onus of proof in this regard and had established that the claimant was dismissed for reason of his conduct which is a potentially fair reason in terms of section 98(2)(b) of the ERA.

50. I was further satisfied on the evidence that the respondents had acted reasonably in treating the admitted matter of the claimant's conduct on the second occasion, in the context of his live final written warning, as a sufficient reason for dismissing him. While recognising to a degree, taking account of the explanation provided by the claimant, that the remarks were, as between himself and his Asian colleague, remarks which fell into the category of non-malicious banter, the respondents considered that that was not the only issue which was focused. Rather, they considered that the making of such remarks in a public scenario and in circumstances where they were, and had been on the previous occasion, overheard by the employees of third party contractors, was unacceptable behaviour which was potentially abusive and or discriminatory when addressed to a person of colour and which, further, had the potential to damage the company's reputation.

51. At the point of issuing the final written warning, but for the claimant's colleagues support of the proposition that the remark was made in a bantering sense, they would have regarded the remark "fucking monkey" as self evidently discriminatory and on that basis and in all likelihood would have summarily dismissed the claimant. In the event, they issued him with a final written warning. In relation to

the second remark they were ultimately satisfied only that the claimant had used the term “fuck off” and were not satisfied and did not hold established that he had used any more racially descriptive terms. They also considered, however, that the terms of the written warning were not restricted to a repeat of a potentially racially discriminatory remark. The terms of the warning related clearly to any further misconduct. They were concerned that the second incident disclosed that the claimant’s view of such matters and conduct had not changed namely that provided he was in a position to say that the remark was made as part of banter, then it didn’t matter whether remarks include swearing. They considered that the claimant represented risk to the company’s fellow employees, in respect of the making of potentially abusive remarks and, a real risk to the reputation of the respondent company.

52. The above views were views that the respondent’s Managers were reasonably entitled to form and to reach on the evidence presented to them at the time, including the claimant’s explanations of his conduct. It may be the case that not every reasonable employer acting reasonably in the circumstances would have decided to dismiss the claimant and that some reasonable employers may have decided, in the circumstances, not to dismiss the claimant. I do not consider, however, that it can be said, on the evidence presented, that no reasonable employer, acting reasonably in the circumstances, would have imposed the sanction of dismissal. I accordingly conclude that the respondents’ decision to dismiss the claimant was one which fell within the band of reasonable responses available to them at the time, and that the dismissal falls, in terms of section 98(4) of the Employment Rights Act 1996, to be regarded as fair. I accordingly dismiss the claim.

53. In relation to the issue of consistency, I accepted as applicable in the circumstances, the respondent’s representative’s submission and I rejected the claimant’s criticisms of the decision to dismiss in that regard.

54. I observe, that had I been persuaded that the dismissal fell to be regarded as unfair, I would, in those circumstances, have also considered that the claimant by

his culpable conduct, had contributed to his own dismissal and would have apportioned to him a high level of blame of some 80%.

55. I also observe that there was merit in the proposition advanced by the claimant that, in an organisation in which there is aspiration to bring about a cessation of the use of inappropriate language in the workplace, it is to be expected that Managers will set an example by taking particular care to ensure that their own use of language is not inappropriate.

Date of Judgment: 17 December 2019
Employment Judge: Joseph d'Inverno
Entered Into the Register: 17 December 2019
And Copied to Parties