



THE EMPLOYMENT TRIBUNALS

Claimant: Mr S Donald

Respondent: Safeguard Security (NE) Limited

Heard at: North Shields Hearing Centre **On:** Wednesday 23rd October 2019

Before: Employment Judge Martin

Representation:

Claimant: In Person

Respondent: Mr I Johnson (MD of Respondent Company)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well founded. However, he is awarded nil compensation.

REASONS

INTRODUCTION

1. The claimant gave evidence on his own behalf. Mr Johnson gave evidence on behalf of the respondent. Ms Willis a director of the respondent company submitted a witness statement but did not attend to give evidence. The tribunal was provided with an agreed bundle of documents marked appendix 1.

THE LAW

2. The law which the tribunal considered was as follows:

Section 98(1) of the Employment Rights Act "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”

Section 98(2) “A reason falls within this subsection if it-

- (b) relates to the conduct of the employee”

Section 98(4) “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.”

The case of British Home Stores Limited v Burchell 1978 IRLR379 where the EAT held that in cases of misconduct: - first there must be established by the employer a belief that the employee had committed an act of misconduct; secondly that the employer had reasonable grounds on which to sustain that belief and thirdly that the employer had carried out a reasonable investigation into the matter.

The case of Polkey v AE Dayton Services 1987 IRLR503 where the House of Lords held that dismissal without a warning may not be unfair if the employer could reasonably have concluded that a warning would be utterly useless. The House of Lords also held in that case that a tribunal can consider whether an employee would still have been dismissed even if a fair procedure had been followed. A tribunal can reflect that chance by considering the percentage chance that the employee would still have lost his employment.

ISSUES

3. The issues which the tribunal had to consider were the reason for dismissal. It was pleaded as conduct. The tribunal had to consider whether the respondent had a reasonable belief that the claimant had committed an act of gross misconduct; whether it was based on reasonable grounds and whether they undertook a reasonable investigation.
4. The Tribunal also had to consider whether the respondent followed a fair procedure, in particular whether the allegations were put to the claimant and he was given the opportunity to respond and whether there was a proper appeal process.
5. The tribunal then had to consider whether dismissal was a reasonable response in the circumstances of the case.
6. The tribunal also had to consider whether, if it found dismissal to be unfair, the claimant might have been fairly dismissed in any event and, if so, what was the

chance of that happening. It also had to consider whether the claimant contributed in any way to his dismissal.

FINDINGS OF FACT

7. The respondent is a small company specialising in providing security services.
8. The claimant was employed initially as an assistant accounts manager from May 2016. He was subsequently promoted to accounts manager in June 2017.
9. The claimant's CV at the time of his recruitment is at pages 3 – 5 of the bundle. On page 3 it states that he was familiar with dealing with payroll.
10. The claimant's job description is at page 6 and 7 of the bundle. It states that he will be responsible for payroll.
11. The respondent's employment handbook is at pages 73 – 89 of the bundle. The claimant said that he had not previously been aware of the respondent's company handbook. Page 86 deals with gross misconduct. It sets out a list of acts, which it says are examples of gross misconduct which will render an employee liable to summary dismissal without notice. It states that the list is not exhaustive. Included within the list at Clause 26.5 is fraud or another offence committed against the business, which would be a breach of the law of the land; Clause 26.10 – falsifying information or records - this goes on to refer to claiming for and leading to the payment of hours not worked or falsifying information with regard to clock cards etc; Clause 26.13 – neglect of duty - this refers to activities such as sleeping on duty, watching TV, acts that demonstrate that the employee is not attentive to their responsibility. Mr Johnson said that the examples given largely relate to security staff and not management.
12. The disciplinary procedure is set out at pages 87 – 88. It sets out the usual process for an investigation, disciplinary meeting; and appeal. It states that the managing director will investigate any alleged misconduct and will manage the disciplinary meeting [page 87]. It also goes on to suggest at page 88 that the managing director would deal with any appeal.
13. In 2017 the respondent became liable for the auto enrolment pension provisions. The pension legislation requires all employers to automatically enrol employees above a certain level into their pension scheme.
14. In September 2017 the claimant signed a declaration confirming compliance with the pension's regulator under the Pensions Act 2008 [page 8 and 9].
15. By September 2018, the claimant became aware that there were discrepancies when he was finalising the 2017/2018 year-end accounts. He was trying to resolve the situation. He made the respondent aware of the problem.
16. As part of his role the claimant liaised with the company's external accountants Summers and Co based in Darlington.

17. On 19th November 2018, the external accountants, after becoming aware of the problems with the pensions, asked the claimant if they could be added as a delegate on the NEST pensions so they could see what was going on [page 12]. On 22nd November the external accountants raised a query about the pension deductions being made and expressed concern that they were not being paid into NEST. They again asked for the log-in details to NEST [page 14 of the bundle]. The claimant replied saying that he was working on resolving the issues [page 15].
18. On 17th December 2018, the claimant informed the external accountants that he did not consider it necessary for them to have access to NEST [page 18]. In his evidence to the tribunal, the claimant said that he was trying to resolve the problem and that he didn't think it would assist for the external accounts to have access to NEST.
19. In December 2018, a meeting took place between the respondent and their external accountants to discuss the 2017/2018 accounts. The issue of the discrepancy regarding the pensions was raised. In his evidence to the Tribunal, Mr Johnson said that the external accountants appeared unable to explain the discrepancy because they said they had not been given access to the NEST pension account by the claimant. Mr Johnson said that he therefore asked the claimant to send the log-in to the external accountants.
20. On 28th January 2019, Mr Johnson received an e-mail from a former employee who had left the respondent in November 2017, but who had been contacted by NEST regarding monies being paid on his behalf. Mr Johnson sent that e-mail on to the claimant and asked him for his comments [page 22]. At that stage Mr Johnson said that he was not given any explanation by the claimant.
21. The issue regarding the former employee's pension discrepancy was raised again by Mr Johnson at a team meeting on 4th February 2019. Mr Johnson said that he was told by the claimant that the problem related to difficulty with the data transfer between SAGE and NEST. In his evidence to the Tribunal, the claimant said that he thought he told Mr Johnson that it was because he had just enrolled the former employee into the NEST scheme. However, when he was cross examined about the matter, he accepted that he may not have said at the time that the discrepancy for the former employee arose because he had been enrolled in January 2019. The claimant explained in his evidence that that might be why letter had been sent to the employee, but that there were problems with the data transfer between SAGE and NEST.
22. On 4th February 2019, the claimant wrote to the former employee to inform him that the issue regarding his NEST account was due to an error in the data transfer between the respondent's payroll system and NEST [page 23].
23. By early February 2019, Mr Johnson said that he realised the claimant had not provided the log-in details to the respondent's external accountants and arranged for the claimant's assistant to do so. Those details were sent to the external accountants on 4th February 2019.

24. On 6th February 2019, the external accountants sent an e-mail to Marie Willis, copied to Mr Johnson, setting out details of their preliminary investigation. In their e-mail they indicated that a number of employees from one company had not been enrolled in NEST; and that a number of employees from another company had deductions made from their salary but those monies did not appear to be being paid over to NEST.
25. In his evidence to the tribunal, Mr Johnson said that he discussed the matter further with the external accountants and was concerned that the situation was much worse than he had been led to believe by the claimant. He said that he was told that some staff had not been enrolled in the pension scheme and that other staff had pension deductions made from their salary, but those monies were not being paid over. He arranged for an investigation to be undertaken. He undertook some investigation himself and the external accountants continued with their investigation.
26. On 7th February 2019, the external accountants e-mailed Miss Willis indicating that there seemed to be a shortfall in the pension contributions [page 28 of the bundle] in the sum of £1,475.53.
27. Mr Johnson said that he then undertook some investigation into the discrepancies and ascertained who had joined the scheme and what monies had been deducted and paid over to the scheme. His investigation is largely at pages 26 - 27, 29 – 31 and 33 – 37 of the bundle. In the meantime, the external accountants were still carrying on with their investigation.
28. The accountants were still undertaking their own investigation and wrote again to Miss Willis and Mr Johnson on 12th February attaching further details of their investigation [pages 39 – 40].
29. Mr Johnson wrote up notes from the investigation he had undertaken and the investigation undertaken by the accountants [page 41 – 43 of the bundle]. His summary of findings is at page 44 of the bundle.
30. On 8th February 2019, Mr Johnson invited the claimant to a disciplinary meeting. The letter is at page 46 of the bundle. In the letter Mr Johnson indicated that he had concerns that the payroll was not being managed in a correct and timely fashion, in particular, that pension contributions were being deducted from several employees' wages but were not being paid into the employees' pensions account. He cited a number of examples. He expressed concern that might constitute fraud and a breach company rules. He also raised another concern about mismanagement of payroll with regard to another employee. He referred to examples of what might amount to breaches of the company's rules and indicated that the actions could amount to misconduct. He explained that the claimant was entitled to be accompanied to the meeting by another work colleague or trade union representative (pages 46 – 47 of the bundle).
31. That letter was posted to the claimant. The claimant said that he did not pick up the letter until later. He said he was then in the office the following day and was given a further copy of the letter with the enclosures.

32. Mr Johnson said that the disciplinary rules at pages 48 – 51 were included in the attachments to the letter. He said that pages 25 – 27 and 29 – 37 were also included with the letter. He acknowledged that pages 39 – 40 were not provided to the claimant. It is not clear if they were ever provided or shown to the claimant.
33. In his evidence to the Tribunal, the claimant said that he could not recall being provided with page 25 with the letter. He said that the documents which were discussed at the disciplinary hearing were pages 26 – 27; 29 – 31 and 33 – 37. He cannot recall page 25 being made available at the hearing.
34. Pages 38, 39 and 40 were not provided to the claimant in advance of the disciplinary hearing. It does not appear that they were provided to him during the course of the disciplinary hearing either.
35. The disciplinary hearing took place on 15th February 2019. It was conducted by Mr Johnson. In his evidence to the Tribunal, Mr Johnson said that the company was a small company and that there was no-one else apart from him and Miss Willis who were more senior than the claimant. He said that was why he undertook the disciplinary hearing. Mr Johnson made notes of the meeting which are at pages 52 – 54; his handwritten notes being at pages 56 – 57. The claimant was not accompanied to the meeting and did not make any notes of the meeting.
36. At the disciplinary meeting the claimant was asked about why some employees were not enrolled who should have been in the NEST pension scheme. He was also asked why some employees had deductions made for their pension but it appeared that those monies were not being paid over to the pension scheme. In the disciplinary meeting, the claimant said that there were problems with payroll. In relation to the pensions the claimant accepted that there were errors but said that the problems related to the data transfer between SAGE and NEST, which he said he was trying to sort out. He said that the system did not work automatically as it was supposed to. The claimant said that he was trying to sort out the problem. When he was asked about why he did not allow the external accountants assess to NEST, he said that he did not think that would help and that he was still trying to sort out the problem. He acknowledged that the problem had been ongoing since September 2018.
37. At the meeting the claimant acknowledged that there were some errors in the pensions in relation to monies not being paid over and employees not being enrolled. He said that this was not deliberate and related to problems with the systems.
38. Following the meeting Mr Johnson made some further enquiries in relation to the claimant's comments about the system and whether it should work automatically. He contacted the respondent's external accountants, who explained to him how the system should work. His notes from that subsequent investigation are at page 55 of the bundle.

39. Mr Johnson did not reconvene the meeting or give the claimant the opportunity to comment on those further investigations. He did not provide the claimant with a copy of page 55.
40. On 15th February 2019 Mr Johnson wrote to the claimant to dismiss him for gross misconduct. The letter is at page 58 – 59 of the bundle. In his letter of dismissal Mr Johnson stated that he was dismissing the claimant for not enrolling employees in the pension scheme in contravention of the pension regulations and for deducting monies from their wages but not paying that money over to the pension scheme. He indicated he thought was a breach of the pension regulations and potentially amounted to fraud. He indicated that the claimant was being dismissed for gross misconduct. He referred to the company's rules on acts of gross misconduct namely those at paragraphs 26.5, 26.13 of the disciplinary rules. The claimant was given the opportunity to appeal the decision to Miss Willis.
41. On the same day the external accountants sent some further information, in particular some spreadsheets, to Miss Willis and Mr Johnson [pages 60 – 62 of the bundle]. Those documents were not provided to the claimant at the disciplinary meeting nor indeed subsequently as requested by him at the appeal meeting.
42. On 18th February 2019 the claimant appealed against the decision. His letter of appeal is at page 63 of the bundle. The claimant indicated that he did not think that his actions amounted to gross misconduct in accordance with the paragraphs quoted in the disciplinary policy. He also asked for copies of certain documents namely a copy of the notes of the disciplinary meeting; copy of a witness statement referred to refuting his comments which would appear to be copies of spreadsheets referred to at pages 60 – 62 above; a copy of his contract of employment; his job description and the company handbook. He referred to contacting ACAS; the pension regulator and NEST.
43. On 20th February 2019 the external accountants wrote further to the respondent namely Miss Willis and Mr Johnson in which they confirming the steps taken to rectify the various issues regarding the pension contributions [page 65].
44. The respondent provided certain documents to the claimant as requested in his letter of appeal – These were the notes of the meeting; a standard contract of employment; his job description and the employee handbook. The claimant was not given a copy of a witness statement because the respondent said that one did not exist. It appears from the claimant's evidence that his request really related to either page 25 or the further investigation undertaken by Mr Johnson following the disciplinary meeting. The claimant says page 25 was not produced at the meeting. The respondent suggests that it was part of the documents sent to the claimant.
45. The claimant was also not sent any of the spreadsheets. He was told that the relevant documents had been produced at the disciplinary meeting. In her witness statement to the tribunal Miss Willis said that the respondent could not produce the spreadsheets because they contained personal information and may

amount to a breach of the data protection act. In his evidence Mr Johnson accepted that the document could have been redacted but he said that the documents provided at the disciplinary hearing were sufficient.

46. The appeal hearing was initially arranged for 25th February 2019, but was adjourned at the claimant's request and reconvened on 4th March 2019.
47. The claimant again attended unaccompanied. Miss Willis conducted the appeal hearing albeit that she had been provided with a lot of information from the accountants.
48. The notes of the appeal hearing are at page 94 of the bundle with handwritten notes at page 95.
49. At the appeal hearing the claimant said that he would like to have had more time to resolve the issue. He did admit that some employees had not been enrolled on the pension scheme.
50. On 4th March 2019 Miss Willis wrote to the claimant to dismiss his appeal and uphold the decision to dismiss him for gross misconduct. She concluded that the claimant had plenty of time to resolve the issue. She also concluded that his actions did amount to gross misconduct. She said it was a breach of the pension regulations under the Pensions Act 2008 for neglect of duty [page 96 of the bundle].

SUBMISSIONS

51. The respondent submitted that the dismissal was for conduct. Mr Johnson submitted that he genuinely believed that the claimant had committed an act of gross misconduct. He said the claimant had admitted it. He submitted that there was a full investigation into the matter. He said that, if there was any procedural errors, the claimant would have been dismissed in any event, bearing in mind the claimant's role in the organisation. He had lost all trust and confidence in the claimant.
52. The claimant submitted that the real issue was the procedural issues. He did not think what had happened amounted to gross misconduct. He also complained that documents were not provided to him. He considered that the respondent acted too quickly to dismiss him although they had known about the matter for some time.

CONCLUSIONS

53. This tribunal finds that the claimant was dismissed for conduct, which is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.
54. The Tribunal finds that the respondent did have a reasonable belief that the claimant had committed an act of gross misconduct. A full investigation was undertaken by the respondent and their external accountants which established that the claimant had not enrolled certain employees into the respondent's

pension scheme as required by law and had deducted monies from other employees which were not paid over to the pension provider.

55. The Tribunal considers that the respondent had reasonable grounds and believed this amounted to gross misconduct as the situation had been going on for some time and the claimant refused to involve the external accountants despite a number of requests by them. Further he also sought to mislead the respondent about the extent of the problem and the reasons for it, in particular he informed one former employee that the problem related to the payroll system and NEST, but failed to mention that he had only just enrolled that employee into the scheme.
56. For those reasons, the Tribunal finds that the claimant's actions did amount to gross misconduct. The fact that he had failed to enrol employees in the pension scheme and made deductions from their salary, but did not paid those monies over to the pension scheme was a breach of the pension legislation and could amount potentially to fraud. The Tribunal notes that the list of acts of gross misconduct in the respondent's disciplinary rules is not, as stated, intended to be exhaustive. The Tribunal finds that the claimant's actions were potentially fraud and a breach of legislation and would amount to gross misconduct bearing in mind the role which the claimant held within the organisation. The Tribunal accepts, as does the respondent, that the claimant did not do anything deliberate.
57. In relation to the procedure adopted by the respondent the Tribunal was concerned that Mr Johnson conducted some investigation into this matter and then conducted the disciplinary hearing. The Tribunal was also concerned that Miss Willis conducted the appeal hearing, yet seemed to also have had some involvement in and was certainly copied into most of the details about the investigation. This raises some concerns about potential bias, however on balance the Tribunal considers that this did not amount to procedural irregularities or bias in the circumstances of this case for the following reasons :-
 - 57.1 Firstly, this is a small company and there was no-one else in a senior position to deal with any disciplinary hearing and appeal other than Mr Johnson and Miss Willis;
 - 57.2 The respondent's disciplinary policy specifically provides that the managing director, namely Mr Johnson, will deal with any investigation and disciplinary hearing as well as any appeal hearing, although in this case he arranged for Miss Willis to deal with the latter;
 - 57.3 Most of the investigations undertaken were in fact done by the external accountants;
 - 57.4 The claimant effectively largely had admitted his actions. The real issue for the Tribunal was whether or not there were procedural irregularities in the way the disciplinary process was conducted.

- 57.5 In relation to that, the Tribunal does consider that there were deficiencies in the process. The claimant was not provided with all of the documents considered as part of the investigation and the decision to proceed to a disciplinary hearing. He was not given the spreadsheets at page 19 – 21, nor was he provided with the further documents produced by the accountants at pages 39 to 40. In relation to page 25, although the claimant says that he did not think that he had this document and the respondent suggests that he did provide it; what is quite clear is that the claimant was seeking this document or the subsequent further investigations undertaken by the external accountants after the disciplinary meeting. That is what he was referring to as the witness evidence which was effectively pages 25, 39-40, which the Respondents did not provide to the claimant, following his request before his appeal hearing. Further, Mr Johnson's notes of the further investigation were not provided to the claimant either. Furthermore, the Tribunal considers that it was procedurally unfair not to reconvene the disciplinary hearing, after those further investigations were undertaken by Mr Johnson with the external accountants, and give the claimant a further opportunity to comment on those matters.
58. For those reasons, this Tribunal finds that the procedure adopted by the respondent was unfair. Accordingly, the claimant's complaint of unfair dismissal is upheld.
59. However, although we found that there were discrepancies in the procedure used, the claimant nevertheless admitted that he had the errors with pension. Scheme. Taking account of the claimant's role in the company, the Tribunal considers that the claimant would have been fairly dismissed in any event. It is quite clear that the respondent had lost trust and confidence in him and therefore he could not continue in his role.
60. Furthermore, the tribunal considers that the claimant entirely contributed to his own dismissal. He admitted the errors in relation to the pension scheme. His subsequent actions namely: by not allowing the external accountants to access the scheme details; misleading both the respondent and a former employee about the problems and reasons why that former employee was receiving correspondence from the pension scheme so long after that employee had left the Company all amounted to blameworthy conduct, which did indeed contribute to the claimant's dismissal.
61. For those reasons, this tribunal finds that the claimant is not entitled to any compensation as he would have been unfairly dismissed in any event and in any event contributed a hundred percent to his dismissal.

EMPLOYMENT JUDGE MARTIN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 3 December 2019**

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