EMPLOYMENT TRIBUNALS

Claimant: Mr C Elliott

Respondent: Hyndburn Borough Council

Heard at: Manchester **On:** 16, 17 and 18 December 2019

Before: Employment Judge Dunlop

REPRESENTATION:

Claimant: In person
Respondent: Mr J Baron (Solicitor)

JUDGMENT having been sent to the parties on 20 January 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Mr Elliott brings a claim of unfair dismissal against his former employer Hyndburn Borough Council. It is a misconduct case which arises on relatively simple facts which are mostly not in dispute.

The Hearing

2. I heard the case over three days on 16, 17 and 18 December 2019. The respondent called three witnesses: Jane Ellis, Executive Director for Legal and Democratic Services, who was the dismissing officer; Clare Cleary, a Councillor (at the material time), who was the appeal officer; and Kirsten Burnett, Head of Policy and Organisational Development, who gave evidence relating to other disciplinary cases conducted by the respondent. Mr Elliott gave evidence on his own behalf. I also had regard to an extensive agreed bundle of documents and an additional small bundle ("C1") of emails relied on by Mr Elliott. As explained to the parties, I only read those documents which were referred to in witness statements or to which I was referred during the course of the hearing. I also carefully considered the written submissions which were prepared on behalf of each party.

The Issues

3. We discussed the issues at the outset of the hearing. It was agreed that the reason for dismissal was Mr Elliott's conduct, which is a potentially fair reason under s.98(2) Employment Rights Act 1996 ("ERA"). In those circumstances, the Tribunal must apply the test set out in **Burchell v British Home Stores 1980 ICR**. Essentially: did the respondent have a genuine belief that the misconduct had occurred, was that belief reasonable on the facts available and had was it based on a reasonable investigation. The tribunal must also consider the procedure followed by respondent, in order to make an overall assessment as to whether whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as sufficient reason to dismiss, that being the test set out in s98(4) ERA.

4. Mr Elliott confirmed that his main arguments would be:

   4.1 That the investigation was tainted by a lack of transparency and by the involvement of Ms Ellis;

   4.2 That he had been denied access to documents;

   4.3 That the sanction was too severe;

   4.4 That other employees who had committed similar (or more serious) acts of misconduct had been treated more leniently;

   4.5 That the decision to dismiss was outside the band of reasonable responses.

5. The respondent contended that, if the dismissal was unfair, compensation should be reduced to reflect the possibility that a fair dismissal could have taken place in any event (**Polkey v A E Dayton Services Ltd 1988 AC 344**) and/or to reflect the fact that Mr Elliott's conduct had contributed to the dismissal.

6. Finally, there was an issue as to whether Mr Elliott should be awarded compensation under s. 38 of the Employment Act 2002 in relation to a failure to provide a statement of employment particulars under s.1 ERA.

Findings of Fact

7. Mr Elliott was a long-serving member of the respondent's staff, having been employed by the council for nearly 30 years. In late 2017 there was a restructuring exercise, during which his role changed from Facilities Manager to Senior Technical Officer. Mr Elliott describes this as a demotion, and he was clearly unhappy about both the process and the outcome. I find that this significantly demotivated him in his work and (whether justifiably or not) caused him to have a negative attitude towards his employer.

8. The nature of Mr Elliott's role meant that he attended various sites to conduct his work, mostly alone. He would clock into work at his office and then write on a whiteboard the visits he was to undertake, so that others in his team knew his whereabouts. The respondent operated a flexitime system, such that if Mr Elliott wanted to visit his home during his working day, or conduct a personal errand, he

would have the autonomy to do so, but he was required to ensure that his clocking time was adjusted.

9. On 12 February 2018, Mr Mark Beard, the council's Head of Audit & Investigations, observed Mr Elliott's car at his home address when he was supposed to be working.

10. It was Mr Beard's position, as reflected in the subsequent investigation report, that he had simply happened to be passing Mr Elliott's home on that occasion. In particular, he said he was taking an unusual route due to bad weather. It came to light from documentation disclosed to Mr Elliott (as a result of a subject access request ("SAR")) that there had been a meeting on 7 February during which Mr Elliott's managers had raised some general concerns about his whereabouts at various times and why was visiting particular locations. Mr Beard was present at this meeting. There were further references in the SAR documents suggesting that another manager, Sarah Whittaker, had seen Mr Elliott's car at his house either in the preceding weeks, or at some earlier point in 2016, or possibly both.

11. Against this backdrop, Mr Elliott is sceptical of Mr Beard's claim that his sighting on 12 February was a matter of sheer coincidence. Mr Beard himself has not given evidence and, on the strength of the documentary evidence alone, it does seem to me more likely than not that he took the opportunity to pass Mr Elliott's house on 12 February in part due to the discussions that had been taking place rather than solely, as he stated in the investigation report, due to adverse weather conditions.

12. In any event, following Mr Beard's sighting, an organised surveillance programme was commenced lasting until Monday 26 February. There was then a short break with further surveillance taking place between 5 and 16 March. On eight days during those periods Mr Elliott was observed to have gone home while being clocked on at work. The respondent's investigation included further details as to timings and in some instances entries Mr Elliott had made on the whiteboard in the office, indicating he was attending various council premises.

13. During this period, on 8 March 2018, Mr Beard sent an email to unknown recipients setting out information/opinions in relation to the surveillance operation. There is a reply to that email from Miss Ellis (who was later to be the dismissing officer in this case) where she comments that "*I think there is scope to argue that the surveillance is in the main surveillance of Craig's car rather than Craig himself. At Craig's house you are, as I understand it, parked some way away from the house and are simply observing the vehicle parked outside his house*". There is no mention of the name "Craig" or the details of the location of the surveillance in Mr Beard's email. It is therefore apparent that these emails were sent against the backdrop of prior discussions, either verbally or by email, during the course of which Ms Ellis was made aware, at least in broad terms, of the nature of allegation against Mr Elliott. Mr Elliott complains that this degree of involvement at the investigation stage meant that she could not be regarded as impartial at the disciplinary stage. I address this argument in the Conclusions section below.

14. These observations led to a formal disciplinary investigation process, during which Mr Elliott was interviewed and, ultimately, an investigation report being

compiled by Mr Beard recommending disciplinary action. Mr Elliott first admitted to spending time at home in an email dated 18 April 2018, by which point he was aware of the surveillance operation. In that email, he raised a grievance about his line manager, which was heard and rejected in due course.

15. By letter dated 19 July 2018, Mr Elliott was invited to a disciplinary hearing to consider the following allegations:

15.1 that Mr Elliott had misused the flexible working policy by being absent from work at times when he was clocked on and accruing flexitime;

15.2 that Mr Elliott had knowingly provided false information to his team manager about his whereabouts to make it appear that he was visiting council sites when he was not (i.e. in what he recorded on the whiteboard)

15.3 That he had acted in a way which led to a loss of trust and confidence in him,

16. The hearing was chaired by Ms Ellis and took place on 2 August 2018. Mr Elliott admitted the first allegation in respect of the occasions where he had been observed by the surveillance operation. He did not admit that he had done the same thing at any other time. He said that he had acted in this way due to his emotional state and mental health difficulties, stemming from the restructure and problems at home. He did not admit the second allegation. His position was that he had visited all of the locations he had stated on the whiteboard. He explained that some visits might be very short – he may simply need to 'drive by' a site to check that there were contractors present working on a task. He disputed the third allegation. He also argued that other people had not been dismissed for breaches of the flexible working policy, and that he should be allowed to keep his job.

17. Ms Ellis rejected Mr Elliott's argument that his mental health had caused him to breach the policy. She considered that the evidence produced indicated that the disciplinary process itself had caused anxiety, rather than that there was evidence of an earlier mental health issue which had caused the misconduct.

18. In relation to the second point, the timings and distances as set out in the investigation report meant it would have been very difficult for Mr Elliott to have visited the sites he had recorded on the whiteboard. Mr Elliott had, at a late stage in the disciplinary process, requested access to his emails and work calendar which he said would help him to evidence his attendance at various sites. Ms Ellis refused to delay the disciplinary outcome to enable him to access that document. Her evidence before the Tribunal was that having discussed the matter in the disciplinary hearing she had been prepared to accept that Mr Elliott had indeed visited the sites – even if only on a 'drive by' basis – but that the information given on the whiteboard was still misleading as colleagues reading it would assume he was spending substantive time at those locations rather than (as was actually the case) spending much of it at home.

19. However, that narrow view of allegation two and what was required to make it out does not seem to fit squarely with the documents. The verbal conclusion noted at

the disciplinary hearing is that on 22 February and 12 March Mr Elliott had gone straight home and come back to work. Both of these were dates for which there were whiteboard entries showing other destinations. That conclusion is essentially repeated in relation to 26 February and 12 March in the outcome letter. In respect of 22 February Miss Ellis writes that Mr Elliott had had little opportunity, if any, to carry out productive work. Miss Ellis was questioned on this during the appeal hearing and stated, "*the case was never that he didn't do anything, although on some days looking at the timing I don't think he did*".

20. I find that Miss Ellis did have a belief that Mr Elliott, at least on some occasions, put sites on the whiteboard that he had not visited at all. I also find that that is what she meant when she found that allegation two had been made out. If allegation two simply meant that he had not written on the whiteboard that he was going home before or after visiting the sites then it adds very little to allegation one

21. On the basis that she considered the first two allegations to have been made out, Ms Ellis also found that the third allegation (acting in a way which led to a loss of trust and confidence) was made out. However, Ms Ellis did not consider that the third allegation added anything material to the two substantive allegations.

22. Ms Ellis stated that she took the decision to dismiss Mr Elliott due to the seriousness of the misconduct but also (in summary) because she did not feel he had been straightforward and honest in admitting the extent of the misconduct, because there had been one occasion where he had called the office and asked to be clocked out because he was going to run an errand (therefore demonstrating that he was aware of his obligations under the policy) and because he had not shown remorse but had instead tried to blame other people. She further stated that she was concerned about allowing him to return to a role which, by its nature, involved a large degree of autonomy and a lack of supervision, and that there were no other suitable roles available. She stated that she was not aware of the details of other cases of breach of flexitime policy, but was aware that it was considered a serious matter. She considered each case had to be dealt with on its own merits, and believed that dismissal was the right sanction given the circumstances of the case before her. I accept all this evidence as an honest and accurate account of Ms Ellis's decision-making process and the factors she considered.

23. By letter dated 7 August 2018, Ms Ellis confirmed her decision to summarily dismiss Mr Elliott for gross misconduct.

24. Mr Elliott appealed his dismissal and that appeal was duly heard by a panel of two Councillors (of whom Ms Cleary was one) and the respondent's chief officer. The panel upheld Ms Ellis's decision, although there appears to have been some concern about the point in relation to access to documents and whether Mr Elliott should have been given more opportunity to attempt to prove that he had visited all the sites listed on the whiteboard. Ultimately, the appeal panel accepted Ms Ellis's argument that it would have made no difference to her decision.

25. In the course of this litigation, anonymised documents have been disclosed in relation to eight other employees of the respondent who faced disciplinary processes. Ms Burnett in her evidence outlined the circumstances of each case with reference to the documents. It is not necessary to rehearse the facts of each of

these. I will record that there was only one employee, designated Employee A, whose circumstances were in some respects close to those of Mr Elliott. Employee A had similarly been discovered spending time at home during working time. In his case he admitted that the conduct had been ongoing over a period of two years. The outcome letter states he could have been dismissed for gross misconduct but was instead given a final written warning with stringent conditions attached. When questioned about his conduct, Employee A had immediately admitted the full extent of his misconduct, apologised and offered to work back the hours. There were mitigating factors relating to his personal life and he was co-operative and helpful. This disciplinary process took place approximately three years before Mr Elliott's disciplinary process and the case was determined by a different manager.

26. Ms Burnett explained (and I accept) that the involvement of HR officers in every disciplinary case would ensure that disciplinary managers were made aware if they were proposing a decision which went "*way outside*" the respondent's normal approach to a particular type of misconduct. It was not the practice of the HR department to set tariffs, nor did they encourage disciplining managers to routinely examine earlier decisions as part of their decision-making process.

The Law

27. The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for a potentially fair reason: s. 98 (1) ERA. In this case, it is agreed that the reason for dismissal was a reason related to conduct. Consideration must then be given to the general reasonableness of that dismissal under s.98(4) ERA.

28. Section 98(4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

29. In considering the question of reasonableness, the I have had regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17**; **Foley v. Post Office and Midland Bank plc v. Madden [2000] IRLR 82**.

30. In summary, these decisions require that I focus on whether the respondent held an honest belief that Mr Elliott had carried out the acts of misconduct alleged, and whether it had a reasonable basis for that belief. I must not however put myself in the position of the respondent and decide the fairness of the dismissal based on the what I would have done in that situation. It is not for me to weigh up the evidence as if I was conducting the process afresh. Instead, my function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

31. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in the '**Burchell**' test. The three elements of the test are:

31.1 Did the employer have a genuine belief that the employee was guilty of misconduct?

31.2 Did the employer have reasonable grounds for that belief?

31.3 Did the employer carry out a reasonable investigation in all the circumstances?

32. It was confirmed in **Sainsbury's Supermarket v Hitt 2003 ICR 111** that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

33. On the question of comparisons with sanctions received by other employers, I have paid careful attention to the guidance in the cases of given in **Hadjioannou v Coral Casinos [1981] IRLR 352** and repeated in **Paul v East Surrey Health Authority [1995] IRLR 305**. In summary, these cases emphasise the importance of allowing an employer flexibility in how it deal with cases of apparently similar misconduct. Comparisons will generally be relevant in limited circumstances only (such as where the more lenient treatment of others supports an employee's argument that the misconduct was merely an excuse for the dismissal, rather the underlying reason) and tribunals should take case to ensure that cases are truly parallel before drawing conclusions of unfairness from such comparisons.

34. Section 123(6) ERA provides that: Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

35. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

Submissions

36. Both parties chose to prepare detailed and helpful written submissions documents which were supplemented with oral submissions. As the submissions are in writing and on the Tribunal file, I will not summarise them here. I considered the submissions from both sides carefully. The key points made by each party are reflected in my discussion and conclusions below.

Conclusions

Allegation 1

37. Allegation 1 was "that you have misused the flexible working policy by being absent from work at times when you were clocked on an accruing flexitime.". As I

have said, Mr Elliott admitted this allegation in full. I therefore find the **Burchell** test satisfied in respect of this act of misconduct.

38. Before going on, though, I should address two particular arguments made by Mr Elliott in relation to the reasonableness of the investigation. The first relates to the circumstances in which the investigation commenced. As set out above, I found that Mr Beard *did* intentionally choose to drive past Mr Elliott's house due to the discussions that that occurred about his attendance. Mr Elliott says that it flows from that that the investigation was in some way "tainted" and unfair. That, in my view, is not a conclusion that can properly be drawn. This is not a case of entrapment (as Mr Elliott suggested). It was his decision to go home and in doing so he breached the policy. The decision was not instigated or encouraged by anything Mr Beard did. It was appropriate for Mr Beard, having made the observation, to arrange for further surveillance of Mr Elliott to determine if this was an on-going issue, rather than challenging Mr Elliott immediately. For all these reasons, Mr Elliott's complaints about Mr Beard's conduct do not take him any further in terms of challenging the fairness of the dismissal.

39. The second complaint relates to the degree of involvement in the investigation by Ms Ellis who was later to be the disciplinary officer. As noted above, there was an email chain involving Ms Ellis and Mr Beard in which the nature of the surveillance operation concerning Mr Elliott was discussed. It can be inferred from the content of the email that there were further discussions on the same topic. Ms Ellis gave evidence that it would be usual for managers to seek her input on matter such as this, given her professional status as a solicitor and her position with the respondent.

40. It was appropriate, in my view, for Ms Ellis to be involved in sensitive decisions about the use of covert monitoring and surveillance. It does not mean that she was taking the role of investigating officer, nor did it stop her from act fairly in her role as disciplinary officer later on. I do not find any procedural irregularity here or anything that taints the respondent's investigation.

Allegation 2

41. The second allegation was "that you knowingly provided false information to your team manager about your whereabouts to make it appear you were visiting council sites when you were not". This allegation related to the whiteboard entries. Ms Ellis found that allegation to have been made out. As noted above, I find that she reached this conclusion not simply on the narrow point that Mr Elliott had been home *as well as* attending the location on the board but also (contrary to her evidence) that he had actually failed to attend some of the locations on the whiteboard on certain days.

42. Considering the **Burchell** test as it applied to allegation 2, I am satisfied that Ms Ellis held this belief genuinely, and that it was reasonable on the basis of the information she had – namely the contents of the investigation report which were strongly suggestive that Mr Elliott would not have had time to visit these sites given the time he had spent at home. As noted above, Ms Ellis reconvened the disciplinary hearing specifically to ask Mr Elliott about this point in view of his comments about needing access to documentation. In the end, however, Ms Ellis felt she could reach a conclusion without these documents. The delay that this additional piece of

investigation would have caused, given up-coming holiday commitments on the part of both Ms Ellis and Mr Elliott, seems to have been a significant factor in her decision.

43. Looking at allegation 2 in isolation, I find it would have been outside the band of reasonable responses for Ms Ellis to uphold this allegation without further investigation. Whilst it was undesirable for the disciplinary process to be delayed, the claimant was a very long-serving employee and his job was at stake. The lack of the opportunity for him to review the documentation and use it to support his case (if, indeed, it did) clearly troubled Ms Ellis given her decision to reconvene the disciplinary hearing to discuss it further and it also, in due course, troubled Ms Cleary and the appeal panel. In deciding not to allow access to the additional documentation, but still to uphold allegation 2, Ms Ellis took a shortcut, and that meant that the investigation which underpinned her conclusion was not a reasonable one (having regard to the guidance in **Hitt**).

Allegation 3

44. Finally turning to allegation three, that was "that you have acted in a way that leads to a loss of trust and confidence in you". There is no separate act of misconduct alleged here: it is simply a contention relating to the effect of allegations one and two. For that reason, I do not find that allegation three takes matters further, and it does not appear to have formed a significant part of the disciplinary outcome.

45. Mr Elliott has actually suggested during the hearing that the third allegation was rejected during the disciplinary process. This seems to be a case of confusion as the dismissal letter is clear that all the allegations were upheld and the appeal outcome upheld the disciplinary outcome. However, as I have already said, the third allegation does not really take matters further.

Fairness

46. I have concluded that the **Burchell** test is satisfied in respect of one of the substantive allegations of misconduct, but not the other. Does that mean that the dismissal was unfair overall? I find it does not mean that. I am satisfied by the evidence of Ms Ellis that she would still have dismissed on the strength of allegation one alone. She told the Tribunal that directly and explicitly and I accept her evidence on that point. I also believe it is implicit in her decision not to seek the additional evidence in respect of allegation two. Ultimately, because of the view she had formed about the core misconduct, even if Mr Elliott could show that he had visited each of the sites named on the whiteboard for short periods it would not have made a difference to the overall outcome.

47. I then turned to the question of whether the sanction of dismissal was within the band of reasonable responses. There is wide discretion available to an employer in determining the sanction, and it is not a decision with which the Tribunal can lightly interfere. I fully accept that another employer might have decided that a lesser sanction was appropriate in this case. Nonetheless, the decision to dismiss was squarely within the band of reasonable responses available to the council. This was a serious situation and Mr Elliott's conduct fell clearly within the examples of gross misconduct given in the respondent's disciplinary policy. He put forward some

factors of mitigation but again, applying the band of reasonable responses test, it was reasonable for the employer not to accept that mitigation as being strong enough to sway the balance against dismissal.

48. I also carefully considered Mr Elliott's argument in relation to 'comparator' employees. In respect of seven of the eight, the circumstances were (for various reasons) not at all similar to those of Mr Elliott. In respect of Employee A, I accept that disciplinary officers do not have a mechanical role of applying a tariff but a nuanced role of making a judgment. I find that that judgment was properly exercised by Ms Ellis for all the reasons she gave. I also find that if Ms Ellis's proposed disciplinary outcome had been particularly harsh compared to the treatment received by other employees, this would have been drawn to her attention by the respondent's HR department, who had appropriate practices in place to identify and rectify any such scenario. If Employee A had received a minimal sanction (for example a verbal warning of short duration) then the disparity in his case would have been more troubling. However, it is clear from the outcome letter that Employee A in fact escaped dismissal 'by the skin of his teeth'. The fact that he did so does not mean that, three years later, a different disciplinary officer was compelled to allow Mr Elliott to do the same.

49. For all those reasons my conclusion is that the dismissal was fair.

50. In the event that my decision on unfair dismissal is incorrect, I have also consider the arguments in respect of **Polkey** and contributory fault, and will briefly set out those conclusions also. To the extent that the dismissal was flawed by the failure to properly investigate allegation two, I find that a 100% **Polkey** deduction should be made. This follows the reasoning above: essentially that Mr Elliott would have been dismissed based on allegation one in any event. I do not accept the respondent's alternative **Polkey** case: that Mr Elliott would have been dismissed within a short period of time for gross negligence unrelated to this matter. The evidence put forward to support that (which I have not rehearsed in this judgment) fell far short of what would be required to make any level of deduction.

51. Alternatively, if I was considering the matter on the basis of contributory fault only, I would assess the appropriate level for such a reduction as being 80% for both the basic and compensatory awards. This reflects Mr Elliott's admitted misconduct.

52. Mr Elliott's claim under s.38 Employment Act 2020 (for payment in respect of a failure to provide a statement of particulars of employment) is contingent on his unfair dismissal claim, so that also fails.

Employment Judge Dunlop

Date: 03.02.2020

REASONS SENT TO THE PARTIES ON

17 February 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to Mr Elliott(s) and respondent(s) in a case.