



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr B Blake**

**v**

**The United Synagogue**

**Heard at:** Watford

**On:** 4 July and 4 November 2019

**Before:** Employment Judge Manley

**Appearances:**

**For the Claimant:** Ms L Kaye, Counsel

**For the Respondent:** Mr M Sellwood, Counsel

**JUDGMENT** having been sent to the parties on 6 November 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction and issues

- 1 There was no list of agreed issues in this case. We discussed the issues on the first day and it was agreed that this is an unfair dismissal claim and that therefore the respondent bears the initial burden of proving a potentially fair reason for dismissal. Its case is that the claimant was dismissed by reason of misconduct. In the alternative it says that the dismissal was for some other substantial reason, because of breach of trust. If the respondent can show a fair reason, I consider whether the dismissal was fair or unfair.
- 2 There is also a breach of contract claim for the failure to give notice. I must decide, as a matter of fact, whether there was any misconduct which amounted to such serious misconduct as to allow the respondent to dismiss summarily without notice.

### The hearing

- 3 On the first day of the hearing on 4 July 2019, I pre-read the three witness statements from Mr Majithia, who was the dismissing officer, Mr Virdee, who was the appeal officer, and the claimant. I then heard evidence from Mr Majithia and Mr Virdee. I had a bundle of documents which contains the usual documents for this sort of case, the letters, minutes of hearings and

so on. The matter could not be completed within the one day allocated to it and it was adjourned to 2 August. Unfortunately, I was on sick leave that week and a further date in September could not be accommodated as I was on another longer case. The matter came back before me on 4 November 2019.

## The facts

4 The claimant started as a Chevra Kadisha for the respondent at its Bushey cemetery on 27 May 2008. The respondent has oversight over various synagogues and cemeteries and their response indicates that they employ around 1,400 people. The claimant's role as a Chevra Kadisha was protecting and preparing the body for Jewish burial in accordance with Jewish customs and he accompanies families to the cemetery. He was also a driver. Part of his responsibilities were checking the tombstones and carrying out ceremonial cleaning. He often collected bodies from houses, hospitals and so on. He was a health and safety representative. As described by Rabbi Sunderland this was a very trusted position expected to be held by people of high character. It was said to be for people who were "a cut above the rest".

5 The claimant had no warnings on his file. The only item on his disciplinary record was for one letter which indicated a meeting in January 2017 following an investigation which was to do with a misplaced watch and whereupon no further action was taken.

6 On 22 February 2018 the claimant was suspended. The letter (page 33) states that there was an allegation of theft against the claimant on 21 February. There was a meeting with an HR representative where the claimant was shown some CCTV footage, some of which was viewed during this hearing. The footage shows the claimant near charity boxes which were fixed to the wall at the cemetery where people made charitable donations. These are small apparently wooden boxes with a small slit in the top into which coins or notes can be placed. They are locked and it is not possible to see what is inside the boxes. The claimant explained his behaviour there as "*pushing money down*".

7 An investigation meeting was held with Mark Williams, who had raised concerns about the claimant on the same day. It is recorded that Mr Williams said:

*"MW stated the allegations of Brian Blake (BB) stealing money from the charity boxes have been going on for a long time. MW went on to say that it is common knowledge that BB loiters around the charity boxes."*

8 There was a further investigation meeting with an anonymous person on 26 February. They said that they had noticed the claimant hanging around charity boxes, that they had seen him going to look in and that they guessed the claimant went into the box but that they did not see him take anything out. This anonymous person also says:

*"Occasionally there will be coins that have not been pushed down in*

*far enough but you just knock it down and it will be resolved. There is no need for tweezers, notes don't usually stick as people push them right in." (Page 37)*

9 An investigation meeting was held with the claimant on 1 March. He was asked about his job and he outlined the roles that he carried out and what he did in the time between dealing with matters directly connected to the burial. He said that if he saw things sticking out of the charity boxes he pushed them in; that sometimes he used items that he had on his person connected to the stone setting, etc. and these might be a comb, a pen, a ruler and so on. He said that he did a visual check and that some things stick out. He said that sometimes he picked prayer cards out of the boxes.

10 There was then an investigation report. This indicated the terms of reference which were as follows:

*"The investigation considered the formal complaint raised in November 2017 by a member of staff that was investigated but nothing was substantiated. Following BB's questionable actions witnessed by members of staff this resulted in the CCTV being viewed and facilitated the decision to suspend and investigate."*

11 Later there was reference to something in November 2017 and that the claimant was *"constantly hanging around the charity boxes with a pair of tweezers. The complainant claimed they were used to retrieve notes from the charity boxes. The complainant didn't take the complaint any further because they had not actually seen BB take any money..."* This 2017 matter did not go any further and was not mentioned to the claimant at the time.

12 What the CCTV footage showed was only matters which took place on 21 February. The investigation report suggested that the footage showed the claimant *"using something to get into the box"*. The report also contained a number of matters which were not discussed with the claimant, notably that no notes or charity slips were found in the charity box after the end of the day on 21 February. It does not say whether any coins were found in the boxes on that day.

13 The allegations in November 2017 were mentioned again in that report (page 48), where it reads as follows:

*"BB in his interview mentioned he had been investigated on various allegation and HR has an allegation of theft of file of January 2017 although this cannot be used as part of this investigation because it was not substantiated. It does provoke and question the increasing lack of confidence and trust in BB from the managers."*

14 I understand this to be a reference to the letter which I mention at paragraph 5 which was to do with a misplaced watch. There was also further reference there to the November 2017 allegation of the claimant taking *"money from the charity"*.

- 15 On the basis of that investigation report the claimant was invited to a disciplinary hearing on 15 March. He was told who the hearing officer would be and of his right to be accompanied. The allegation now read as follows: *“Activity shown on CCTV footage and witnessed by members of staff has led to a breach of trust and confidence.”*
- 16 When the claimant was asked about this in the tribunal hearing he said he could not remember reading that allegation. In any event he was warned that one of the outcomes might be final written warning or dismissal. The claimant attended that hearing accompanied by Rabbi Clancy. It was a relatively lengthy hearing which took almost two hours and the CCTV footage referred to was looked at several times. It has also been viewed at the tribunal hearing. In summary the short clips show the claimant walking around, close to the area where charity boxes are fixed to the wall. Usually there are several other people around but occasionally the claimant is seen on his own and appears to look around. Whether or not there are people outside the view of the CCTV camera I have no idea. It shows the claimant going up to one or more of the charity boxes and looking inside. On one occasion it shows him using something which he takes from his pocket, touching the box and putting the item back in his pocket. Nothing appears to be removed from the charity boxes. I accepted, as did the claimant later, that his behaviour looks odd.
- 17 Mr Majithia, who was the dismissing officer, gave evidence at the tribunal hearing. He accepted that the claimant was in an acceptable area of the cemetery at the time of the CCTV footage. He also accepted the claimant’s explanation was that he pushed coins in if they had become stuck and that on odd occasions coins can become stuck. He accepted that the claimant was of good character but also said, rather inconsistently, that the November 2017 allegations went to *“his character and suspicious behaviour”*. He said that the November 2017 allegations formed a small part of his decision. Mr Majithia seemed particularly concerned about the use of the implement when in his view that was unnecessary if coins had become stuck and they could just be tapped down. Although he did not think that the claimant had taken anything, he said that his actions in total amounted to a breach of trust and confidence.
- 18 The claimant at the disciplinary hearing denied taking anything out of the boxes and there is no finding that he did, although a HR adviser did seem to suggest that. I find as a fact that the claimant did not commit an act of misconduct, let alone one of gross misconduct. His actions were, at worst, likely to cause some concern but he was not spoken to about that.
- 19 The claimant produced letters about his character, all of which spoke about his good character. One of the matters which is recorded in the notes was that the claimant was very shaky when he was being interviewed. For reasons I do not understand, that is emboldened in red. I find nothing unusual about that. Of course, people facing possible dismissal might well behave in a nervous fashion. It is accepted that coins get stuck in the charity boxes. One of the things that I noted when reading the notes of the disciplinary hearing is that an HR adviser advised the claimant that the outcome would be either a dismissal or a final letter of warning. That adviser does not suggest, as would be normal, that one of

the outcomes might be no further action at all. That suggests a predetermined outcome.

- 20 By letter of 21 March Mr Majithia wrote to the claimant that he was to be dismissed. He recognised the claimant's "*age, years of service to the burial society and character references*" but said he weighed this against the following factors:

*"1 The video clips show a number of occasions during a relatively short period of time where you repeatedly looked into the charity boxes with no reasonable explanation or justification.*

*2. One of the clips showed you using an implement to interfere with the charity box, however, during the hearing you were unable to give a satisfactory explanation as to what exactly you were doing, why you was doing it or your reason for having such an implement on your person.*

He goes on:

*"Accordingly, on balance it is my view that your actions on the day in question amount to proving the breach of Trust and Confidence which in turn constitutes Gross Misconduct and as such the correct sanction in the circumstances in accordance with the final stage in the United Synagogue's Disciplinary Procedure is that you are summarily dismissed as of 21 March 2018."*

- 21 The claimant immediately wrote a letter of appeal which is relatively short. He was asked for more information which he provided on 19 April. In that he raised one of the matters which concerned him, which was a breakdown in relationship between himself and a colleague and he also mentioned the previous incidents being raised. He was told that the appeal was to be heard by Mr Virdee.

- 22 After some postponements for good reason, the claimant attended the appeal hearing on 7 June 2018. He was accompanied by Rabbi Sunderland and again the CCTV footage was looked at in some detail. The claimant accepted that he was "*stupid to be around the boxes*" but repeated that he did not take anything out. He accepted that it didn't look good and that it looked odd.

- 23 Mr Virdee had read the papers but he did not speak to Mr Majithia. In any event, Mr Virdee considered matters and, by letter of 8 June, he dismissed the claimant's appeal. He listed 7 matters (page 93/4) which he took into account when reaching his decision. The first point is that he said that previous allegations or suggestions "*did not contribute to the decision to dismiss*". That does not accord with Mr Majithia's evidence. He upheld the decision to dismiss.

## **Law and submissions**

- 24 The law which I am bound to apply in this area is set out in the Employment Rights Act 1996 (ERA) particularly Section 98. Section 98

(1) and (2) contain the potentially fair reasons for dismissal including “conduct” and “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held”. The burden of showing a potentially fair reason rests on the respondent.

25 As to the fairness or otherwise of the dismissal, if I am satisfied that there was such a potentially fair reason, Section 98 (4) states;-

*“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”*

26 The respondent’s case is that the dismissal was either for some other substantial reason or for misconduct. As the wording suggests, such a reason has to be substantial and relate to the employee’s job. In this case it is said to be a loss of trust and confidence the claimant being in a trusted position.

27 It is said, in the alternative to be a conduct dismissal, so I should consider guidance provided by the leading case of British Home Stores v Burchell [1978] ICR 303 which sets out the issues which I should consider including whether the respondent had a genuine belief in the conduct complained of which was founded on a reasonable investigation and whether a fair process was followed. That case advises as follows:-

*“What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further”.*

28 The investigation should be one which is fair and reasonable, and the band of reasonable responses test applies to that part of the process as

well as to the overall consideration of the fairness of the sanction (*Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23*).

29 I must also not substitute my view for that of the respondent, a point emphasised in *Iceland Frozen Foods v Jones [1982] IRLR 439* (and re-affirmed in *Foley v Post Office and HSBC Bank Ltd v Madden [2000] ICR 1283*). Rather, I must consider whether the dismissal fell within a range of reasonable responses.

30 The claimant is also claiming that his summary dismissal amounted to a breach of contract. I must decide whether the facts, as found by me, show conduct which is so serious as to bring the contract to an end without notice.

31 Both representatives made submissions. They did not disagree about the legal tests to be applied as set out above.

### **Conclusions**

32 I first had to consider whether the respondent had shown a potentially fair reason for the dismissal. The only ones that are suggested by them under s.98 was either that it was a conduct dismissal or, if not, it was for some other substantial reason.

33 I consider whether the respondent has satisfied me that the reason for dismissal was conduct. I found this question a difficult one in the circumstances of this case. The conduct relates to how the claimant behaved on the CCTV footage which I have now seen. This is a few minutes' footage, on various occasions on one day. The respondent argues that what is seen there is behaviour which amounts to a breach of trust. Although, as indicated, I can see that some aspects of what the claimant is doing might seem rather odd, there can only be very limited circumstances where acting oddly can amount to misconduct. Especially in circumstances where there have been no instructions to guide employees on what is or is not acceptable behaviour.

34 Although breach of trust is contained in the respondent's list of examples of gross misconduct, such breach of trust must contain an element of objectivity in order to assess whether it is indeed a breach of trust or not. I cannot accept that there was any misconduct or that the respondent reasonably believed that there was. The respondent has failed to discharge the burden of proof here. The respondent has not shown that the reason related to the claimant's conduct.

35 I therefore turn to the question of whether the respondent can satisfy me that what is seen there amounted to some other substantial reason of the kind such as to justify the dismissal of the claimant. Again, the respondent has difficulties here. It is not entirely clear what objections the respondent has to the claimant's behaviour. Is it looking in the box? Is it touching the box? Is it looking in the box several times? Is it looking in the box when there was nobody there? The problem really for the respondent is that behind the actions that it took was the suspicion it had, apparently from an earlier occasion, that there may have been theft. On

any account, there was no theft that that could be seen in the claimant's actions of 21 February. The respondent cannot show some other substantial reason for dismissing the claimant.

36           However, if I am wrong about that and the evidence is sufficient to show a potentially fair reason for dismissal, I go on, for completeness, to consider fairness or otherwise. Here the burden of proof is neutral. I look then at all the evidence before me, what evidence there is of the investigation and the disciplinary procedure used. Lastly, I consider, whether dismissal was a reasonable sanction in all the circumstances.

37           As far as the investigation is concerned, it only has to be one which is within the range of reasonable responses. The claimant was spoken to at a properly convened meeting; the CCTV footage was looked at and other witnesses were spoken to. I am concerned that there did appear to be some pre-formed views about something that had been discussed earlier. No other Chevra Kadishas were spoken to, nor anyone else including as I understand it, the claimant's line manager, or at least there is no statement from them. On balance, however, I am prepared to accept that the investigation was just about sufficient for these purposes.

38           Looking then at the disciplinary process, there are no particular criticisms of this. The claimant was invited to the meetings and he was accompanied. Mr Majithia appeared to be trying his best to deal fairly with the claimant and listened to what he had to say. On balance, again, I do not think there is anything to be severely criticised in the disciplinary procedure itself.

39           I therefore consider whether dismissal fell within the range of reasonable responses and I find that it did not. This was an employee with a clean disciplinary record. There were no instructions about what he should do or not do during the time when he was not otherwise engaged. Whilst I accept that his behaviour of looking into boxes, on one occasion poking at something with a stick looks a little odd, it is certainly a very long way away from theft. There is no indication at all of theft in that footage. It is not within the range of reasonable responses for a reasonable employer of this size and administrative resources to dismiss an employee with this length of service and a clean record for what they saw on this CCTV footage.

40           I particularly bear in mind the apparent pre-judging of this matter, calling it theft at the outset and referring to the earlier allegations which were unsubstantiated. These did play a part in what was decided. The respondent accepted that he did not take anything out of the boxes and that he was of good character. The decision making seems a little confused and inconsistent. If there was any wrongdoing and I am not convinced that there was, a reasonable employer would have considered how to remedy that by clear instruction to the employee. My view is that this is not a situation where a reasonable employer would have taken the decision to dismiss.

41           As must be clear from my findings of fact, the respondent was not entitled to dismiss summarily as there was no gross misconduct.



42 Given my finding that there was no misconduct I cannot find that there was really any blameworthy conduct on the part of the claimant. I would not be inclined to make any deduction for contributory fault. Given that I have not said that the procedure had any substantial defects, I also do not think it is a case where any Polkey deduction would apply so we go on to decide remedy.

### Remedy

**Note. After oral judgment and a short judgment was sent to the parties, the respondent wrote to say there had been some miscalculations. The claimant agreed and an amended judgment has been sent by consent. The figures below are the accurate figures after those amendments.**

43 After I gave oral judgment as above, we then discussed remedy. Much of this was agreed, the basic award was agreed at £6,601.50.

44 For the compensatory award, It was agreed that the claimant secured employment on 27 July 2018. The respondent agreed that overtime should be included when calculating net loss. The major difference between the parties was about the length of time over which I should award loss of earnings. The claimant's evidence was that he had looked very hard to secure employment. He had secured the job in July 2018 as a driver's mate on a minimum wage. During cross-examination he said that he had "lowered his sights" when he accepted that job because it became clear to him that he was not going to secure employment at the rate of pay he had enjoyed with the respondent. He signed on as unemployed and received Jobseekers Allowance. His current job is due to expire soon. I have been asked to consider losses from July 2018 to today. The statutory cap applies.

45 The claimant told me that he is registered with employment agencies and that he continues to check for better roles. During the period of unemployment, he spoke to his Rabbi at Borehamwood, went into shops including a Kosher butcher's where he had previously worked and tried to find employment. He said that he continued to try and find better employment even after he secured his current employment. I accept that the claimant worked hard to find alternative employment. I also accept that his age and the fact that his previous employment terminated because of an allegation of gross misconduct would be matters which would make it particularly difficult for him to find employment at the rate he had previously enjoyed.

46 After careful consideration, I find that a reasonable length of time for the claimant to have found alternative work at an equivalent salary would be 26 weeks from 27 July 2018. Loss of statutory rights is in the reasonable amount of £400.

47 The totals are as set out in the short judgment as now amended as follows:-

**Basic Award**

£6601.50

**Compensatory Award**

Loss of earnings from 21 March 2018 to 27 July 2018	£8,417.34
Loss of earnings 26 weeks from 27 July 2018	£2362.62
Loss of statutory rights	£400

The recoupment regulations apply. The sum to be paid immediately by the respondent is the total of the Basic Award (£6601.50); loss of earnings from 27/7/18 (£2362.62) and loss of statutory rights (£400). This total is £9,364.12.

The amount to be retained by the respondent, pending the relevant government department confirming the amount of job seekers allowance to be re-paid, is £8417.34. Upon notification by the relevant government department, expected to be in the region of £300, the balance will be paid to the claimant.

---

Employment Judge Manley

Date: 31/01/2020

Judgment sent to the parties on

.....  
11/02/2020

For the Tribunal office