



EMPLOYMENT TRIBUNALS

Claimant: Mr Richard Andrew
Respondent: Montgomery Waters Ltd
Heard at: Llandudno **On:** 13 & 14 February 2020
Before: Employment Judge S J Williams (sitting alone)

Representation:

Claimant: Mr Paul Wilson (Counsel)
Respondent: Mr Robert Wyn Jones (Counsel)

JUDGMENT

The judgment of the tribunal is that:

- 1 The claimant was both unfairly and wrongfully dismissed;
- 2 The claimant contributed to his dismissal to the extent of 50%.
- 3 The question of remedy is adjourned to a date to be fixed.

REASONS

Introduction

- 1 The claimant was employed by the respondent water bottling business as a production team leader from March 2004 until his summary dismissal on 4 February 2019 for alleged contravention of the respondent's no-smoking policy. The claimant's dismissal was confirmed by letter of 5 February and his appeal heard on 13 February was rejected.

- 1 By his claim (ET1) presented on 3 May 2019 the claimant contends that his dismissal was both wrongful and unfair and claims pay in lieu of notice and compensation.
- 2 By its defence the respondent denies the claimant's claims.
- 3 Mr Jones, for the respondent, adduced the evidence of Melanie Teece, Technical Manager; Steve Prosser, Operations Director; and Andrew McAdam, Commercial Director. Mr Wilson adduced the evidence of the claimant. All witnesses presented their evidence in chief in written witness statements which were read by the tribunal in advance and on which they were cross examined.
- 4 The tribunal was provided with a trial bundle of documents containing pages 1-301, to which pages 301-6 were added by consent during the hearing. Arrangements were made for the tribunal to view the CCTV footage referred to below.
- 5 Counsel jointly produced for the tribunal a list of agreed issues which they addressed in their oral closing submissions.
- 6 This hearing was limited to questions concerning liability.

The facts

- 7 The respondent, employing some seventy employees and three directors, operates a water-bottling business at Churchstoke in Powys which supplies bottled drinking water to a number of large customers including Tesco and Co-operative Stores. Water is brought from springs and boreholes in the vicinity and stored in tanks on site before being processed, bottled and supplied to customers.
- 8 The respondent's operation is subject to the stringent controls one would expect in a business producing product for human consumption. The respondent is audited and certified by BRC Global Standards for Food Safety and, save for a short period of exception, has achieved Grade A*, one level below the highest possible grade. Additionally, some customers, notably Tesco, may carry out their own audits to satisfy themselves that the respondent's processes and systems meet their requirements.
- 9 This tribunal accepts without qualification that the maintenance of food safety standards is of the utmost importance to the respondent, and that any failure or downgrading which led to dissatisfaction on the part of its customers could have extremely serious commercial consequences.
- 10 The respondent wrote to staff, including the claimant, on 29 November 2004 stating that, having considered the then recent legislative changes, *'and with specific attention to the fact that we are all concerned in the production of a food product, our Company will become a totally non-*

smoking site from March 1 2005. Thenceforth smoking would be permitted during formal break times and in designated areas only and subject to a hand-washing rule. The letter continued, *'after numerous requests to voluntarily accept these conditions of employment we find that there is no other way than to make it a disciplinary issue.'*

- 11 The rules surrounding smoking were incorporated in the respondent's handbook, which currently provides (VER 3 16 December 2016):

'DISCIPLINARY RULES

Misconduct

...

- 11.6.12 Smoking in no-smoking areas.

Disciplinary penalties

12.31 The usual penalties for misconduct are set out below ...' [There follow references to first and final written warnings, dismissal and alternatives to dismissal.]

- 13 Later in the handbook there appears:

'NO-SMOKING POLICY

26.3 Smoking is banned in our workplace ...

Breaches of the policy

26.6 Breaches of this policy will be dealt with under our Disciplinary Procedure and, in serious cases, may be treated as gross misconduct leading to summary dismissal.'

- 14 'Serious cases' (see previous paragraph) are not defined in the handbook or elsewhere.
- 15 Despite that apparently absolute ban on smoking, the respondent provides a 'smoking hut' which is the only area on the premises where smoking is permitted.
- 16 The 'tank farm' is an area within the respondent's premises in which numerous large metal tanks are located in which water is stored and from where it is piped to the processing and bottling plant as required. The tanks remain sealed to the atmosphere save for rare occasions when they might be open for cleaning. The tank farm is (though was not always) surrounded by a metal fence and locked door. It is one of a number of areas in the premises which are accessible only by using an electronic 'key fob.'

- 17 The respondent's evidence, which I accept, was that the risk of contamination from smoking near tanks is negligible (save for when a tank might be open), but that nevertheless the respondent's customers view it seriously. On one occasion the respondent was given a 'minor non-conformance' by a customer when cigarette butts were found outside the door to a production area. A customer aware of smoking in the tank farm area would expect the respondent to take action.
- 18 The respondent's premises are covered by CCTV and there are notices to that effect. Following information received suggesting that the claimant had been seen smoking in the tank farm, Ms Teece obtained the authorisation of Mr McAdam to install a further, temporary, CCTV camera giving a view of a raised metal walkway between two rows of tanks in the tank farm.
- 19 On 23 January 2019 footage from the temporary camera showed a man wearing a red overall walking, on four separate occasions, onto the walkway where he acted in ways from which, it was agreed, it might be inferred that he was smoking. His arm was repeatedly raised towards his mouth and what appeared to be puffs of smoke could be seen. Both Mr Prosser and Mr McAdam, who have known the claimant for numerous years, said they could identify him from that footage as the man smoking. The image was both distant and very blurred and, from that image alone, the tribunal would have questioned whether a reliable identification could be made.
- 20 Mr Prosser suspended the claimant from work by letter of 24 January 2019 headed 'Ref: Investigation into GROSS MISCONDUCT – Infringement of Smoking policy.' The letter confirmed that the claimant was suspended with regard to 'Smoking within the non-designated factory arear and at a time when you were not clocked out as part of your break periods.'
- 21 Mr Prosser investigated by viewing additional footage from permanent CCTV cameras which, he believed, showed the claimant leaving his workplace (known as Sidel 1) and entering the tank farm at times consistent with his having been observed smoking there. Mr Prosser also considered access control records which showed the claimant's 'key fob' being used to access the tank farm on four occasions.
- 22 There is a 'lag', or delay, between the times shown on the temporary camera, the permanent cameras and the access control records. The respondent's evidence was that that 'lag', caused by their being connected to different servers, was nevertheless consistent on each occasion, and

- that the person seen leaving Sidel 1 could therefore be identified as the person entering the tank farm and being seen smoking there.
- 23 By a letter of 28 January 2019 the claimant was invited to an investigation meeting on 30 January. Mr Prosser explained the time 'lag', the claimant declined to look at the CCTV footage from the temporary camera and asked for it to be sent to him so that he could view it privately. That footage was sent as well as the access control records and the meeting reconvened on 31 January.
- 24 On 31 January the claimant denied that the person shown on the CCTV footage was him, and said 'Prove it.' The claimant also said that 'because the timings were out you could not use it.' The claimant was told to attend a disciplinary hearing on 4 February.
- 25 The respondent's disciplinary procedure provides

'Notification of a hearing

12.19 Following any investigation, if we consider there are grounds for disciplinary action, you will be required to attend a disciplinary hearing. We will inform you in writing of the allegations against you, the basis for those allegations, and what the likely consequences will be if we decide after the hearing that the allegations are true.'

- The respondent accepts that it failed to follow its own disciplinary procedure by neglecting to inform the claimant in writing of the allegation against him and of the possible consequences.
- 26 Both the investigation meeting and the disciplinary meeting were conducted by Mr Prosser. The respondent's reason for this was that Mr Delves, the respondent's managing director, was at the time on leave. Thus if Mr McAdam had conducted the disciplinary there would have been no director available to conduct an appeal hearing. The oral evidence was that Mr Delves was absent for some two weeks.
- 27 On 4 February 2019 Mr Prosser repeated his conclusion that the claimant was the person seen smoking, and said that he was one of only two employees on the day shift who wore red overalls and that the other was not in the area. The claimant said 'it could be anyone and that he couldn't even see it was a red coat.' Mr Prosser said 'we deem the breach as extremely serious and therefore as our smoking policy in handbook says, this is gross misconduct and I have no alternative to but to terminate your employment from immediate effect (sic)'. The claimant referred to paragraph 11.6.12 treating smoking as 'misconduct' to which Mr Prosser

- replied that paragraph 26.6 said 'serious cases' may be treated as gross misconduct.'
- 28 Mr Prosser said that in his presence the CCTV footage was never shown to the claimant, and that the permanent camera footage helped to confirm his identification of the claimant. He did not think the claimant had seen the permanent camera footage. In his witness statement (para. 22) Mr Prosser attributed to the claimant an explanation for the smoke seen in the footage by which he said he was 'genuinely gobsmacked', namely the suggestion that 'It's my breath it was cold'. As Mr Prosser said, if the claimant did say that then it amounted to an admission that he was the person in the footage but that he was not smoking. Mr Prosser made no note at the time of this remark, nor, very surprisingly, does such a startling change in the claimant's position appear in the minutes of the disciplinary meeting taken by a human resources officer. Mr Prosser's statement was signed over ten months later on 11 December 2019. In evidence Mr Prosser said 'I think it was said – it comes from my memory.' On this occasion I do not believe that Mr Prosser's memory has served him well.
- 29 The claimant's summary dismissal was confirmed by letter of 5 February 2019, which stated,
'The grounds of the disciplinary are, you were caught on camera smoking within the tank farm which is a prohibited area. As 11.6.2 (company handbook) states minor company breach, 11.6.12. We however see the area that you were seen smoking breaches company policy 26.6. as this is our main raw ingredient.
The nature of your actions constitutes gross misconduct as clearly laid out in section 11.7 of the company handbook. Therefore, leaving us with no other choice that to terminate your employment at Montgomery Waters Ltd with immediate effect. You have the right to appeal this decision within 7 days as per section 12.39 of the company disciplinary procedure.'
- 30 By his letter of 10 February, the claimant appealed against the decision to dismiss him on the grounds that he was not the person shown on the CCTV footage, that there was no risk of contamination to the sealed tanks from smoking, that he did not agree the minutes of previous meetings, and that evidence of smoking did not necessarily come from staff because a Sunday market was at the time held regularly in the area immediately outside the tank farm. The Sunday market is no longer held in that area.
- 31 On 13 February 2019 the claimant's appeal was heard by Mr McAdam who rejected all grounds and repeated that the respondent was '100% sure that it is you smoking.'

- 32 As the minutes indicate, all meetings with the claimant were very short, no more than about 10 minutes, because, according to the respondent the claimant had very little to say. The claimant did not disagree with that in evidence.
- 33 Another employee, Mr Johnson, had earlier been dismissed for smoking in the tank farm area.

Discussion and conclusions

Unfair dismissal claim

- 34 In the claimant's claim to the tribunal he complained that the temporary CCTV camera footage amounted to improperly obtained covert recording, and that the respondent had some other reason to want him out and set him up for that purpose. These matters were not pursued by Mr Wilson in his cross examination or his submissions.
- 35 There is no doubt that the respondent's reason for dismissing the claimant – no other now being advanced – related to the claimant's conduct and was therefore a potentially fair reason (Employment Rights Act, section 98(2)).
- 36 The respondent's investigation of the matter comprised examining two sources of CCTV footage and comparing those against the access control data. The time differences between those three electronic sources was found to be consistent on each of the four occasions in question. The respondent therefore concluded that the person seen leaving Sidel 1 was the same person seen, immediately afterwards, entering the tank farm and smoking there. That was in my judgment a reasonable conclusion.
- 37 The claimant in evidence agreed that he must have been the person operating the controlled doors, to Sidel 1 and the tank farm, because the access control data showed his 'key fob' was used on each occasion. He did not suggest that anyone else could, or might have used it. The fixed CCTV footage gives a reasonably good view of the person in shot, his gait and stature, and clearly shows his red overall. The temporary CCTV footage is much less clear though the red overall is visible. The only other person who wore a red overall on the day shift and was present on the day in question was a Mr Taylor who, the claimant agreed, is much larger and taller than he. Mr Prosser had known the claimant for some 15 years, Mr McAdam for 9 years; both said they could positively identify the claimant from the images they saw.
- 38 I regarded the evidence of the Sunday market as irrelevant. The respondent did not base its suspicion or its conclusions on evidence of

smoking which might have come from members of the public attending the market, such a cigarette butts on the ground outside the tank farm. No member of the public had access to the tank farm through the access controlled doors. That is where the respondent believed the claimant was smoking.

- 39 In my judgment the respondent carried out a reasonably thorough investigation and came to a genuine, honest and reasonable belief that the person seen smoking in the tank farm area on four occasions on 23 January 2019 was the claimant.
- 40 The claimant's dismissal is said to be unfair for the reasons set out at paragraph 3 (a – i) of the list of issues prepared by counsel (Employment Rights Act 1996, section 98(4)). I deal with them in turn.
- 41 3(a): The claimant was not co-operative about viewing the CCTV footage. He initially refused to view the temporary footage until it was sent to him privately. It would have been preferable for the respondent to play all the footage in the claimant's presence, but given the claimant's steadfast denial that he is the person shown, I do not consider that this matter was of central importance.
- 42 3(b): The respondent's failure to set out in writing the allegations for which the claimant was to be disciplined and the likely range of consequences is more serious. Its importance is demonstrated by Mr Prosser's evidence that 'the inescapable knowledge that I had knowing he was smoking in his PPE and without washing his hands following each cigarette break, was also in my contemplation.' The original letter of suspension had also referred to a potential aggravating feature, namely the claimant's smoking when not clocked out. I accept that in the end Mr Prosser felt that the act of smoking was in itself enough to warrant dismissal. Nevertheless the claimant is entitled to know in advance of the disciplinary hearing the full extent of the charge against him, including all potentially aggravating features. I do not accept that the heading 'gross misconduct' on the suspension letter is sufficient. What matters at this stage is not the initial reason for suspension, but the charge which, after investigation, is being pursued to the disciplinary hearing. Furthermore, setting out clearly the range of consequences assumes particular importance in this case for reasons set out more fully at (e) below.
- 43 3(c): Whilst the claimant was dismissed solely for the act of smoking where he did, these potentially aggravating features were in Mr Prosser's mind and should have been made plain to the claimant (see (b) above).
- 44 3(d): Mr Prosser acted as both investigator and disciplinary officer. In some very small employers there may be no practical alternative. This

- was not the case here. Mr Delves was on annual leave, according to Mr Prosser, for a 'couple of weeks'. The respondent did not suggest any reasons why the claimant's appeal could not have waited till his return, which would have allowed Mr McAdam to bring a fresh pair of ears to the disciplinary hearing. When one and the same person investigates and then disciplines, there is an inevitable impression that his/her mind is already made up. This was an avoidable element of unfairness in this case.
- 45 3(e): By far the most significant aspect of the unfairness in this case is the confusing inconsistency between paragraphs 11.6.12 and 26.6 of the respondent's handbook, and the uncertainty about whether smoking, other than in the designated 'smoking hut', will amount to misconduct or, 'in serious cases' gross misconduct. The respondent's evidence demonstrated that such 'serious cases' likely to attract the draconian penalty of summary dismissal were not clearly defined.
- 46 Mr Prosser accepted that, in effect, some no-smoking areas were treated as more 'no-smoking' than others, and thought that in 'production areas' the utmost good hygiene had to be maintained. Thus, for Mr Prosser, smoking in a production area would attract summary dismissal, but smoking in, for example, the car park would not. But the tank farm is an area where raw material, water, is stored; nothing is actually produced there. Ms Teece said that customers' perception was the overwhelmingly important factor, and that the tank farm needed protection in the same way as a production area because 'raw material storage had to be classed as production'. Mr McAdam thought that smoking in those areas which had controlled access would be 'serious cases', and that Ms Teece's training covered the point which was therefore common knowledge amongst staff. For his part, the claimant said that he distinguished between enclosed areas and areas open to the air, such as the tank farm was. Both Mr Prosser and Ms Teece acknowledged that the risk of any actual contamination was negligible save for rare occasions when a tank might be open.
- 47 It is of course entirely proper and reasonable for any employer, particularly one engaged in food production, to impose strict rules limiting smoking in particular areas. But it is equally reasonable, and given the potentially draconian consequences of non-compliance by an employee, necessary, for those rules to be clearly set out, by signage, in the handbook, or by other clear and effective means, so that someone who smokes in a strictly no-smoking area knows the risk he takes. That was not done by this

- employer, and the fact that the respondent's witnesses did not all speak with one voice shows that it was not done.
- 48 The respondent cannot in my judgment rely on having previously dismissed another employee in similar circumstances as sufficient to inform the claimant of what would happen to him. Paragraph 26.6 says 'may be treated as gross misconduct', not that it will be in all cases. Cases depend on their particular circumstances. The 'grapevine' is not a reasonable or adequate substitute for clear information from the employer. Nor was I referred to evidence to support Mr McAdam's suggestion that staff were trained on this point by Ms Teece.
- 49 3(f): I have no doubt that the training received by the claimant was sufficient to establish that this was a no-smoking workplace (save for the 'smoking hut'), but it was not sufficient to identify in precisely which areas the respondent would treat smoking as gross misconduct likely to lead to summary dismissal.
- 50 3(g): It is by no means unusual for an employer to limit the role of a companion to that of providing silent support. In the context of this case, where the claimant's position was a straightforward denial, I do not regard this point as of significance.
- 51 3(h): I accept the respondent's evidence that the claimant was a valued member of their team whose dismissal caused some disruption. If the respondent had attended to the matters set out at paragraphs 44-47 above, they would in principle have been entitled to treat smoking in clearly defined areas as gross misconduct, and to regard an offender's previous disciplinary record as irrelevant.
- 52 3(i): For the reasons set out above, and in particular at paragraphs 44-47, I find that the sanction of dismissal was not open to a reasonable employer in the circumstance of this case.

Polkey

- 53 Whilst there were certain aspects of unfairness in this case which can be termed procedural, the most important aspect was substantive, namely the respondent's failure to identify clearly the circumstances in which smoking might lead to summary dismissal. Thus, even if the procedural shortcomings had been made good, the claimant's dismissal would still have been unfair. No deduction is therefore appropriate.

Contribution

- 54 The claimant was well aware that his was a no-smoking workplace. The respondent was reasonably entitled to come to the conclusion that he had

been seen on camera and correctly identified as the person smoking in the tank farm on the day in question. That was, to the claimant's knowledge, a breach of the respondent's no-smoking rule, and was therefore culpable conduct which contributed significantly to his dismissal. In my judgment the claimant's contribution is properly placed at 50%, so that of any compensation (basic and compensatory awards) for unfair dismissal which he is ultimately awarded the claimant will receive 50%.

Wrongful dismissal claim

55 I find on the evidence before me and set out above, and on the balance of probabilities, that the claimant was the person seen on CCTV footage and identified by the respondent as having been smoking in the tank farm area. For the reasons which are set out above, it is not established in this case that smoking in an open-air storage area, albeit one where raw material, namely water, was stored, was of such seriousness that it amounted to a fundamental breach of contract. I therefore find that by summarily dismissing the claimant the respondent acted in breach of the claimant's contract of employment. The claimant is entitled to compensation representing payment in lieu of his contractual entitlement to notice, or alternatively his statutory entitlement to notice.

Conclusion

56 For the reasons set out above I find that the claimant was both unfairly and wrongfully dismissed.

57 Further consideration of the remedies to which the claimant is entitled is adjourned to a date to be fixed.

Employment Judge S J Williams
Dated: 21 February 2020

JUDGMENT SENT TO THE PARTIES ON
.....1 March 2020.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS