EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR R DAWES	AND	AIRBUS UK LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 26TH / 27TH FEBRUARY 2020

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **MR A GLOAG**

FOR THE RESPONDENT:- **MR S FOSTER**

JUDGMENT

The Judgment of the Tribunal is that:-

1. The claimant's claim that he was unfairly dismissed is not well founded and is dismissed.

2. The claimant's claim that he was wrongfully dismissed is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings claims of unfair dismissal, and wrongful dismissal (notice pay). Claims for unlawful deduction from wages and unpaid holiday pay have been withdrawn.

2. The tribunal has heard evidence from Mr Henry Ashton and Mr Brian Agnew on behalf of the respondents; and from the claimant.

Summary

3. The claimant was employed by the respondent from 6th October 1980 until his dismissal for gross misconduct on 16th April 2019. The claimant's line manager AP was dismissed, also for gross misconduct arising from the same investigation into the same events. The claimant does not dispute that AP was guilty of misconduct but contends that he was manipulated by AP and "*was unwittingly drawn into this by his line manager who used his position to put pressure on him to push the project forward. The claimant has been taken advantage of and feels his helpful nature has been cynically abused as has his willingness to get the job done."* (Statement of Claim para 4). In essence the claimant submits that he was the innocent dupe of his line manager and that the conclusion that he was personally guilty of gross misconduct was not a conclusion reasonably open to the respondent.

Background

4. The respondent is an international aerospace company. The claimant was employed as a Band 5b manager, the third tier of management. His line manager AP was a Band 4 (second tier) manager. The two had worked together for some ten years.

5. Underlying this claim is the question of the extent to which a failure to alert the respondent to a conflict of interest involving AP (set out in greater detail below) was or was not misconduct on the part of the claimant, and if so misconduct of what level of seriousness. Among the documents in the bundle were a number of the respondent's policies, which set out that it is the responsibility of every employee to report any conflict of interest. These had been the subject of mandatory annual training and briefings and include the Airbus Group Anti-Corruption Policy which sets out generally applicable principles. Its Introduction refers to "..*a zero tolerance policy towards corruption of any kind…active or passive*." Section 3 What you should know : Anti-Corruption Laws In a Nutshell refers to the risk of prosecution for employees adopting a "*head in the sand approach*", and that any employee failing to comply with the policy will face "*appropriate disciplinary action*."

6. The Airbus Procurement Policy contains the specific requirements relevant to this case. In particular section 2.2.2 Ethics and Compliance Rules incudes "*The MFT leader or any MFT/CFT members must contact their relevant Compliance Focal point*

if any potential non-compliance with the Airbus Ethics and Compliance Rules (e.g conflict of interest) is suspected."

7. It is not in dispute that the claimant did not report any conflict of interest to anyone other than AP himself and the extent to which he did consult AP is the subject of a dispute, the issues in respect of which are set out below.

8. Part of the respondent's business involves the use of hydraulic end caps which were used once and then disposed of. In 2018 AP and the claimant began the preparation of a tender for hydraulic end cap cleaning which would allow them to be cleaned and re-used. The claimant was project manager (MFT leader) for the tender which was released in July 2018. The call for tender (CFT) was open between the 2nd and 8th August 2018. The tender was of significant financial value in excess of 800,000 euros for the pilot stage alone, and potentially reaching some 7 million euros if the whole four stage project had been completed. Only one bid was received for the tender from a company Aerocleaned Ltd, which had been registered in March 2018. In April 2018 NP, AP's wife was appointed as a director of Aerocleaned. It is not in dispute that this raised a clear conflict of interest for AP and Aerocleaned itself and that both owed the respondent a duty to declare it.

9. On 11th October 2018 Mr Matt Beard the Business Compliance Officer received a report from an individual (subsequently anonymised) highlighting the coincidence of the shared surname of AP and NP and alleging a potential conflict of interest, the implication being that an Airbus Manager had directed business to a supplier of which his wife was a director. No conflict of interest had by that stage been declared either by Aerocleaned itself, or by AP or the claimant.

10. Mr Beard commenced an investigation on 11th October 2018. The initial investigation involved obtaining publicly available information, and then interviewing AP, the claimant and Reza Nawrozdda (an employee in the procurement department). The claimant was interviewed on 22nd November 2018 and 7th January 2019. Due to engagement on another project a forensic examination of the computer data and email traffic did not commence until 6th March 2019. On 21st March 2019 the investigation was completed. Mr Beard recommended that AP face disciplinary action for allegations of gross misconduct; and for the claimant to answer allegations of misconduct: " *Richard Dawes facilitated the selection of a supplier where there was a conflict of interest between his manager and the supplier and further prepared and passed information to Aerocleaned that would be of commercial advantage prior to the tender being initiated*". (Report 7.2) At 5.3 he had said "*These allegations are also applicable to Richard Dawes but as a direct report of AP he is deemed to be less culpable*."

11. Mr Henry Ashton (A350 Local Chief Engineer) was tasked with conducting and determining both disciplinary processes. From the investigation report he set out against the claimant four disciplinary allegations. These, as set out in a letter of 5th April 2019 were that he:-

i) Facilitated the selection of a supplier when he was aware that there was a conflict of interest;

ii) Prepared and passed information to the supplier that would be of commercial advantage;

iii) Unduly influenced the procurement process;

iv) That the above represents a conflict of interest and a serious breach of the ethics and compliance process.

12. However, Mr Ashton did not agree that the disciplinary charges were simply potentially misconduct, but were potentially gross misconduct and the letter set this out.

13. Before dealing with the disciplinary or appeal conclusions it is useful to set out the allegations of the claimant's personal involvement in the process in so far as it relates to Aerocleaned Ltd.

14. The evidence is that in March and April 2018 AP provided via email details of the hydraulic end caps concerned to Aerocleaned. The claimant was not copied into these initial emails. However, on 15th May 2018 AP sent an email to his wife, which was copied to the claimant. It was headed "Words" and he suggested "Phrases to Help." From the content it appears that the help being provided was to assist Aerocleaned in any future presentation to Airbus. As Aerocleaned were not at that stage an approved supplier they would need to obtain approval in order to tender for contracts. Shortly afterwards the claimant added a number of suggestions and replied saying "Few comments added if you agree". From those comments the claimant appears to show a degree of familiarity with Aerocleaned's business. By way of example in AP's original email one suggestion was "*On this side of the business four permanent employees with the ability to retain trusted flexible workers*" to which the claimant appended "*own vehicles so easy flexible to adjust at last minute if required*". How the claimant knew this by 15th May 2018 is not at all clear. In addition, that suggestion is prefixed by "*If asked"* which appears to suggest the advice to Aerocleaned extended beyond the initial documentation but how to reply to any questions asked of them. In addition, one comment which the claimant did not alter was "*Introduced, to this opportunity by Richard Dawes at Airbus who provided some example parts which we have cleaned…*" In evidence the claimant did not accept that this was correct, and asserted that all direct dealings with Aerocleaned had been conducted by AP.

15. On 17th May 2018 at a WebEx meeting Aerocleaned made a presentation to the respondent. The claimant was present representing the respondent, and NP represented Aerocleaned. He did not disclose or raise during or after the meeting (save possibly with AP himself) that he was aware of a conflict of interest which neither AP nor Aerocleaned had disclosed, nor did he disclose that he had assisted Aerocleaned in preparation for that meeting as set out above.

16. The claimant accepted that during the summer of 2018 he had tried to advance the project despite the fact that the only potential bidder was Aerocleaned. His evidence is straightforwardly that as the Project Leader that was his job. There was a thirty-nine week time frame with which, as project leader he was required to comply, and therefore there was a significant degree of urgency. This is the explanation for any apparent attempt to advance the interests of Aerocleaned at the time. However, in the course of doing so on 29th June 2018 he emailed Hollie Macreadie and said "*As I explained I want Aerocleaned on the list due to the fact that I have spent time with them and completed some trials with them*." In evidence the claimant was unable to explain the basis of this assertion, or what time he had spent with them on what trials.

17. On 25th September 2018 the claimant submitted a Procurement Process Deviation Request Form in order to proceed with the tender with only one bidder. To do so required authorisation from two senior managers. One of the fields to be completed in the form is Potential Impacts/Risks and that the claimant had not either in this part of the form or by any other means alerted either manager to the potential conflict of interest before obtaining their authorisation. Moreover, the claimant travelled in person to the south of France to obtain the authorisation but did not at that point draw it to the attention of either of them.

18. Thus, by the point at which the conflict was brought to the respondent's attention the claimant had not himself disclosed it despite having a number of opportunities specifically to do so. The claimant asserts however that he had drawn the conflict to AP's attention on some five or so occasions and had been reassured by AP, and had not therefore taken it any further. In his witness statement he describes questioning AP at or about the time of the WebEx presentation (para 5), and several other times (para 19 and 36). This is the evidential proposition at the heart of the claimant's case. He contends that he had followed the policies set out above by drawing it to his line manager's attention, he had been reassured by his line manger and therefore had no reason to report it further. As is set out above he contends was duped by his line manager.

19. The issue as to the accuracy of this account arises as the evidence before me is very different to that before the original disciplinary hearing. He was interviewed twice during the original investigation (22nd November 2018 and 7th January 2019) and did not in either refer to having raised the issue with AP. In the investigatory interview of 22nd November 2018 he states that he was not aware of the any conflict of interest at the time and "Did not think about any conflict of interest once it had been revealed to me", and on 7th January 2019 he stated " I have not spoken to AP on this issue". Moreover, both in the investigatory interviews and at the disciplinary hearing he denied that any pressure had been put on him by AP to promote or use Aerocleaned.

20. The respondent submits that it is "inconceivable" that if the claimant did raise the question of a conflict of interest with AP on several occasions and was pressured by AP to carry on (as he sets out at para 36 of his witness statement) that he would not have said so in either the investigatory or disciplinary meetings. In my judgement there is much merit in this contention and moreover, the failure to do so at the

disciplinary hearing is particularly inexplicable as the claimant's evidence before the tribunal is that "*When reading the report for the first time I was physically sick as I didn't realise the part or support AP was giving to Aerocleaned whilst applying pressure on me to push the project along*" (para 38, underlining in the original). This is very similar to what is set out as part of the appeal which begs the question of why it was not raised earlier. If this is true the failure to raise it at the disciplinary hearing after the claimant had read the report is incomprehensible. Looking at all the evidence I have concluded that on the balance of probabilities I am not persuaded that the claimant raised the conflict of interest with AP on several occasions as he now asserts. For the avoidance of doubt whilst that is the conclusion I have reached on the evidence before me; it was not one reached by Mr Ashton, as it was never advanced to him; nor specifically by Mr Agnew, although as is set out below one of Mr Agnew's grounds for rejecting the appeal were the inconsistencies in the accounts that had been given by the claimant.

21. To return to the disciplinary process the claimant attended the disciplinary meeting with Mr Ashton on 10th April 2019. He was accompanied by a colleague Daniel Wiltshire. By a letter of 16th April 2019 Mr Ashton set out his conclusions. He found each of the allegations proven for reasons he set out in detail in the letter. In summary he concluded that in relation to allegation 1 that the evidence showed that the claimant had worked with Aerocleaned for some 5-6 months prior to the CFT, that he had not engaged with any other potential supplier, that working with Aerocleaned gave it a distinct competitive advantage, and that he had assisted their introduction presentation in the "Phrases to help" email. In relation to allegation 2 he concluded that the claimant had directly contributed to the phrases to help email, engaged solely with Aerocleaned despite the having no aerospace cleaning experience, and worked with them on a sample cap cleaning process. In relation to allegation 3 he repeated the points above in relation to the phrases to help email, and that he did not himself declare the conflict of interest, and highlighted the claimant's stressing the urgency of the project on a number of occasions, and having authored the procurement deviation form and thus promoted Aerocleaned ahead of any other suppliers. As a result of his conclusions summarised above, he concluded that there a serious breach of the ethics and compliance processes. He concluded that the proven allegations constituted gross misconduct for which the appropriate sanction, notwithstanding the claimant's long service, was summary dismissal.

22. The claimant appealed and in his appeal letter essentially set out for the first time his case as advanced before the tribunal. He had not favoured or assisted Aerocleaned but had acted properly within his role as project manager. He had raised the issue of the conflict of interest with AP on a number of occasions and had always been reassured by him. He accepted that he should have raised the conflict of interest himself and requested that the finding be reduced to "a lesser degree of misconduct.", and that to receive the same punishment as AP was unjust.

23. The appeal was heard on 8th May 2019 by Mr Agnew. Following the appeal he made enquiries of Holllie Macreadie, Matthew Beard and Rob Williams. Overall he concluded that there were inconsistencies in the claimant's accounts throughout the process; that the claimant admitted fault in the appeal document and in the hearing;

that his actions had placed Aerocleaned at a commercial advantage; and he upheld the conclusion that he had committed gross misconduct for which the appropriate sanction was summary dismissal.

Conclusions

Unfair Dismissal

24. The claimant was dismissed for misconduct which is a potentially fair reason for dismissal. Whilst the fairness of the dismissal is in dispute it has not been challenged that the claimant was dismissed because of a genuine belief that he had committed the misconduct alleged; and in any event I accept that evidence of both Mr Ashton and Mr Agnew. Accordingly, the respondent has satisfied the burden of proving a potentially fair reason for dismissal.

25. The question of the fairness of the dismissal has to be answered by reference to the well-known Burchell questions. Did the respondent conduct a reasonable investigation; did it draw reasonable conclusions as to the misconduct; and was dismissal a reasonable sanction? In relation to each of those questions the tribunal is not to impose or substitute its own view for that of the respondent but to apply the range of reasonable responses test to each of those questions, i.e. could a reasonable employer have investigated, and drawn the conclusions both as to the misconduct and the sanction as the respondent did (See Sainsbury's Supermarket v Hitt).

26. Before dealing with the specific points, in determining the overall fairness of the decision I bear in mind that by the time of the appeal stage the claimant accepted that it had been an error not to have escalated any concerns he may have had to more senior management and accepted that he had committed misconduct, but requested the decision "be amended to a lesser degree of misconduct" and relied on Mr Beard's conclusion that his degree of culpability was lower than that of AP. The central issue is therefore whether the respondent was entitled to conclude that his culpability was sufficiently serious to justify a finding of gross misconduct and the sanction of dismissal.

27. Investigation – The claimant makes a number of procedural criticisms as to the investigation at various stages. In relation to the investigatory stage the claimant complains that Mr Beard has set out at page 3 of the report that he had unminuted conversations with two members of staff. The contents of those conversations are not set out in the report itself nor were ever elaborated on during the subsequent disciplinary process. As Mr Beard was not called to give evidence it is impossible to know what those conversations disclosed or the extent to which they influenced Mr Beard's conclusions. The information has not at any stage been made available to the claimant.

28. In relation to the disciplinary hearing the claimant submits that Mr Ashton failed to make any enquires of the procurement department to establish what it had done in relation to "compliance, directions, timescales etc"; and in relation to the appeal that

as Mr Agnew himself set out he made further enquires after the appeal hearing which in at least one respect informed his conclusions and which again were not disclosed to the claimant so as to allow him to engage with them prior to the decision being taken. In addition the claimant had set out in the appeal document that in relation to the assistance provided to Aerocleaned that this would if requested had been made available to any other supplier and that evidence in support of this would be discovered in the weekly management 4 box reports; but that Mr Agnew had not investigated this.

29. The claimant submits that these failings are sufficiently serious to amount to a systemic failure of process that fatally undermines the respondent's capacity to draw reasonable conclusions as to the misconduct.

30. My conclusions as to these submissions are set out below.

31. Conclusions as to Misconduct – The claimant makes relatively little criticism of the conclusions. In essence he submits that both Mr Ashton and Agnew should have accepted his account as honest and reliable and concluded that he had either no culpability, or that if he had committed any misconduct that it was not gross misconduct. Specifically, he points to two factual errors, the first Mr Ashton's conclusion that the claimant worked continuously with Aerocleaned for a period of 5-6 months prior to the call for tender". If this is a reference to the first call for tender then it is incorrect as the period was only some three months. In relation to the appeal he points to Mr Agnew's reliance on an assertion of Mr Beard that the claimant had in the first investigatory interview said that Aerocleaned had a good reputation, whereas there is no record of him having said this.

32. Before dealing with the question of sanction in my judgment the contentions set out above both in relation to the investigation and the conclusions in essence relate to the same point, whether in the absence of disclosing the material to the claimant, or making the enquiries, and in the light of the factual errors whether it was possible for the respondent to draw reasonable conclusions as the alleged misconduct; or whether they fatally undermine the process.

33. The central difficulty for the claimant, in my view, is that all the points made are relatively minor when set against the wealth of evidence both at the disciplinary and appeal stage that the claimant had assisted Aerocleaned, and had fundamentally failed to adhere to the requirement that he draw the conflict of interest to the attention of the respondent. As is set out at paragraph 6 above he had a specific duty as the Project Leader to do so; and the evidence in support of the contention that he had an obligation to do so, knew of that obligation and had many opportunities to fulfil it was simply overwhelming. Put simply the conclusions of both managers that the claimant had assisted in providing Aerocleaned a commercial advantage, and had failed in his duty to disclose a known conflict of interest were on any analysis reasonably and rationally open to them on the information before them and the criticisms of the investigation and their conclusions do not alter this central fact. Moreover, as set out above, at least by the time of the appeal misconduct in failing to do so was accepted.

34. Sanction – In my judgement if it is accepted that the conclusion as to the misconduct was reasonably open to the respondent, which for the reasons set out above I do, then the conclusion that it was gross misconduct is equally well within the bounds of reasonable conclusions. For a manager of the claimant's seniority and experience to (as the respondent had found) provide a commercial advantage to one supplier in a tender process and fail to bring the known conflict of interest it to the respondent's attention over many months despite the opportunities to do in my judgment reasonably justifies a conclusion that the claimant was in fundamental breach of the obligation he owed. In my judgement the respondent was entitled to take the view that these were extremely serious actions; and the conclusion that the misconduct was sufficiently serious to justify dismissal was again, in my judgement, reasonably open to the respondent.

35. It follows that the claimant's claim for unfair dismissal must be dismissed.

Wrongful Dismissal

36. The test for wrongful dismissal is different. The tribunal is not asking whether the respondent's conclusions as to the misconduct fell within the range of reasonable responses but whether the claimant had as a matter of fact committed a fundamental breach of contract justifying summary dismissal.

37. In relation to the facts I am not, for the reasons set out above persuaded on the balance of probabilities that the claimant had disclosed his concerns to AP and therefore in terms of the claim for wrongful dismissal there has been in my judgement a complete failure of the claimant to fulfil the obligation to report the conflict of interest. For the sake of completeness had I formed the alternative view and accepted the claimant's evidence it would not have assisted him greatly as, in my judgement, it would compel the conclusion that he had recognised the conflict of interest but still failed to report it beyond the individual who held the conflict. The question for me is whether that failure is sufficiently serious to justify summary dismissal. I should say I take the view that a number of aspects of the claimant's behaviour during the process are extremely odd and might allow the conclusion to be drawn that his involvement with Aerocleaned was much greater than he admits. He was, however, not cross examined on this basis and I have made no finding of fact about it. For the purposes of the wrongful dismissal claim I have considered only the fact, as I have found it on the balance of probabilities, that the claimant did not report his concerns to AP, and the admitted fact that he did not report the conflict of interest to anyone else.

38. The respondent has referred me to *Adesokan v Sainbury's Supermarkets Ltd [2017] EWCA* in which (at para 24) Elias LJ stated:

The question for the judge was, therefore, whether the negligent dereliction of duty in this case was "so grave and weighty" as to amount to a justification for summary dismissal."

39. Recast to encompass the circumstances of this case the question for me is whether the claimant's failure to report the conflict is sufficiently grave and weighty to justify dismissal. In my judgement it clearly was and the claim for wrongful dismissal must also be dismissed.

EMPLOYMENT JUDGE CADNEY
Dated: 24th April 20
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