EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Baker	**v**	Tallington Lakes Land Limited

Heard at: Cambridge **On**: 26 November 2019

Before: Employment Judge Johnson

Appearances
For the Claimant: Mr L Varnam, Counsel
For the Respondent: Mr J Pettican, Director

RESERVED JUDGMENT

1. The Claimant's claims of unfair dismissal and breach of contract are well founded. This means that the Respondent unfairly dismissed the Claimant and failed to pay him the notice pay to which he was entitled.

2. The case will now be listed for a hearing to determine Remedy on a date to be arranged and the parties will be informed of the date when it will take place and any appropriate case management orders in due course.

RESERVED REASONS

Introduction

1. The Claimant was employed by the Respondent as a gardener / handyman from 19 March 2015 until 2 November 2018 when he was dismissed.

2. The Claimant commenced proceedings in the Employment Tribunal on 11 February 2019 following a period of Acas Early Conciliation from 4 January 2019 until 11 January 2019. A response was presented on 19 April 2019.

3. Essentially, the claim is about the summary dismissal of the Claimant on 2 November 2018 without notice. The Claimant believes that the Respondent

did not communicate a potentially fair reason for his dismissal to him on 2 November 2018 and did not follow a fair and proper process.

4. The Respondent will say that while the Claimant was dismissed, it was for the potentially fair reason of gross misconduct and that it attempted to follow all reasonable procedural steps, but that the Claimant failed to cooperate with management on 2 November 2018.

5. It was confirmed at the beginning of the hearing that the correct name for the Respondent was Tallington Lakes Land Limited.

The Evidence Used in the Hearing

6. For the Claimant, the Tribunal only heard witness evidence from the Claimant. For the Respondent, the Tribunal heard oral evidence from Mr J Pettican who is a Director and also from Miss K Abbott who is a Personnel Manager. A signed witness statement was also provided by the Respondent from a Mr Bloodworth, but he did not attend the hearing to give oral evidence. I explained to the Respondents that while I would take into account the statement of Mr Bloodworth, I would be unable to give it the same weight as I would give the oral evidence which I would hear from the Respondent's witnesses and the Claimant.

7. This was a case where the hearing bundle was a single lever arch file of less than 100 pages. There were few documents provided by the Respondent and nothing was provided relating to records of the disciplinary process against the Claimant, or copies of time sheets which were used to complete the spreadsheet showing the Claimant's time sheets and clock card entries.

8. As the Respondent confirmed that the Claimant was dismissed, it was appropriate to hear the Respondent's witness evidence first.

9. The Claimant gave his witness evidence during the afternoon and as the Respondents were not represented, Mr Pettican was nominated as the advocate who would cross examine the Claimant. The parties were allowed regular breaks and were able to request additional breaks as necessary. The Tribunal did take notice of the fact that the Respondent was unrepresented and may not have been familiar with Tribunal or Court proceedings. In particular, before the cross examination of the Claimant by Mr Pettican, he was allowed a short break to collect his thoughts and consider what questions he might wish to ask.

The Issues

Unfair Dismissal

10. What was the principal reason for the dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996, ("ERA")? The Respondent asserts that it was a reason relating to the Claimant's conduct.

11. If so, was the dismissal fair or unfair, in accordance with the ERA s.98(4) and in particular did the Respondent in all respects act within the so called band of reasonable responses?

Breach of Contract (Wrongful Dismissal)

12. Was the claimant dismissed and if so, was the dismissal without notice?

13. Was there a repudiatory there a breach of the contract of employment by the claimant which justified summary dismissal?

Remedy

14. The claimant seeks compensation. The case today has dealt solely with liability.

Findings of Fact

15. The Claimant was employed as a Gardener / Handyman with the Respondent from 19 March 2015. This role required him to clock on each day when he arrived at work and also to submit time sheets for the work which had been carried out. It was understood from the evidence of Miss Abbott that the initial clocking on was to allow the employer to identify which employees were on site and at the time of the Claimant's dismissal this could be identified by the Respondent's management electronically.

16. The clocking on point was described by Miss Abbott as being about half a mile from where the Claimant and his colleagues would start work. It was therefore expected that the clocking on time would be different to the start time on the time sheet. The time sheets were submitted for the period when the employees commenced work. It was accepted that an ongoing issue had been that employees had not been correctly recording their time sheets

to reflect the time when they started work and instead would use the time which they clocked on or off.

17. The Respondent did have a grievance and disciplinary procedure in place and it applied to the Claimant as an employee. There was no dispute by the parties as to the contents of the disciplinary procedure, although there was some disagreement as to how it was to be applied. I am satisfied that the procedure did make provision for the use of both informal and formal processes to deal with disciplinary matters. It is noted that the procedure makes clear, *"where practicable, the aim of any disciplinary action is to correct and not to punish"*.

18. The procedure explains that in cases of gross misconduct, *"employees may be liable to be dismissed without notice or payment in lieu for a first breach of discipline"*. A non-exhaustive list of samples of gross misconduct includes dishonesty and falsification of data.

19. The procedure also explains that in all cases there will be an interview stage, a disciplinary action stage and an appeal stage. The interview stage will require the Respondent to inform the employee of a particular incident that requires investigation and will ask the employee to attend an interview. An employee would be required to attend with a colleague. The interview would be designed to allow the employee to be advised of all facts gathered during the initial investigation and he or she would then be given the opportunity to comment and present the relevant facts.

20. Disciplinary action would only take place following the interview and would result in the employee being informed of the Respondent's findings, together with any disciplinary action which is considered appropriate. Disciplinary action could involve a range of warnings or where appropriate, dismissal.

21. Finally, once the disciplinary action had been imposed, the employee would have the right of appeal with notice of intention to appeal having to be given in writing to the Managing Director within seven days of notification of the disciplinary action.

22. Both Miss Abbott and Mr Pettican sought to argue that the Claimant had been subject to a number of warnings during 2018 caused by his failure to return to work after lunch and taking far too long with his breaks and also smoking around petrol machinery on site. The term *"general laziness"* was also used and the Respondent felt that the Claimant would avoid doing work if he could.

23. The Claimant disputed that warnings had been given to him. Despite the Respondent initially confirming that documentation was available on file to support the warnings, they had not been included in the bundle of documents. When dealing with disclosure, Miss Abbott for the Respondent

had indicated to the Tribunal and the Claimant's Solicitors that they had disclosed everything that they had which was relevant to the case.

24. While I recognise that the Respondent may have had some ongoing concerns about the Claimant and his general performance during 2018, in the absence of any documentation, it is difficult to see how the Claimant was actually singled out for particular disciplinary action prior to the date of his dismissal. The Claimant gave evidence concerning this matter and I find that at most, any issues concerning disciplinary matters were conducted on an informal basis and collectively to members of staff from time to time.

25. Although there was some disagreement as to the manner of the Claimant's dismissal during the hearing of witness evidence, it was eventually accepted by Miss Abbot for the Respondent that the Claimant was dismissed on 2 November 2018 and this was for the potentially fair reason of gross misconduct. What happened was that at 4:55pm that day, Mr Pettican drove in his van and stopped to tell the Claimant that he was *"finished as of today"*. The Claimant said that he was not given any reasons for his dismissal and he had no idea that he was going to be dismissed at this point. Mr Pettican argues that he had made his mind up to dismiss the Claimant following a discussion with Miss Abbott, but had wanted to discuss the matter further with the Claimant in order that he could give his comments concerning the dismissal.

26. There was no dispute that the decision to dismiss the Claimant had been communicated to him by Mr Pettican before any notification of an investigation under the disciplinary procedure had taken place.

27. Having heard the Respondent's witness evidence, it was not entirely clear why they decided to dismiss the Claimant when they did. During the hearing a number of explanations were given. Mr Pettican initially sought to argue that the earlier formal issues of poor time keeping and smoking were relevant. However, this was disputed by the Claimant and no documentation was available to support Mr Pettican's contention within the hearing bundle. I felt that the Claimant's evidence was more credible on this matter. He asserted that any management concerns regarding possibly conduct issues, had been dealt informally at meetings before all members of staff. Accordingly, I am not convinced that these earlier matters were major issues that gave rise to the decision to dismiss.

28. Another view expressed by Miss Abbott and Mr Pettican was that the decision to dismiss focused upon a concern that the Claimant was deliberately fabricating time sheets so that he gave the impression he was working longer hours than he actually was. Mr Pettican adjusted his decision again to suggest that it was a combination of the time sheets issue and also the Claimant's ongoing smoking close to petrol driven machinery which caused severe health and safety issues.

29. A statement had been provided by Mr Bloodworth which was critical of the Claimant's general attitude and effectively supported the Respondent's case. However, it was difficult for me to place much credibility upon its contents given that he did not attend the hearing and his evidence could not be tested under cross examination. Moreover, it was not supported by any contemporaneous documentation which would have indicated that he raised concerns about the Claimant.

30. Miss Abbott confirmed that an investigation had taken place into the Claimant's time sheets by colleagues in the office who worked with her. No documentary evidence was provided to support this contention that a formal investigation had taken place. A spreadsheet was produced which demonstrated that between June and November 2018, there were occasions where the Claimant's time sheet recorded additional hours which were not reflected in the clocking in records. However, no documents were produced by the Respondent to suggest that these errors had been investigated and been dealt with as part of a formal process.

31. Mr Pettican and Miss Abbott were clearly of the view that the only explanation for these errors could be the dishonesty of the Claimant and at this point they agreed that he should be dismissed without notice. While this might be the case, I was unable find any evidence that this reason was actually communicated to the Claimant when Mr Pettican told the Claimant that he was dismissed on 2 November 2018.

32. Under these circumstances it is understandable that the Claimant was shocked and surprised that he was being dismissed and I am satisfied that he did not have any idea of any prior disciplinary concerns which would have given rise to this decision. Indeed, upon being told of his dismissal by Mr Pettican, the Claimant immediately went to speak to Miss Abbott who was unwilling to provide any further information and explained that this was a matter between Mr Pettican and the Claimant.

33. The Claimant did not return to work following 2 November 2018 and had thrown the keys to his van on to the roof before leaving.

34. The Claimant unfortunately suffered a heart attack shortly afterwards and was unable to take any calls from Mr Pettican on either 5 or 6 November 2018. Subsequently, Mr Pettican was informed that the Claimant's family did not want him to call the Claimant due to his health issues. Mr Pettican gave evidence to say that he wanted the Claimant to have an opportunity to explain himself, but was concerned not to call him following the intervention of his family members. While this was an understandable concern, neither he nor Miss Abbott thought it would be appropriate to send a dismissal letter nor remind the Claimant of his right of appeal against dismissal in accordance with the Respondent's procedure.

35. When the Claimant was finally well enough, he wrote to Miss Abbott on 11 December 2018 explaining that the decision to terminate his employment was in breach of contract and that he was seeking to speak with Acas concerning the matter. At this point, the Claimant had not received a letter from the Respondent confirming the decision to dismiss him and explaining the reasons for the dismissal.

36. In relation to the Claimant's letter of 11 December 2018, the Respondent did not consider that the Claimant's mention of breach of contract and a referral to Acas as a prompt to offer him a right of appeal under their disciplinary procedure.

37. A letter was sent by Miss Abbott to the Claimant on 19 December 2018, confirming that he had been dismissed for gross misconduct. It indicates that the gross misconduct was following an investigation into the hours worked by the Claimant and that discrepancies had happened on multiple occasions. Additional referral was made to the poor approach to work for a period of time and it appears that this was taken into account by the Respondent when making its decision regarding the Claimant. Indeed, the letter goes on to say, *"the above shows a clear picture of your general attitude to work"*. No offer of appeal was made in this letter and instead the Claimant was informed that his P45 would be sent to him.

Wrongful Dismissal

38. There was a memo in the bundle which was produced by management and which was sent to all members of staff on 2 November 2018. It concerned ongoing time recording issues. Both Mr Pettican and Miss Abbott denied that this memo was connected with the decision to dismiss the Claimant. It does seem surprising that a memo of this nature was sent to all members of staff enclosing examples of their time recording and that a decision was reached on the same day that the Claimant should be dismissed. It was difficult to understand exactly what the Respondent's reason was in dismissing the Claimant. However, it does appear there was an ongoing frustration with him and while this may not have been the subject of formal processes, both Mr Pettican and Miss Abbott suggested that recordings had been made of specific incidents involving breaks, the perception of laziness and smoking near machinery. There is no evidence, however, that processes were commenced concerning these issues in accordance with the disciplinary procedure. What seems to have happened is that on 2 November 2018, when considering the issue of time recording, the Respondent became exasperated with the Claimant and decided that he must be dismissed.

39. As a result, the Claimant was dismissed on 2 November 2018 and he was not informed of that reason by Mr Pettican or by Miss Abbott. He was not notified of an investigatory process, the reason for the investigation or a disciplinary hearing. He was not given a letter confirming his dismissal

because of gross misconduct and explaining why he should be summarily dismissed.

40. As a consequence, I am unable to identify a repudiatory breach on the part of the Claimant which entitled the Respondent to dismiss the Claimant summarily.

The Law

Unfair Dismissal Claim

1 The Respondent bears the burden of proving on a balance of probabilities that the claimant was dismissed for misconduct; see section 98(1) ERA.

2 If the Respondent fails to persuade me that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. If the Respondent does persuade me that it had a genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. To complete our enquiry, I must go on to consider the general reasonableness of that dismissal under section's 98(4) ERA.

3 Section 98(4) ERA provides that the determination of the question of whether a dismissal is the unfair depends upon whether in the circumstances (including the Respondent's size and administrative resources) the Respondent acted reasonably or unreasonably in treating this conduct is a sufficient reason for dismissing him. This should be determined in accordance with equity and substantial merits of the case. The burden of proof in this regard is neutral.

4 In considering the question of reasonableness, we must have regard to the decisions in *British Home Stores Ltd v Burchall* [1980] ICR 303 EAT; *Iceland Frozen Foods Ltd V Jones* [1993] ICR 17 EAT; the joined appeals of *Foley v Post Office and Midland Bank plc v Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA. In short, when considering section 98(4) ERA, I should focus my enquiry on whether there was a reasonable basis for the Respondent's belief and test the reasonableness of its investigation. However, I should not put myself in the position of the Respondent and test the reasonableness of its actions by reference to what I would have done in the same or similar circumstances.

5 In particular, it is not for me to weigh up the evidence that was before the Respondent at the time of its decision to dismiss, (or indeed the evidence that was before the hearing before the Respondent at the time) and substitute my own conclusion as if I was conducting the process afresh. Employers have at their disposal 'a band of reasonable' responses to the

alleged misconduct of employees and it is instead my function to determine whether, in the circumstances, this Respondent's decision to dismiss this Claimant fell within that band. The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which the decision was reached

Wrongful Dismissal

41. The Employment Tribunal's Extension of Jurisdiction Order 1994 provides the proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries or other personal claims) where the claim arises or is outstanding on the termination of the employee's employment, claim for notice pay is a claim for breach of contract; Delaney v Staples [1992] ICR483HL. In cases of wrongful dismissal, it is necessary for the Respondent to prove the Claimant had actually committed a repudiatory breach of contract. See Shaw v B and W Group Ltd. UK EAT/0583/11.

Discussion and Analysis

Unfair Dismissal

42. The Respondent asserts that the Claimant was dismissed for the potentially fair reason of conduct. This took place on 2 November 2018 when the Claimant was told verbally that he was dismissed. However, the reason for the dismissal was not communicated to him on this date.

43. As I discussed above in my Findings of Fact, it was difficult to identify the precise reason why the Mr Pettican and Ms Abbott believed the employee was guilty of misconduct. However, it would appear that they identified their reason in the letter sent to the Claimant on 11 December 2018 which alluded to the issue of time recording.

44. However, even if the Respondent believed that there was misconduct, it cannot be said that they had reasonable grounds to hold that belief. No investigation had taken place, other than a reference to the printed time sheet. No exploration had taken place as to possible alternative explanations as to the discrepancies in the Claimant's time recording data and management had simply jumped to a conclusion due to previously held prejudices concerning the Claimant's work ethic which had not bee the subject of any formal disciplinary process.

45. I am therefore not able to conclude that the Respondent had carried out as much investigation as was reasonable in the circumstances for it to form the belief that the Claimant had committed misconduct. Despite having a disciplinary procedure, the Respondent failed to investigate the concerns that it had with the Claimant, to notify him of those concerns and to follow any form of reasonable disciplinary process.

46. As a consequence, I do not accept that the decision to dismiss the Claimant was within the range of reasonable responses available to the Respondent. It could not reasonably conclude that the Claimant had committed gross misconduct which would allow it to summarily dismiss the Claimant. At best, there appeared to be minor irregularities concerning time recording and without a formal process being properly conducted by the Respondent, it was not reasonable to make a finding of gross misconduct. The Claimant was simply told verbally that he was dismissed and without any reason being communicated to him. No letter or telephone call immediately followed this decision and accordingly the dismissal was wholly unreasonable and unfair in accordance with section 98(4) ERA.

47. This is not a case where the Claimant has simply been unfairly dismissed because of a failure to follow process. On the facts of the case before me, it is a substantively unfair dismissal. It was not a case where dismissal was inevitable. Based upon the evidence I have before me, a proper consideration of any concerns that the Respondent had with the Claimant using their disciplinary procedure would have been unlikely to result in a finding of gross misconduct and a fair dismissal. Accordingly, a reduction in the compensatory award in accordance with the procedural unfairness principles established in the case of *Polkey v A E Dayton Service Ltd* 1988 ICR 142 HL would not be appropriate.

Application of the Acas Code of Practice

48. It is accepted that the Respondent was not a particularly large employer. However, it is still expected to follow employment law principles and it is noted that it had a disciplinary procedure which was included within the hearing bundle.

49. A fundamental difficulty in this case was that Mr Pettican and Miss Abbott took the view that once they had concluded that the documentation, namely the spreadsheet comprising of time sheet and clock card entries for the Claimant show discrepancies, they must be connected with the Claimant's dishonesty. As a consequence, they decided that the Claimant had committed gross misconduct without carrying out any further investigation.

50. While both Mr Pettican and Miss Abbott were keen to stress that they wanted to follow a fair procedure in this matter, they did not follow their disciplinary procedure and commence an investigation, or let the Claimant know of the issues that they wished to consider, before making a decision to dismiss. It may well have been the case that they wished to let the Claimant provide his comments on 2 November 2018 once the decision had been given, but Mr Pettican and Miss Abbott were undoubtedly of the view that the Claimant had been dishonest and did not consider that there might be other possible explanation for the errors in time recording on the spreadsheets to have taken place.

51. This was contrary to their own disciplinary procedure and also to the Acas Code of Practice which would have applied to them. While there was no doubt a matter which might have been capable of an investigation, the Respondent made a fundamental error in failing to conduct any form of investigatory process. This meant that when Mr Pettican communicated the decision to dismiss to the Claimant, there had been no fair process followed in reaching that decision and the Claimant had not had an opportunity to provide any comments which might have indicated that the conclusion reached was fair.

52. The Respondent then compounded this failure by being unwilling to send a dismissal letter to the Claimant and to communicate his right of appeal. It might have been possible at this point for them to have corrected their error and potentially to have ensured that the Claimant could have been reinstated.

53. For these reasons and taking into account the size and resources available to the Respondent, I find that it is appropriate to apply an uplift of 20% to the Claimant's award for remedy in accordance with section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992.

Deductions for contributory fault

54. In the absence of any evidence of any culpable or blameworthy conduct on the part of the Claimant, I am unable to find any contributory fault on his part with regard to the dismissal.

Wrongful Dismissal

55. In relation of any breach of contract on the part of the Claimant, I was unable to find that he was guilty of a conduct that was so serious as to amount to a repudiatory breach which entitled the Respondent to terminate his contract of employment summarily. The Respondent had failed to properly establish that such a breach had taken place.

Conclusion

56. For these reasons, I find that the dismissal of the Claimant must be unfair. Not only was he unfairly dismissed but he was wrongfully dismissed.

57. The Respondent has failed to demonstrate that the dismissal was as a result of a fair and proper investigation and under these circumstances the Claimant's claims must succeed. There is nothing that the Respondent could have done which would have resulted in a fair dismissal had corrections to the process taken place after the decision to dismiss had been given.

58. Accordingly, this matter will now be referred for a Remedy Hearing to be listed in due course with an estimated hearing length of 1 day, at which all issues relating to remedy will be considered.

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Employment Judge Johnson

Date: 20 December 2019

Sent to the parties on: .....

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For the Tribunal Office