Case Number: 2301497/2019 V

EMPLOYMENT TRIBUNALS

Claimant: **Mr A S Centioni**

Respondent: **Fire Design Solutions Ltd**

Heard at: **Croydon** **On: 10 February 2020**
Then via **CVP** **On: 30 June 2020 and 1 July 2020**

Before: **Employment Judge Wright**

Representation:
Claimant: **In person**
Respondent: **Mr M Williams - counsel**

LIABILITY JUDGMENT

It is Judgment of the Tribunal that the claimant's claim was presented out of time. It was reasonably practicable for the claim to be presented in time. In the alternative the claims of unfair dismissal and wrongful dismissal also fail. The claims are therefore dismissed.

REASONS

1. This case was listed for a one-day hearing by notice of hearing dated 4/12/2019, having originally been listed for a one-day hearing on 24/6/2020

The previous hearing was postponed due to the claimant undergoing medical treatment.

2. On 5/6/2019 and 23/1/2020 the respondent applied for the hearing to be converted to a half-day preliminary hearing in order to determine whether or not the claimant's claim was presented out of time. It was acknowledged the claim was presented four days late. That application was refused as the claimant was also claiming a redundancy payment and it appeared that claim would remain to be determined, irrespective of whether or not the unfair dismissal and claim for notice pay was out of time.

3. The hearing commenced on 10/2/2020 as a 'traditional' in person hearing, with the parties, witnesses and representatives physically present at the Tribunal hearing. At the start of the hearing, the claimant confirmed that he was no longer pursuing a claim for a redundancy payment. That information should have been communicated to the Tribunal, as the fact there was a claim for a redundancy payment extant, was material when considering the respondent's application to convert the hearing to a preliminary hearing. It may well have been the position that the respondent's request to convert the final hearing into a preliminary hearing would have been granted if the correct information had been provided.

4. The start of the hearing was delayed due to the fact the respondent's counsel did not have the bundle or witness statements. They had been posted to the Tribunal by the instructing solicitor, however, the solicitor had not taken steps to ensure the papers would be available. As a result, the Tribunal was not able to 'read into' the case until the papers were located. Approximately an hour was lost due to this.

5. The next issue was that the claimant said he had only received the respondent's witness statements on Friday 7/2/2020. He said he received them in the morning, but that he had been at work all day. The claimant's representatives, Employment Law (UK) Ltd was on the record, however, he represented himself at the hearing and it would have been courteous for the claimant's representative to have informed the Tribunal of this.

6. There was a concern that the claimant had not had enough time to prepare for the final hearing. There was a case management direction that witness statements were due to be exchanged on 9/7/2019. The directions were not varied when the first hearing was postponed and accordingly, the parties (who were represented) were expected to prepare in accordance with the overriding objective and the Presidential Guidance – general case management dated 22/1/2018 refers to case preparation. It states witness statements should be exchanged two weeks before the final hearing. It transpired that the respondent's solicitors had attempted to exchange witness statements on 4/2/2019, 5/2/2019 and on four occasions on

6/2/2019. The result was then that the statements were exchanged on 7/2/2019. It therefore appeared if there was any disadvantage to the claimant, that it was caused by his advisor. In any event and in order to give the claimant was much time as possible, he gave his evidence first. He had the benefit of the time whilst the respondent was locating the bundles, the period of time the Tribunal was reading into the papers, over lunch and as the case was not concluded on 10/2/2020 several months in order to prepare his cross-examination of Mr Mills and Ms Joseph, the dismissing officer.

7. The case went part-heard for several reasons. One was the delay in locating the bundles. Another reason was that neither party had addressed how many witnesses were being called, how many documents were referred to and as such, how much reading time would be needed. As the original hearing was listed for one day and in view of the number of witnesses called (irrespective of whether or not statements had been exchanged), it should have been obvious that the hearing would not conclude in one day.

8. On 10/2/2020 the Tribunal heard from the claimant; and for the respondent, from: Ms Smith and Mr Waterfield. There was a witness statement from Mr Mills, however he was not available to give evidence on the 10/2/2020. Due to the case going part-heard, Mr Mills was subsequently able to appear and give evidence in person. An agreed bundle of approximately 165-pages was provided. At the start of the hearing, the claimant added 19-pages of documents. Mr Williams did not object.

9. It was also confirmed at the commencement of the hearing that the claims were of unfair dismissal and for notice pay/wrongful dismissal.

10. The case was listed to resume on 14/5/2020. In accordance with the regime in place at the time, due to Covid-19, the hearing was converted into a case management hearing via telephone. The claimant was represented by Ms Vanbergen (a non-practising barrister) of Employment Law (UK) Ltd.

11. In view of the claimant's health issues and his desire for the case to be concluded in the short-term, all parties agreed to the case proceeding via CVP. This was at a point in time when CVP hearings were in their infancy.

12. As it became clear the hearing would resume, Ms Vanbergen objected to Mr Mills then giving evidence and she subsequently made an application for costs. Ms Vanbergen said the basis of the cost application was that she and the claimant had spent a considerable amount of time preparing questions in cross-examination for Mr Mills, which was subsequently wasted as Mr Mills did not appear. Ms Vanbergen also took issue that the

respondent had not informed her when witness statements were exchanged or even prior to that, that Mr Mills would not be attending on the 10/2/2020.

13. The Tribunal was troubled to now hear a different version of events in respect of the preparation for the final hearing from Ms Vanbergen, to that which had been advanced at the hearing[1].

14. The costs application will be addressed separately as there are other issues which arise as a result of that.

15. There was a short technical delay at the start of the resumed hearing on 30/6/2020. After some preliminaries, the claimant proceeded to put his questions to Mr Mills. After approximately an hour, there was a 10-minute break. The claimant's questions of Mr Mills resumed for approximately a further hour, after which a further 10-minute break was taken. The claimant concluded his questions for Mr Mill and Mr Williams put some short points to him in re-examination

16. Prior to any questions being put to Mr Mills, the parties were reminded that the Tribunal needed to keep a note of the proceedings. It was pointed out that it is impossible to keep a note if there is more than one person speaking. The claimant was asked to put his question to Mr Mills and then to allow Mr Mills to answer and not to: talk over him; ask a follow up question; or comment upon the answer. The parties were told that it was not a debate and that by following the format of question and answer, this would enable the Tribunal to best understand each parties case. There was also a difficulty with the sound quality (the claimant in particular had a tendency to talk to the side of his screen which meant that the microphone did not pick up the sound and the claimant could not be heard). This resulted in questions and answers being repeated.

17. Unfortunately, the claimant did not heed this advice and he continually talked over Mr Mills and asked questions to the side of his screen. Such that during the lunch adjournment, the Tribunal seriously considered whether it was in the interests of justice to continue using CVP. Or, whether justice would be served by continuing the hearing in person, at some point in the future. The difficulty with this, in particular for the claimant, was not only would there be a further considerable delay; but as he has health issues and is vulnerable, it may be that the case could not resume until 2021.

18. In light of the situation, the fact the claimant said he had 5-10 questions for Ms Joseph and upon his express agreement that he would allow Ms Joseph to answer his questions without interruption, the hearing continued. With one interruption from the claimant (despite the express agreement reached

[1] The claimant has said he had not had enough time to prepare.

approximately 15-minutes earlier), Ms Joseph's evidence concluded within approximately 20-minutes.

19. It was the claimant's preference that the hearing resume on the 1/7/2020 for closing submissions as he wished for further time to prepare. Mr Williams said he was in the Tribunal's hands. In view of that, the case resumed on 1/7/2020 for closing submissions, again, heard via CVP.

The Law

20. Section 111 of the Employment Rights Act (ERA) deals with complaints to Employment Tribunals and provides:

> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

21. Section 98 of the Employment Rights Act 1996 (ERA) deals with unfair dismissal and provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

4) 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.

22. The respondent relies upon the potentially fair reason of conduct. In a conduct dismissal, the relevant authority is that of British Home Stores v Burchell 1980 ICR 303, the respondent mush show that:

it believed the employee to be guilty of misconduct;

it had in mind reasonable grounds upon which to sustain that belief; and

at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

23. The employer does not therefore have to have conclusive or direct proof of the employee's misconduct. It only needs to have a genuine and reasonable belief, reasonably tested. The burden of proof is that the respondent must establish the first of the three aspects of the test and thereafter is neutral.

24. When assessing whether or not the Burchelll test has been met, the Tribunal must ask itself whether what occurred fell within the 'rage of reasonable responses' of a reasonable employer. In J Sainsbury plc v Hitt 2001 ICR 111 the Court of Appeal held that the range of reasonable responses test applies in a conduct case to both the decision to dismiss and the procedure by which that decision was reached.

25. The claimant also makes a claim in respect of this notice period. He was summarily dismissed and so was not paid his notice period of one month. A claim for wrongful dismissal requires the contract to be breached and if dismissal is the result, then the dismissal is wrongful. The jurisdiction falls under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623

Preliminary issue - time

26. The chronology is that the claimant started employment on 31/5/2016. He resigned on 8/11/2018 or in the alternative was dismissed for gross misconduct on 15/11/2018. He engaged on Acas early conciliation between 9/1/2019 and 22/1/2019. He presented his claim from on 4/3/2019, which was out of time.

27. The claimant's explanation for this was that he was ill. Although he did not know it at the time, he had non-Hodgkin lymphoma, which was diagnosed on 27/3/2019 (page 155). The claimant begun to feel increasingly stressed and unwell during the second half of 2018. He suffered from extreme tiredness and could barely function at all. The symptoms became very severe during January to March 2019. The claimant (as noted above) contacted Acas between 9/1/2019 and 22/1/2019. He said he was not functioning properly at this time, was sleeping a lot and suffering from 'a sort of brain fog'. For those reasons, the Tribunal was asked to allow the claim out of time.

28. In respect of the claimant's ill-health preventing him presenting his ET1 on time, the Tribunal makes the following findings.

29. The findings by no means intend to undermine or diminish the impact or seriousness of the claimant's health problems. The claimant has everyone's sympathy in respect of the condition which was diagnosed on 27/3/2019, but which he had clearly been suffering from for some time.

30. The question for the Tribunal however is, was it reasonably practicable for the claim to have been presented within the time limit and if it finds it was not; was it presented within such further period as is considered reasonable?

31. There was no medical evidence provided, other than the diagnosis from Croydon University Hospital dated 27/3/2019 (page 155). There was nothing other than the reference to the symptoms being 'severe' throughout January to March 2019 in the claimant's witness statement. There were no GP notes for example, showing the claimant was incapacitated in February 2019. In addition there was no explanation as to why, when the symptoms were severe in January, the claimant was capable of contacting Acas and complying with the early conciliation requirements; the claimant was then unable to present his ET1 on time, later in February. Furthermore, there was no information provided as to why he was then able to do so in March 2019 when he had said his symptoms were equally severe during this time, as they were in January (when he engaged with Acas) and February (when he could not present his ET1 due to them).

32. A debilitating illness may prevent a claimant from submitting a claim in time. This will usually only constitute a valid reason for extending the time limit however, if it is supported by medical evidence, particularly if the claimant in question has taken legal advice and was aware of the time limit.

33. In Midland Bank plc v Samuels EAT 672/92 - the claimant's unfair dismissal claim was presented almost a month late. The claimant claimed that she had been suffering from illness and depression and it had not been possible for her union to contact her about the claim because she had changed address and her mail had not been forwarded. The respondent accepted these arguments and granted an extension of time. The EAT held that it was up to the claimant to produce medical evidence as to the extent and effect of the illness and to keep in touch with her union representative. She could not rely on her failure to do so as an excuse for presenting her claim out of time.

34. The test of reasonably practicable is a strict one. The time limits are deliberately short and are strictly applied in the Tribunal. For the breach of contact claim, the time limit can be contrasted with the County Court, where the time limit is six years. Time limits are designed such so that claims are brought promptly, before memories fade, personnel move on and to provide certainty in respect of whether or not a claim will be made.

35. There was no misunderstanding in respect of the termination date and the claimant had not been misled in respect of it. Indeed, the claimant does not rely upon any confusion of the date for presentation of the ET1, he only refers to his health issues.

36. In view of those factors and irrespective of the claimant's health issues (for which the medical evidence amounted to one letter), the Tribunal finds that it was reasonably practicable for the claimant to have presented his claim form on time.

37. For the sake of completeness, the Tribunal then considered whether or not the claim was presented within such further period as was considered reasonable? Bearing in mind that the claimant has been legally represented since 4/7/2019, this aspect of the time issue was simply not addressed by him. There was no evidence offered to explain why, once the time limit had expired, the claimant then presented his claim out of time. The claim was therefore out of time.

38. Having heard all of the evidence and in case the Tribunal is wrong on the issue of the time limit, the Tribunal proceeded to determine the claimant's unfair and wrongful dismissal claims.

39. The fact the claimant was dismissed is conceded and the reason upon which the respondent relies under s.98 ERA is conduct as per s.98 (2)(b) ERA. The gross misconduct upon which the respondent relies is what it says is fraudulent completion of timesheets by the claimant and leaving the site early and refusing to return. The claimant was also found culpable of misconduct of using foul/abusive language, or to put it more colloquially, swearing when inappropriate.

40. The claimant also claims he resigned on 8/11/2018, but that the respondent did not 'accept' his resignation (page 126). A resignation does not have to be 'accepted' for it to be effective. There may have been a question as to whether or not the resignation was in the 'heat of the moment' and as such should not have been taken at face value. There is also the question of whether the claimant treated himself as discharged from the contract of employment. He did not. He continued to engage with the respondent and despite his 'resignation' at the meeting on 8/11/2018, the disciplinary meeting was rearranged and he attended the postponed meeting; indicating he considered himself to remain employed. In his claim form, the claimant stated the termination date was 15/11/2018, which accords with the meeting on 15/11/2018 and the respondent's dismissal letter of 21/11/2018 (page 137). It should also be noted that if in fact the resignation was effective[2] on 8/11/2018, then the limitation date (subject to any extension of time for early conciliation) was 22/2/2019. Furthermore, it appears the claimant was paid until the 15/11/2018.

41. The claimant's contractual hours are 8:00am to 4:30pm with an hour for lunch each day. The Tribunal was told that the claimant was not paid for travelling time and that he was expected to travel from home, to various sites, in his own time.

42. In early 2018, a letter was sent to the claimant, advising him that following an incident on 25/1/2018 there was an allegation he had used abusive

[2] Without notice.

language (page 91). The claimant was informed that any repercussion of events, could result in disciplinary action. In addition, the issue of the claimant leaving the site without permission was also raised. The claimant was reminded that although he may have completed the work planned for the day prior to his finishing time, he was contracted to work 7.5 hours per day and should there be any reason to leave work/or the site prior to the completion of his contracted hours, he should contact the relevant Project Manager or the office prior to doing so. Although no formal warning was issued, the claimant was informed that the notice would be kept on file for 12-months and that it could be revisited if there were any similar incidents. There was no issue raised with the claimant's completion of his time-sheets at this stage.

43. There was then an incident between the claimant and another employee on 11/9/2018 (page 95). The claimant raised this as a concern on the same date (page 95). A grievance investigation meeting was held on the 12/9/2018 (pages 96- 98). The other employee was also interviewed (pages 100-101).

44. A further complaint was then made about the claimant on 10/10/2018 by a project manager (GHE) (page 102). The accusation was the claimant had sworn at the project manager. The claimant was interviewed on 16/10/2018 (pages 104-106). The claimant swore during the interview, was abusive about the project manager and he was asked to lower his tone. The claimant ranted about the project manager. He was ill at the time of this interview, yet at this hearing, when the claimant confirmed he was well (he said he was lucid when he gave his evidence on 10/2/2020) he did the same[3] when questioned about the project manager. The claimant said he did not care if he had told the project manager to 'fuck off' as the respondent did not understand his frustration. As a result, the claimant was invited to a disciplinary hearing (page 107).

45. On 26/10/2018 another issue arose (page 108). The claimant had left the site (Brentford Lock) early. He agreed he left at around 3:30pm. He had told someone (it was not clear who) that he intended to leave early that day in order to avoid the Friday afternoon rush hour. The project manager of the site (CR) called the claimant and asked him to return to the site and to carry out some testing. The claimant swore at CR and refused to return to site.

46. As a result of this, the disciplinary meeting in order to discuss the incident on 10/10/2018 was postponed. The claimant was suspended and called to an investigation meeting which took place on 2/11/2018 (pages 111-112). At the meeting, the claimant refused to comment on the allegation CR had made against him. In respect of the query about his hours of work, (the

[3] He ranted disrespectfully about the Project Manager.

respondent wished to discuss his time-sheets not matching up to the vehicle tracker) Mr Mills attempted to investigate this with the claimant. In particular, he was asked about his timings and attendance on a site in Teddington between 1/10/2018 and 10/10/2018. The claimant said the respondent's concern was irrelevant and he went onto say that he could not comment as he did not know in advance of the meeting that he was going to be questioned about those particular dates. The claimant referred to checking his diary and he was given the opportunity to do so. In response, the claimant then said he did not wish to do so as there was nothing wrong with his work.

47. The claimant provided a written statement on 7/11/2018 (pages 116-123). The claimant set out the issues he had had (such as there being no power on the site) in relation to days one to six – it was not clear what dates those references (days one to six) were to. The claimant denied he had spoken aggressively to CR, he said he had spoken:

> 'slow and clear as though speaking to a child as he continuously questions reported issues without any understanding, yet never listens or reinterprets what is actually said.'

48. In response to the swearing on the call with GHE, the claimant hung up and said he only swore as he was ending the call, in frustration at the situation. The profanity was not directed at GHE; it was directed at the situation and it was not his intention that GHE would hear.

49. In respect of the incident on the 26/10/2018 the claimant stated that he had told 'all parties involved' that he intended to leave at 3:00pm on Friday. The claimant said he was ill, but that he could not afford to be absent from work. The claimant went onto say that he had told CR on Friday morning that he would be leaving at 3:00pm. His statement records:

> 'I didn't swear when I said [it's] not my job but I admit to saying they don't give a XXXX[4] and you don't give a XXXX.

50. The claimant agreed CR had called him at around 3:30pm and in response, the claimant said that he was not paid travel time and:

> 'How many times do I have to say I'm leaving at three, it's three thirty and it's XXXX Friday mate I'm not risking three hours in traffic.'
>
> …
>
> None of those time that I actually did swear were they anything other than conversational swears and were not directed, it wasn't

[4] This is how the swear words were expressed in the statement, the actual words were not stated.

> intentional merely the result of constant badgering which I now believe was deliberate, intended to aggravate. We work on building sites swearing is constant in normal conversation all around us daily.'

51. The claimant set out what work he had done on various dates, for example:

> '5.10.18
>
> certs
>
> 8.10.18
>
> Job was cancelled by an email sent from [GHE] on Sunday which stated the office will call me with a job. I called office at 0830 as I'd not heard anything, job was given around 1000-1030 from maintenance to go to vista. Maintenance emailed on completion of work.'

52. The claimant did not address the other dates in October which had been put to him in the investigation meeting of 1/10/2018 to 10/10/2018. The claimant also said he was extremely ill and had to have a blood test and biopsy. He said he had no choice but to resign under duress.

53. The claimant was called to a disciplinary hearing on 8/11/2018 (page 114). The allegations were:

> '… concerns in relation to your conduct and the use of inappropriate language towards colleagues…'
>
> and
>
> 'fraudulently recorded the actual hours worked on [his] time sheet compared to that on [his] vehicle tracker…'

54. The claimant attended a meeting on 8/11/2018, however that meeting was postponed as the claimant has said he did not have time to organise a representative to attend with him; although the minutes show that it was difficult for Ms Joseph to pin down what the claimant actually wanted to do (pages 124-128). It took 20 minutes to agree with him to rearrange the meeting.

55. The reconvened meeting took place on 15/11/2018. Again, the claimant was unaccompanied, however on this occasion the meeting went ahead.

56. In respect of the issue of working hours, the claimant had two explanations. Firstly, he said that his line manager at the time his employment

commenced had told him that no matter how many hours he worked, to 'put 7.5 hours'. Secondly, he relied upon work he did, such as writing software, outside of the core hours of 8:00am to 4:30pm. The claimant referred to being 'pissed off' and said 'you lot are scum'.

57. Ms Joseph took the decision to dismiss the claimant and that was confirmed to him in writing on 21/11/2018 (pages 137-139). Ms Joseph accepted swearing was common on building sites, however, she found that the claimant had used profanities whilst conversing with colleagues who had been offended by this. She also referred to use of profanities during the disciplinary hearing. Ms Joseph upheld this allegation as misconduct.

58. In respect of the gross misconduct allegation of fraudulently recording working hours on the timesheet, Ms Joseph found that there was as disparity between what was put on the timesheet and the vehicle tracker records. She did not accept that the claimant's original line manager has told him to enter 7.5 hours, irrespective of the time he had spent. Her rational for this was that other engineers provided a breakdown. She referred to the incident on 26/10/2018 and said that the claimant had not requested permission to leave the site early and his refusal to return to the site when asked to do so by CR. She concluded the fact the respondent does not pay travel time or that the claimant had said he had finished his work, was not reasonable mitigation. Ms Joseph noted that the claimant had been given the opportunity to provide any documents which he wished to rely upon and he had chosen not to do so. The conclusion was that the claimant was in breach of his contract in leaving site early on 26/10/2018 without permission and he then refused to return when asked to do so. She also concluded that the claimant had fraudulently recorded the hours he had worked on the timesheet and this was deemed gross misconduct as per the disciplinary policy. Ms Joseph said the claimant was dismissed for gross misconduct with immediate effect.

59. The claimant chose not to appeal against Ms Joseph's decision as he was not well enough and he said he 'knew that nothing [he] could say would alter their decision'.

60. In closing submissions, the respondent referred to the incident in January 2018, the claimant's admissions and his behaviour as recorded in the minutes of the meetings. It was also pointed out that the claimant simply did not address the time-sheet issues. The respondent said it was the claimant who swore at his colleagues and did not treat them with respect; rather than the other way round.

61. In submissions, the claimant raised the issue that he was underworked and voluntarily undertook extra duties. He also said there were no complaints about this standard of his work. The claimant also referred to the fact the

weekly planner containing work for the following week was frequently sent out after 5pm on a Friday and lack critical information (such as full address and postcode). He also said he was paid a salary and there was no financial gain by him.

62. Although not relevant to the issues to be determined, the claimant's position on these matters is accepted.

Conclusions

63. The claimant takes issue that Mr Mills did not investigate his complaints about his colleague ML. His evidence is that he raised a written grievance about ML in January 2018 and he was not aware ML was investigated (pages 140-144). Mr Mills investigated this incident and met with the claimant on 21/2/2018 (pages 92-94), resulting in a letter noting the respondent's concerns on 5/3/2018 (page 91). The incident arose as a result of complaint by a third party. It is not clear that Mr Mills did speak with ML; however the outcome was the claimant was informed any concerns he had, should be raised with the Project Manager or the Contracts Manger and under no circumstances, should issues be raised and aired on the client's premises.

64. The claimant did not raise any further formal complaints about ML until raised a grievance on 11/9/2018 (page 95). Mr Mills met with the claimant on 12/9/2018 (pages 96-98). Mr Mills wrote to ML on 27/9/2018 and met with him on 4/10/2018 (pages 99-101). ML referred to a colleague and Mr Mills met with that colleague on 1/11/2018 (pages 110-112) (Mr Mills said in evidence the meeting was delayed due to personal issues).

65. The investigation into the claimant's grievance was overtaken by the complaint from GHE about the claimant raised on 10/10/2018 (page 102).

66. Conduct is a potentially fair reason for dismissal under s. 98 ERA. Applying the Burchell test to the facts as found; the respondent did have a reasonable belief in the misconduct. It had the time-sheet evidence and the claimant's admission of swearing.

67. The respondent had in mind reasonable grounds to sustain that belief. There was nothing which arose during the process which would undermine that belief. During the investigation the conduct was admitted by the claimant and he agreed he had left the site early and had refused to return.

68. In respect of the allegations made on 10/10/2018 by GHE and on 29/10/2018 by CR, it was reasonable for the respondent to take these allegations at face-value (bearing in mind the previous incident in January 2018) and to investigate them. The investigation was reasonably

conducted. Mr Mills interviewed the various members of staff. It is noted that where the misconduct is admitted, the required level of investigation is not as high as where the misconduct is denied.

69. The claimant admits to swearing; however, he says it was not directed at anyone in particular and that there was a culture of swearing on site. In respect of the time-sheet, he simply does not accept this was an issue. He says he was told at the outset that he was simply told to entre 7.5 hours onto his time-sheet, irrespective of the number of hours he worked. He also said he had autonomy to arrive and to leave the site as the work requirements dictated.

70. The next consideration is whether or not Ms Joseph's decision to dismiss, within the range of responses which a reasonable employer could reach? It is important for the Tribunal not to substitute its decision as to what it would have done. It does not have to be the case that every employer would have taken the decision to dismiss or would have imposed a different disciplinary sanction.

71. The respondent distinguished between the misconduct of the swearing allegation and the gross misconduct of the time-sheet allegation (which included leaving the site early and refusing to return); although it found both allegations proven. It should be noted that the issue raised with the claimant resulting from the 25/1/2018 was leaving the site early and not falsifying the time-sheet. The question is, whether it was reasonable for Ms Joseph to conclude, mis-recording his time on the time-sheet was fraud and therefore amounted to gross misconduct?

72. The disciplinary policy includes 'fraud, deceit or other dishonesty' as examples of gross misconduct (page 81). The Tribunal finds the claimant's failure to provide an explanation for the discrepancies on the time-sheets was that he did not think he was doing anything wrong. Furthermore, he knew the vehicle had a tracker device and that the respondent could check his movements, arrival and departure times. The Tribunal finds that there was no element of fraud in the claimant's completion of the time-sheets. There was no deception element to the claimant's completion of the time-sheets and he did not profit financially. As such, it was unreasonable therefore for the respondent to categorise the claimant's recording of his hours worked as fraud. The claimant was in the wrong, he had contractual hours and he was expected to be on site for 7.5 hours, however, that does not equate to 'fraud'. There was only one time-sheet relied upon by the respondent for September /October 2018 (page 145).

73. The claimant's case was he had never correctly completed a time-sheet. If as was the respondent's case, incorrect completion of time-sheets was gross misconduct and was fraud, then it is reasonable for it to have

produced other examples. Based upon the claimant's admission, the sheets he completed every month would have evidence further wrongdoing. The fact there is wrongdoing does not necessarily equate to fraud and based upon these facts, the Tribunal finds that the respondent was entitled to request and expect that time-sheets were completed correctly. In these circumstances however, the claimant's misconduct did not amount to gross misconduct as there was no fraudulent element on the part of the claimant.

74. The allegation however concerned the time-sheets in addition to leaving site early on 26/10/2018 and refusing to return. The claimant admitted this misconduct. He off-sets that against the travel time to site. Leaving site early was something which the claimant had been told was unacceptable on 5/3/2018 (page 91). The claimant was expressly told that not only were his contractual hours 7.5 per day, but that if there was any reason to leave the site early, he should contact the project manager or the office. Despite this, the claimant did not do that on the 26/10/2018 and he refused a reasonable management instruction to return to site to conduct some testing.

75. The additional element and the fact that the claimant was aware the respondent did not accept this form of time-keeping or insubordination could bring the decision to dismiss within the range of responses a reasonable employer could reach in these circumstances, (in applying s. 98(4) ERA the respondent having used different personnel for the elements of the process and been consistent in its approach).

76. It is also clear that the claimant's employment would have terminated in the short-term. He had already resigned on the 8/11/2018 and had referred to that in his written statement. He also said in his ET1 that he intended to leave in the New Year and it was clear the relationship had broken down. There is also contributory conduct in respect of the proven misconduct, the claimant's behaviour in the meetings, his lack of engagement in explaining what he had been doing with his time and his failure to appeal the decision to dismiss. The Tribunal finds that had the outcome been a lesser disciplinary sanction, such as a final written warning, that the claimant would not have accepted that and would have left the respondent's employ.

77. For the purposes of the wrongful dismissal claim, the Tribunal is required to set out its own findings on the question of whether the claimant had committed a repudiatory breach of contract such as to mean that his contractual right to notice was rendered unenforceable.

78. The claimant admitted failure to complete the timesheets[5], he admitted to leaving site early and refusing to return and he admitted swearing. The Tribunal finds the swearing was directed at his colleagues and that the

[5] Noting the Tribunal's findings that there was no fraud above.

claimant behaved inappropriately in the meetings. The finding is those factors coupled together do amount to a repudiatory breach of contract. As such, the respondent was entitled to summarily dismiss and the claim for wrongful dismissal fails.

79. The claim is therefore dismissed as it was presented out of time, it was reasonably practicable for it to be presented in time and it was not presented within such further period as was considered reasonable. The unfair and wrongful dismissal claims fail. The claims are therefore dismissed.

80. Accordingly, the remedy hearing listed for 6/11/2020 is no longer required and will be vacated.

Travel Time

81. The claimant's contract of employment states his place of work was 152-154 London Road, Greenhithe. It would therefore appear to be a breach of the Working Time Regulations 1998 for the respondent not to pay its staff for their time in travelling to sites as the sites are not the place of employment in applying Federación de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another [2015] IRLR 935 ECJ

Employment Judge Wright

Dated: 9 July 2020