EMPLOYMENT TRIBUNALS

Claimant:
Mr Nathan Under

Respondent:
Sky In-Home Services Ltd (sued as Sky UK Ltd)

Heard at: **Sheffield (by video link)** **On: Friday 23 October 2020**

Before: **Employment Judge R S Drake**

Representation
Claimant: In Person (not represented)
Respondent: Ms A Rumble (of Counsel)

JUDGEMENT

1 The title of the Respondents is amended so as to describe them as Sky In-Home Services Ltd.

2 The Claimant's complaints of breach of contract, automatically unfair dismissal because of alleged health and safety reasons, unfair dismissal, and alleged withholding of pay all fail and are dismissed.

3 Because this decision was not given extempore after deliberation and is now promulgated in greater detail, I have decided to set out Reasons in full as below.

REASONS

Introduction

First, I record my gratitude to the parties for their effective and in some cases disarmingly candid presentation of their respective cases, helpful and co-operative

advocacy, and also extremely helpful preparation of the presentation of documentary evidence and the presentation of final oral submissions.

Second, though I was able to read the 450 pages of documents on the day of hearing, after hearing all the oral evidence, cross-examination and submissions, I recognised the need to read the documents with more focus in order to reach my conclusion on the merits of the substantive case. Therefore, I reserved the giving of full decision and reasons.

Issues and Respective Arguments

I determined (with the assistance of the parties, and thus largely by agreement, that the issues to be examined and respective cases were agreed as follows in addition to those identified by EJ Cox in her telephone Case Management Preliminary Hearing on 23 April 2020 : -

1 Unfair Dismissal

1.1 The parties agree that the Claimant was dismissed with immediate effect on 11 December 2018;

1.2 Was the Claimant dismissed for one of the potentially fair reasons set out in Section 98(1) of the Employment Rights Act 1996 ("ERA")? If so, could the Respondents establish what was the reason (or, if more than one, the principal reason) for dismissal? The Respondent asserts their reasons were principally a reason relating to conduct under Section 98(2)(b) ERA 1996 and/or (by implication) some other substantial reason under Section 98(1)(b) ERA being consequent loss of trust and confidence;

1.3 If a/the reason for the Claimant's dismissal was related to conduct as alleged:

1.3.1 Can the Respondents show - (i) they genuinely believed the Claimant was guilty of misconduct, - (ii) did they have reasonable grounds for such belief and - (iii) had they identified such grounds after undertaking as much investigation as would be carried out by another reasonable employer? The Claimant says that he was not provided with a copy of the statement a particular customer gave to the Respondent (relating to a service visit made by the Claimant to that customer on 04 October 2018 – job number 1327348014) or a copy of his investigatory interview notes.

He says he therefore did not have a reasonable opportunity to challenge what the customer had said during the course of the disciplinary hearing. The Respondents say that the Claimant was provided with a copy of both these documents in the documents pack he was given before the disciplinary hearing. The Respondents further say that the dismissing manager Mr Naylor preferred the customer's version of events to that of the Claimant, because the customer had no reason to give an inaccurate version, and the Claimant's account had been inconsistent between the investigatory (08 November 2018) and disciplinary (11 December 2018) meetings.

1.3.2 In short, was the decision to dismiss arrived at in accordance with the above three-part test as set out by the EAT in **BHS v Burchell [1978] IRLR 379**;

1.3.3 If so, did the Respondents act fairly and reasonably in dismissing the Claimant on grounds as pleaded of gross misconduct (for the purposes of section 98(4) ERA 1996), or put more simply, was it reasonable in all the circumstances for the Respondents to dismiss the Claimant rather than impose a lesser sanction?

1.3.4 If not dismissed for misconduct, can the Claimant establish that he was dismissed for making a complaint about health and safety and thus subjected to detriment contrary to section 44 ERA?

2 Remedy

If the Tribunal were satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason relating to conduct, but is satisfied the dismissal was nonetheless substantively and/or procedurally unfair, it would have to determine whether the Claimant would have been dismissed fairly in any event if a fair procedure had been adopted, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119 and 123 ERA. This was not a live issue once I reached my conclusions as set out below, but I started my consideration with an awareness that this may become a live issue.

3 Wrongful Dismissal (in breach of contract)

In relation to the Claimant's claim for notice pay the issue is whether the Tribunal is satisfied on the evidence it is heard that the Claimant was in fact guilty of gross misconduct, then if he was, the Respondents are not legally obliged to give him notice of dismissal

The Law

4 The relevant law applicable to this case (I have not quoted each part of the section/subsections not relevant to this case) is set out in Section 98 of the Employment Rights Act 1996 ("ERA") which provides: -

" - (1) In determining … whether 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…."

" – (2) A reason falls within this subsection if it -

(a) ……..
(b) It relates to conduct … "

5 If the Respondent satisfies the test set out in Section 98(1) and (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

"Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

(a) Depends 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."

6 The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office and HSBC Bank –v- Madden [2000]**) which is to consider whether the employer's actions, including its decision to dismiss, fell within the band of responses which a reasonable employer could adopt in the same circumstances, but

not substituting the Tribunal's view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. literally just one other) reasonable employer to act.

My findings of Facts and my Reasons

7. I made the following findings of fact based upon evidence which I heard from the Claimant himself and the Respondents' witnesses Damon Allerton (Team Manager), Iain Naylor (Team Manager and dismissing officer in this case), and lastly Martin Procter (Area Manager who heard the Claimant's appeal). Each was thoroughly cross-examined in that where the Claimant had difficulty framing his questions, I framed them for him in the interest of ensuring equality of arms, and I raised the questions he needed to ask in order to test the oral testimony with which he took issue. I commend both sides for giving candid and frank evidence even where they perceived that in parts it damaged their own positions. I also considered not only the written statements of the above-mentioned witnesses, but also, when attention was drawn to it, the contents of a combined documents bundle comprising over 450 pages. Lastly, time was allowed at the conclusion of oral testimony to enable both sides to express Final Submissions which were also considered in detail.

8. Using abbreviations of "C" and "R" for Claimant and Respondent respectively and referring to witnesses by their initials (**DA**, **IN**, and **MP**) and the documents in bold type page numbers in the Evidence Bundle (**P1 to P175**) or paragraphs in witness statements, the findings of fact relevant to the Tribunal's decision are as follows: -

    8.1 C was employed by R at their location in Hull and at the time of the termination of his employment by them had been engaged (by them since 1 November 2009 (**P9 – ET1)**. At the time of dismissal, he held the post of Technical Support. Events occurred in January 2019 which gave rise to R calling C to a disciplinary meeting which, though initially scheduled to be earlier, eventually took place at C's behest on 14 March 2019. C was given a concise description of the reason for the meeting in a letter dated 4 March 2019 (**P97-98**) and it advised of his right to be accompanied.

    8.2 There are few conflicts of evidence in the considerable volume of documentary (450+ pages) and oral evidence before me. I find the accounts of what happened, and the chronology of events described by R in particular to be persuasive and cogent. Furthermore, I find their accounts of what they had in mind and the sincerity of their attention to what was said to them by C to be

convincing to the required standard of proof being a balance of probabilities. I do not find any aspect of their testimony, or anything said by C, who took considerable issue with their interpretation of events, to be such as to impeach their credibility. The Claimant argues that there was insufficiency of investigation by the Respondents, in that when he explained that the customer had asked for an excess of wire to be provided when he was fitting a TV Receiver Dish and that he expected that a contractor would clip the wire close toa ledge at dangerous height, this assertion was not further tested with the customer.

8.3 The chronology of main events is as follows but with my further findings about them are duly added: -

8.3.1 29 July 2013 – Commenced employment with R as a Customer Adviser in the Service Department and thereafter undertook safety training for his role as a Letter calling Investigation Meeting for 8 February 2019;

8.3.2 27 March 2017 – C became an Engineer reporting to a Team Manager and responsible for installing TV Receiver dishes at customers' homes;

8.3.3 His contracts (P37 to 60), at all material times, included reference to both Safety and Disciplinary Policies/Procedures and incorporate them by reference; The Health and Safety paragraph states (P57): - "You are responsible for the safety of yourself, other employees, contractors and visitors whilst at work. This includes compliance with all company safety procedures and any special regulations relating to your immediate workplace." It otherwise further provides (P63): - "When an employee chooses not to use their equipment and or follow health and safety procedures, this can lead to injury and in the worst-case scenario, death. This is why we must take action if an employee is seen or believed to have been working up unsafely."

8.3.4 Training records and materials (P61 to 89) show that C was aware of the significance of avoiding risks inherent in working at height and his responsibility in this respect for risks faced by others affected by his work. He says that there was a change to the 2 metre rule (not to work within 2 metres of a flat roof edge without safety harness and eye bolt connection to the surface)

described in P85 after he was last trained in this area, but I find that this was not significant as a cause of or contributor to the actions for which he was dismissed, so such change was not material to his case as much as he supposes;

8.3.5 The Conduct Policy incorporated in the contract of employment provides that gross misconduct can lead to summary dismissal and that (at P93) the term “gross misconduct” includes “any action that puts your or anyone else’s health and safety at risk”- thus generically including customers;

8.3.6 C was therefore to be regarded as a competent , trained, experienced , and safety-aware engineer, who should be mindful of not doing anything which might put himself or customers (or any other third parties) at potential risk of personal injury;

8.3.7 DA is a Team Manager with 11 years’ service which included experience of conducting Investigative/Disciplinary Procedures; To fulfil his safety remit, he carries out customer visits to cheque the work of engineers like C; his concern about C’s conduct first emerged when a customer complaint relating to job number 1327348014 was brought to his attention on 30 October 2018 relating to work carried out by C at the customer’s home on 4 October 2018; other matters were brought to his attention but they did not form the basis of C’s subsequent dismissal whereas the said job was relevant;

8.3.8 19 October 2018 - Investigation Meeting was conducted by DA with C present; notes were taken (P124-130), given to C who read and signed them though he says he didn’t read them carefully before signing to signify acceptance of them; DA then revisited the customer to gain further information after the Investigative Meeting and noted the following: - “Engineer climbed through the bedroom window to access Sky dish causing damaged to the window sill which required repair. Engineer then ran the twin sat cable straight across the flat roof leaving it hanging like a washing line in the air. After customer noticed this, they brought it up with the engineer who explained he could not clip the cable due to health and safety reasons. Customer explained that they were not happy with this and asked if they could do the clipping as they did not want to look at it out the

bedroom window. The customer then proceeded to clip the cable for him while the engineer was on site. As customer tried to clip this in, he noticed it was too tight so asked the engineer to provide him with more cable which he did. Engineer was aware that the customer was clipping the cable."

8.3.9 DA perceived that The cable was clipped within around 40 of the edge of a flat roof at height where there was at least a two metre drop on the opposing side - he also noted that the dish was within two metres of the edge which is deemed as unsafe without the correct fall arrest system in place;

8.3.10 8 November 2018 – resumption of Investigative Discussion between DA and C, who admitted he had supplied the clips to the customer to enable the customer to do the job himself; no reference was made to any expectation that a contractor would clip the cable according to the notes which C later accepted and signed for; C says he did refer to this and that this should have caused DA to challenge the customer by further investigation, but I find on balance that the notes are reliable rather than C's later ex post facto recollection, as they are contemporaneous and were signed for as accepted by C;

8.3.11 C said that if he had been aware the customer was going to clip the cable himself then he would have told him not to do so, but this in no way detracts from the fact that he provided the means for the customer to do this himself, and in the absence of clear understanding the customer would not do the job himself, was thus putting the customer to potential risk of personal injury; C later says (P135) "I'd never ask a customer to do anything like this as they are not covered - I just know they can't do work for us - all I've been told in training is that we don't let customers do work for us - because of the risk of falling from height" - thus demonstrating his awareness of the nature and severity of the risk, and thus what the potential effect of providing clips to the customer could be;

8.3.12 DA Concluded and wrote to C (P146 – 9 November 2018) to advise that the allegations put to C of breach of Conduct Policy by putting a customer's health and safety at risk were such that it was necessary for him to be suspended from

duties and for full investigation to follow, which involved checking his records; this later led to him being advised in writing (P152 – 6 December 2018) that he had to attend a disciplinary hearing which in R's terminology was described as a Conduct Meeting;

8.3.13 Before the Conduct Meeting took place DA sought to convey to C a pack of materials about the subject matter of the Investigation to C and the only way to do so in time before the Meeting was to arrange meeting up away from C's home at a venue carpark; C now takes exception to this but I find that it had no bearing on the Investigation, the Conduct Meeting or its outcome, and was unobjectionable objectively, as it was at C's request delivery be done in this way; C was advised in writing of the nature of the matter under consideration, that he could respond and be accompanied – P152 – 155; DA's Investigation notes (P136 – 145) and summary (P148 – 151) were included: in the latter the following is noted and thus brought to C's attention: - "Nathan's quality of workmanship was once again raised as a complaint and he admitted to giving the customer the clips to do this himself - however it is reasonable for me to assume that by giving the customer the clips, he was aware that the customer would take the risk himself even if he wasn't on site and it is my belief that he allowed a customer to work unsafely at height where they would be at risk of falling from height";

8.3.14 11 December 2018 – Conduct Meeting undertaken by IN, another Team Manager who had not been part of the Investigative process hitherto and not prejudiced by it, but who had 20 years' service and also of experience of such procedures; notes were taken (P154 – 167) and later again accepted and signed for by C after reading them; by the time this meeting took place, certain of the document DA is said to have not delivered were delivered to C, so his later complaint at appeal must be seen in this light and had no adverse impact on the procedure where IN satisfied himself that C had all he required to see before accounting for his actions under investigation;

8.3.15 IN noted that in relation to the job in question, C had assessed the risk of falling while clipping the

cable but had recognised that without safety measures which the customer had declined to allow, it was unsafe for C to do this work, yet he supplied the customer with the means to do it himself, and thus in IN's view was allowing or enabling the customer to take risk himself; C says he believes that there was some discussion with the customer about a contractor doing the work, but this isn't borne out by the meeting notes (P136 – 145 and P154 – 167) nor by the record of DA's discussion with the customer;

8.3.16 IN was disturbed by C's apparent dismissive view of the risk the customer faced, and he preferred the customer's account and that there had therefore been no discussion about a contractor doing the work of clipping the cable – I also make a finding accordingly that there had been no such discussion, particularly as this is borne out by total lack of mention of this by C in the Conduct Meeting and therefore no need emerged to reinvestigate this point;

8.3.17 The Conduct meeting was adjourned briefly and resumed later the dame day when photos of the job site in question were examined; IN then deliberated and reached a decision to dismiss for gross misconduct which he communicated orally and followed up in writing – P168 - 169; other matters were considered, but as C doesn't challenge on this point, I find that they had no bearing of IN's decision to dismiss;

8.3.18 12 December 2018 – C lodged an appeal (P170 – 171) asserting incomplete delivery of materials before the Investigative Meetings with DA, lack of upto date training and lack of follow up investigation, lack of evidence of him putting a customer at risk, and raising for the first time that he thought the customer was commissioning a contractor, though he later admitted he had seen that the customer had done the work enabled by leaving him clips;

8.3.19 07 January 2019 – Appeal heard by MP, a Regional Manager who had no previous involvement at any stage in this matter but who had 11 years' service and experience of 20 to 30 such cases; MP conducted what amounted to a full re-hearing as opposed to a mere review; he heard everything C had said at the previous meetings

and heard his explanation as to the main grounds of appeal; MP then adjourned the meeting to carry out further enquiries as a result of hearing what C had to say, and then reached his conclusion to confirm dismissal some days later;

8.3.20 MP reasoned that there was an absence of evidence that C had been treated unfairly, that there was no reason to disbelieve what the customer had reported and had then been further interrogated about by DA, that C had not been misinformed in his training as he alleged, that his case had been thoroughly investigated and that C had been inconsistent is some degree especially in respect of only latterly challenging the customer's account of events or reference to him suggesting a contractor would be commissioned to do the clipping work;

8.3.21 MP concluded that summary dismissal was justified because of the deep significance, as he saw it, of putting the customer at risk and him believing C should be aware of this from his training; C protests that he didn't knowingly put the customer at risk, but knowing the risk to himself if he did the work shows he must be taken to be aware the customer would be at risk if provided with the means to do the clipping himself;

8.4 IN had concluded that there was nothing further to investigate, and this was the same conclusion reached by MP at appeal stage.

Conclusions on Application of Law to Facts

9 I find that R has shown that C was dismissed because of a reason relating to conduct (which is the reason they had in mind for dismissal and that they also had in mind resultant loss of trust and confidence because they could discern no grasping by C of the seriousness of the situation he had created by permitting the customer to do work which he himself had declined to do.

10 On the evidence and findings of fact, I do not find that the fact that C raised Health and Safety concerns was the reason for his dismissal. He did not do so, and this aspect of his claims clearly fails at this point.

11 I take the law as described in paras 4 - 6 above as my guidance and my further findings in this respect are as follows: -

11.1 IN as dismissing officer reached his conclusion after as full an investigation as another reasonable employer would carry out with no material gaps in the evidence he could gather; he was entitled to conclude that the customer's account need not be investigated further as there as no material point to be re-investigated so far as would be so considered by another reasonable employer;

11.2 IN undertook a careful and indeed textbook process of Disciplinary and Appeal hearing ensuring C knew what he had to face and yet still had ample opportunity to offer his side of the case as well as arguments as to why his case should be preferred;

11.3 IN preferred the customer's version of events to that offered by C and it was open to them to do so since rarely if ever is direct evidence found and so a reasonable employer has to base a balanced case as best it can on seeking evidence either way which upsets the balance one way or the other and in this case against C. When faced with the argument that the customer was a not unreasonable complaint, as decision maker IN took into account the likelihood that the customer was not telling a tale which was untrue when C had materially agreed with it. Thus, IN was justifiably able to draw a conclusion I would expect of another reasonable employer. I find the **Burchell** test described in para 1.3.2 above to be well and truly satisfied;

11.4 I do not find that telling an employee that if a finding is made against him may lead to his dismissal to be any evidence whatsoever of prejudgment as to outcome. I find that the conclusion R actually reached to dismiss falls within a band of reasonable responses the Tribunal would expect from another reasonable employer in the same circumstances as a finding of gross misconduct does not preclude a lesser outcome, but it certainly gives a sound foundation for an outcome of dismissal. I reach this finding taking account of the case law guidance described in para 6 above.

11.5 I find that the appeal was conducted with objectively model procedure and attitude of mind as displayed by MP.

11.6 I find that even if C didn't expressly think that he exposed the customer to risk, he should or ought to have known he had done so, and that this shows that his conduct was gross misconduct given the nature of risk in question.

11.7 I find that here were no material errors in approach or conduct by R and that C's criticism of them, beyond disagreeing with their point of view and seeking to test their witness testimony today, this

does not amount to any basis for finding that they have not acted reasonably in all the circumstances for the purposes of S98(4) ERA as described in para 5 above.

11.8 I find that "gross misconduct" according to all the decided authorities is the only legally valid and fair basis for terminating someone's contract without notice and in this respect all the authorities require that "gross" means the most serious form measured not simply by reference to intent and mental state of the perpetrator of the misconduct, but also in cases of awareness of risk, to the measure of the consequences as seen by the and any objective victim.

11.9 A person may be justifiably and fairly dismissed for gross misconduct even if there is lack of intent, but where the awareness of consequences is serious. In short, I can find that the reason thus relied upon in the Conduct Hearing, and confirmed on appeal as a basis for dismissal, was a sufficient reason on the facts of this case.

11.10 R has shown to my satisfaction that it had conducted a fair and reasonable procedure in leading up to and reaching a conclusion to dismiss. This was manifestly fair, though I recognise C's sincerity in his challenge of the witnesses both at the time and today as he was entitled to test them in formal evidence giving;

12 A significant test, as in all unfair dismissal cases, is as set out in **Iceland** and is based on what **an** other reasonable employer might do (my emphasis added) not what it might not do, nor what many or all employers would do. The outcome of dismissal was one which in this case and in this Tribunal's finding potentially fell within the bounds of what "an" other reasonable employer would do in the same circumstances. The dismissal was therefore fair.

13 I further concluded that C was acting genuinely and in mistaken belief (he was not significantly represented in this case) that he could challenge the witnesses' testimony and beat it today because he based his thinking on an erroneous impression as to the weight of evidence which an employer can rely on in a case such as this.

14 Thus, I concluded that it would not be appropriate in this case to find that C's pursuit of his claim was unreasonable or doomed to fail as such, since a test of testimony was useful valuable and in this case decisive when coupled with the evidence of how much and how well R investigated and then dealt with the matter procedurally.

15 Further, I find that R has established that objectively C's actions were gross misconduct and amounted to breach of contract to the extent that not giving him notice was appropriate and lawful.

Employment Judge R S Drake

Date: 10 November 2020