EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Lazaros		**MDJ Light Brothers (SP) Ltd**

Heard at: London South Employment Tribunal **On:** 9 November 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:
For the Claimant: In person
For the Respondent: Ms D Oliver (Consultant)

RESERVED JUDGMENT

Following a reconsideration hearing on 9 November 2020, it is the judgment of the Tribunal that the original decision, sent out the parties on 23 November 2019, is confirmed.

REASONS

Application

1. This claim of unfair dismissal was heard on 29 September 2019. As there was insufficient time at the conclusion of the hearing to give a decision orally to the parties, judgment was reserved. A judgment with written reasons was sent to the parties on 23 November 2019 ("the judgment"). The Tribunal found in favour of the Respondent, namely that the Claimant had been fairly dismissed.

2. By an email dated 5 December 2019, the Claimant applied for reconsideration of the judgment.

3. The Claimant says in his application for reconsideration that the Tribunal misunderstood his case. He said [sic]:

> ***I am afraid you have misunderstood the concerns I was raising, I was and am challenging the entire investigation because other then the installation of covert CCTV in the toilets there is no proof of an investigation even took place as there is no documentation of anything, no statement from the alleged tip off, to which a written statement could and should have been made anonymous, no documentation of any company property allegedly found, the soul and vital eye witness was not questioned as to what they saw, when they could have had evidence to my innocence and the very bias line of the questioning by the investigating officer, given their belief I was the guilty party. All this amounts to an unreasonable investigation.***

4. As is clear, the Claimant says he was effectively denied the right to see CCTV footage (see more below) and having since looked through the clips provided to him during the disclosure process, he discovered one part of the CCTV recording which showed a witness who was not questioned during the investigation. The Claimant told the Tribunal at the reconsideration hearing that this person is an employee called Christian. He produced a still image of this part of the CCTV footage, claiming that Christian was a "vital eyewitness".

5. It was primarily for this reason that the case was permitted to proceed to a reconsideration hearing, so that the fairness of the dismissal could be reconsidered in light of this evidence and what the Claimant said about the disciplinary process generally.

6. In his application, the Claimant referred the Tribunal to the case of ***Miller v William Hill Organisation EAT 0336/12*** in support of the principle that serious allegations of criminal behaviour, at least where they are disputed, must always be the subject of careful investigation, always bearing in mind that the investigation will usually be conducted by laymen and not lawyers. The EAT referred to the importance of focusing "*no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on evidence directed towards proving the charges against him*". In contrast there is also the case of **Shrestha v Genesis Housing Association Ltd 2015 IRLR 399, CA,** where the Court of Appeal upheld an employment tribunal's finding that it was not necessary for an employer to investigate every incident and explanation in respect of an employee who was dismissed for claiming mileage that was in excess of the recommended journey times. The employer's investigation had revealed that the mileage claimed was almost twice that recommended by the AA and RAC and exceeded that claimed for the same journeys in the previous year, and the disciplinary hearing had given consideration to all of the defences put forward by the employee. The Court considered that the employer's assessment that the explanations did not provide a plausible reason why every single journey had a higher mileage was reasonable in the circumstances and no further inquiry was necessary.

7. The Claimant also referred to another Employment Tribunal judgment called **Miss D Stokes v Poundland Ltd (3327953/2017)** in which case the Tribunal found that the investigation was "*flawed and raised concerns of bias…."*

Reconsideration hearing

8. At the outset of the reconsideration hearing, the Tribunal agreed to hear further evidence from both parties, dealing solely with the additional issues raised by the Claimant as part of his application for reconsideration. The parties were reminded that it was not the role of the Tribunal to decide whether or not the Claimant was guilty, or not, of the allegations which resulted in his dismissal. The Tribunal emphasised that its role was to look at what the Respondent did during the process leading to the Claimant's dismissal, and then through to the conclusion of his appeal. The Tribunal's task was to consider whether the Respondent acted reasonably, or put another way, within a range of reasonable responses open for them to take. The Tribunal said that any witnesses giving further evidence at the reconsideration hearing should concentrate on what happened at the time, and not what they may have learned since the dismissal. The Tribunal also reminded the parties that it was not an opportunity to re-run the whole case.

Findings of fact

9. The following findings of fact are made pursuant to the reconsideration hearing. They should be read alongside the findings of fact set out in the judgment, which still stand. It is not the Tribunal's intention to rehearse all of the findings of facts set out in the judgment albeit some findings are repeated here to give context to any additional findings.

10. The Respondent was "tipped off" that CPUs were being stolen from the business. CPUs are sold on internet auction sites and can fetch in the region of £200.00 each. Following a search, CPUs were found in a jacket hanging up on a coat stand in the washroom which belonged to an ex-employee. The Tribunal accepts that the jacket remained in the washroom and was not removed. References in this judgment to "the jacket" are to the jacket belonging to the ex-employee.

11. The above discovery led the Respondent to installing CCTV in the washroom on Saturday 26 January 2019, focused on the coat stand where the jacket was hanging. There were two levels of hooks; the jacket was on the bottom level. The Tribunal accepts that in the still images shown to the Tribunal, the Claimant's own jacket was hanging above the jacket. Coats and jackets belonging to other employees were also on the stand but many of these were out of view of the camera.

12. At the end of the day on Monday 28 January the CCTV was viewed by Mr

Peter Green (the investigating officer in this case). Mr Green says he could clearly see the Claimant and a colleague, Danny Alkins, taking items from the pocket of the jacket and inspecting them. For this reason, Mr Green decided to keep the CCTV in operation for a second day. At the end of the second day, Mr Green says that he saw the Claimant placing items into the pocket and later checking the contents of the pockets again. The jacket was removed from the washroom at this point and CPUs were discovered in the pocket.

13. During his evidence at the hearing, and reiterated at the reconsideration hearing, Mr Green was adamant that the only employees that went near the jacket, were the Claimant and Mr Alkins. He was also adamant that he could clearly see the Claimant place items in and out of the jacket pocket. This is disputed by the Claimant, but Mr Green remains very firm in his view about it. I accept Mr Green's evidence in this respect.

14. When asked during the reconsideration hearing about the new evidence produced by the Claimant, Mr Green said that he did not interview the person who came into the washroom (referred to above as Christian) because Christian did not go near the jacket. Further, neither the Claimant or Mr Alkins were near the jacket when he came in. Mr Green decided, in these circumstances, not to interview Christian as it was his view that Christian would have provided no helpful evidence to either party.

15. When the Claimant was invited to a disciplinary hearing, he was sent three still photographs taken from the CCTV footage. These are photographs at pages 66, 67 and 69 of the hearing bundle. The Respondent did not show the Claimant the actual CCTV footage during the investigation as there were concerns at the time regarding data protection, given that another person, Mr Alkins, was also on the video.

16. Mr Jonathan Light conducted the disciplinary hearing and made the decision to dismiss. He was further questioned by the Claimant at the reconsideration hearing. Mr Light was very adamant that during the disciplinary hearing the Claimant refused to properly engage in the process. He said he asked the Claimant whether he wanted to look through the CCTV footage with him at the hearing, and the Claimant replied that he did not. The Claimant said this was because he ought to have been shown the footage before the hearing. The Claimant was asked at the hearing in September why he did not at least watch the CCTV during the disciplinary hearing, and then perhaps ask for an adjournment if he wanted time to consider it further. The Claimant said that he did not think of that as an option, having never found himself in that situation before. The Tribunal does not fully accept the Claimant's evidence on this point and considers it more likely that the Claimant concluded it was tactically better for him to put the Respondent to proof using the stills, rather than use the CCTV.

17. Mr Light concluded that the Claimant's answers to questions during the

disciplinary hearing further supported the Respondent's case that the Claimant was responsible for the misconduct alleged. The notes of the disciplinary hearing state as follows:

> ***JL*** ***Do you have anything you would like to say? You haven't seen the CCTV yet have you?***
>
> ***ML*** ***I have some stills with my letter.***
>
> ***JL*** ***I think it is worth us having a look at the CCTV together.***
>
> ***ML*** ***I thought the evidence used was what I had***
>
> ***JL*** ***As we can't send you copies of the CCTV we sent you some stills taken from it. We can take a look together, there are a few specific things for instance, putting things into a jacket in the washroom with one of your colleagues, would you like to say anything about that?***
>
> ***ML*** ***I have said everything that I need to***
>
> ***JL*** ***Is there a reason why you go into the washroom and put things into a coat pocket on a regular basis over the course of a day***
>
> ***ML*** ***No***
>
> ***JL*** ***Was it your coat?***
>
> ***ML*** ***No***
>
> ***JL*** ***Would you like to add anything to what you said earlier?***
>
> ***ML*** ***No***
>
> ***JL*** ***It is difficult for me to understand. You were adamant in your statement that this had nothing to do with you. The evidence we have is of you going into the washroom on a regular basis with one of your colleagues and putting things into a coat pocket. Is there a reason why?***
>
> ***ML*** ***No***
>
> ***JL*** ***Do you know what it was you were putting in the coat pocket?***
>
> ***ML*** ***No not from memory, no.***
>
> ***JL*** ***So until very recently you were putting these into the coat pocket yet you can't remember what it was?***
>
> ***ML*** ***No***

18. It was put to the Claimant, both at the hearing in September and during the reconsideration hearing, that he had admitted, in the above part of his disciplinary interview, going into the pocket of the jacket. The Claimant

denies it is an admission, yet that is what Mr Light had interpreted, not unreasonably, from the above transcript. Mr Light concluded that the Claimant could not explain why CPUs were accumulating in the jacket that the Claimant was visiting.

19. During the appeal hearing, the Claimant did look at the CCTV evidence when invited to do so. He now complains that he was only shown a short extract of the CCTV, yet once again he did not ask to see anything more than he was shown.

20. Following a disciplinary hearing, Mr Alkins was also dismissed.

Law

21. Rule 70 of the Tribunal Rules provides that a Tribunal may reconsider a judgment where it is necessary in the interests of justice to do so. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective in the Employment Tribunal Rules to deal with cases 'fairly and justly'. This includes:

- ensuring that the parties are on an equal footing;
- dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- avoiding unnecessary formality and seeking flexibility in the proceedings;
- avoiding delay, so far as compatible with proper consideration of the issues; and
- saving expense.

Conclusion

22. The Tribunal has considered everything that the Respondent did, but with particular emphasis on whether the failure to interview Christian, and the Claimant's inability to view the CCTV before the disciplinary hearing, rendered the dismissal unfair.

23. The Tribunal finds that it was reasonable for the Respondent to concentrate its viewing on those parts of the CCTV (from a total of 96 hours) which showed who went near the jacket that was under observation. The Tribunal concludes that the reasons given for not interviewing Christian were not unreasonable in the circumstances. Likewise, whilst ideally the CCTV should have been shown to the Claimant at the investigatory meeting, and certainly before the disciplinary hearing, the Respondent had their reasons for this, based on legal advice received, and in any event the Claimant was

given an opportunity to look at the CCTV at the disciplinary hearing and at the appeal. Had the Claimant wanted further time to consider the evidence, he could have asked.

24. In response to the Claimant's general complaints about the investigation, the Tribunal must consider whether the investigation was generally fair – whether it fell within a band of reasonable responses. In the Tribunal's judgment it did.

25. For the above reasons, the Tribunal concludes that the judgment should be confirmed.

……

Employment Judge Hyams-Parish
13 November 2020