EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR D BENNETT	**AND**	**MITIE TOTAL SECURITY LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL **ON: 8TH / 9TH / 10TH MARCH 2021**

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR T PERRY (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

1) The claimant's claim of Unfair Dismissal is not well founded and is dismissed.

2) The respondent's application for costs is dismissed.

Reasons

1. This has been a hybrid hearing at which the claimant attended in person and the respondents attended remotely via CVP. The tribunal is grateful to both parties for their flexibility which allowed the hearing to go ahead.

2. The tribunal has heard evidence from the claimant, and on behalf of the respondent from Mr Graham Evans who determined the disciplinary outcome and Ms Phillipa Wilcox who determined the appeal.

3. This litigation has a relatively lengthy history. The claimant originally brought claims of race discrimination (direct discrimination / victimisation) which were heard over five days in September 2019 by a full panel including myself. Shortly before the hearing the claimant applied to amend to include, amongst other claims, a new claim for unfair dismissal. EJ

Livesey directed that the original hearing proceed and any residual claims be dealt with at its conclusion. At a case management hearing on 24th April 2020 the claimant confirmed that the only new claim he was bringing was for unfair dismissal, directions were given and the case listed before me for hearing.

Background

4. The following summary is taken and adapted from the earlier decision: The respondent has a contract with Sainsburys to provide security services at its stores. Mr Matthew Dean is responsible for the contract in Bristol and a number of other areas. He interviewed the claimant and appointed him as a security officer, commencing on 9th December 2014. For the period with which we are concerned the claimant was based at the store in Winterstoke Road, Bristol. Two security officers were permanently based at the store. The other was Mr Kamil Ogrodny. The claimant was originally employed by Securitas. In the latter part of 2016 the current respondent Mitie took over the contract and the employees including the claimant moved to them by TUPE transfer.

5. The claimant was dismissed for misconduct which was found to have been committed during the currency of a final written warning as is set out in greater detail below. These events are the culmination of a long series of disputes between the claimant and respondent, in particular his line manager Mr Matthew Dean. In the previous hearing we heard and determined thirty three separate allegations of discrimination covering the period from 2015 -2019. Some of the events which form the basis of this claim were also relevant to the earlier claims and where relevant findings of fact have already been made they are set out below.

First and Final Written Warning

6. On the 11th February 2019 the claimant was issued with a "First and Final Written Warning" for the unreasonable refusal to follow management instructions and for his personal conduct. An allegation of abusive behaviour was not pursued for lack of evidence. The events from which the disciplinary allegations leading to the First and Final Written Warning arose occurred on 5th December 2018 and resulted from the attendance at the store of Mr Dean and Mr Greening. They were the subject of a number of findings of fact in the previous hearing,(allegations 29 and 30 at paragraphs 97 -101). The claimant had contended that the factual allegations made against him by Mr Dean in particular were false and had been invented. On 5th and 6th December 2018 Mr Greening and Mr Dean set out detailed accounts of what they alleged had occurred. Mr Dean's account which we accepted as accurate at the previous hearing included allegations that the claimant had refused to undergo STARS refresher training and was using a podium chair which was not permitted under the terms of the respondent's agreement with Sainsbury's. In respect of the underlying events we accepted Mr Dean's account as factually accurate which meant that the discrimination claims failed. However we made no

findings about the disciplinary action which followed as there was no allegation in respect of it.

7. On 11th December the claimant was invited to an investigatory meeting which was held on 17th December 2018 by Luke Evans . On 1st February 2019 he was invited to a disciplinary meeting heard by Darren Stevens. At the meeting the claimant declined to discuss the allegations further and, as set out in the outcome letter Mr Stevens based his conclusions on the underlying material and the contents of the investigatory meeting and report. As set out above he upheld two of the allegations and imposed a First and Final Written Warning.

8. The outcome letter was sent by both post and email to the claimant, although he says he received neither and was unaware of it until it was mentioned in a case management discussion in relation to the first claim in April 2019. After he contacted the respondent a copy was sent to him. The claimant did not appeal the outcome. His evidence before me is that he did not believe he could because the letter itself gave a timescale of five days in which to appeal which had long passed.

Dismissal

9. The events which led to the dismissal began with the imposition of a new rota. The background this is set out at paragraphs 105/106 of the original decision. Put briefly Sainsbury's requirements for security guards to be present at its Winterstoke Road store at particular times had changed which resulted in proposed changes to the claimant and his co-security guard Mr Ogrodny 's shifts, and the shift pattern being altered. The claimant had objected to the new shift system which had been emailed to him by Mr Dean on 9th April. A meeting to discuss it had been set for 28th May 2019. However on 18th May the claimant emailed saying " I have changed my mind about having a meeting with you and wait for you to make the changes to my hours of work and whatever hours I cannot work because of my commitments that is what my hours will be reduced to".

10. The first shift which is in dispute and which formed the basis of a disciplinary charge was Monday 20th May 2019. The claimant was rota'd for the morning shift starting at 7.00am . He did not attend and was contacted by the control room when he did not arrive. The claimant contends that he did not know he had been rota'd to work on the Monday morning shift as he always worked on Monday afternoon. He did not attend again on 22nd May or on 4th June 2019. From 18th June he was absent but did not contact his line manager, although he subsequently produced a fit note covering his absence. On 7th June 2019 Mr Dean received an email from Matthew Hughes of ARCUS (another contractor of Sainsburys) stating that the security guard, who it is not in dispute was the claimant, was not wearing a tie, and had earbuds in and appeared to be using his phone.

11. On 10th July he was invited to an investigatory meeting in respect of allegations of failure to follow management instructions, failure to follow the absence procedures and to fulfil contractual requirements. The meeting was held on 17th July 2019 by Peter Wilsher. The specific issues discussed were the failure to follow the absence procedure on 20th May and 4th June 2019 and the background to the change in shift patterns. Specifically in relation to the 20th May the claimant stated that he had no need to check WP+ (the shift management system) to find his shifts as he and Mr Ogrodny had an agreement as to who would work which shifts and so it was not necessary to check the rota. The meeting ended at 14.49, the claimant being described as walking out, and the other allegations were not discussed.

12. Mr Wilsher produced an investigation report which the claimant accepts was sent to him prior to the disciplinary hearing together with a number of other documents which formed the pack for the hearing. In it Mr Wilsher refers to the ARCUS allegations as involving a failure to follow reasonable management instructions, detailing the failure to follow absence reporting procedures, and setting out the shifts which he had not attended or not completely attended as being a failure to follow contractual requirements. It is not in dispute that this list is more extensive than that discussed at the investigatory meeting. Mr Wilsher concluded that he had committed wilful misconduct in the failure to attend for his rota'd shifts and that he had walked out of the meeting before the other allegations could be discussed.

13. On 31st July 2019 he was invited to a disciplinary meeting to discuss allegations of failure to wear a tie, as per the code of conduct, failure to follow reasonable management instructions in using the earbuds and his mobile phone (all of which factually relate to 7th June 2019), failing to follow the sickness absence reporting procedures, and failure to fulfil his contractual obligation and work to his shift pattern from 27th May – 17th July 2019.

14. The disciplinary hearing was heard by Mr Graham Evans. Mr Evans worked in a separate sector, did not manage the claimant and had never previously met him. The hearing was originally set for 6th August 2019 but on 5th August 2019 the claimant requested that it be postponed as he was off work sick with stress. The hearing was rescheduled for 15th August and the claimant was informed that if he was unable to attend he could submit written submissions or send a representative but that the respondent reserved the right to proceed and to make a decision in his absence. The claimant did not attend the hearing or supply written submissions and Mr Evans decided to proceed with the hearing.

15. Mr Evans set out his conclusions in a detailed decision letter. In summary he upheld the allegations of failing to wear a tie and using earphones both of which are breaches of the STAR Code of Conduct in which the claimant had been trained, and he had in fact been investigated before for the use of mobile phones and headphones. He upheld the allegation of failing to adhere to the reporting absence procedures and the failure to attend for

shifts in accordance with his contract. He concluded that both of the latter had a detrimental impact on the relationship with the client. He decided to dismiss as the events occurred during the currency of the claimant's earlier written warning for misconduct and the disciplinary procedure provides for dismissal those circumstances. In addition he had previously been investigated for several incidents of misconduct and his behaviour had not improved.

16. The claimant appealed and the appeal was heard by Ms Wilcox who was at the time the Zone Operations Manager for the Sainsbury's contract in the South of England. In that capacity she had had some previous dealings with the claimant. She had only met him on one occasion in 2017 but had been copied in to correspondence including that relating to the 5th December 2018 incident. In particular the claimant relies on an email in relation to the 5th December 2018 incident in which she describes the claimant as conducting a campaign of defamation and slander against Mr Dean as evidence that she was not genuinely independent.

17. The claimant's letter of appeal included detailed points of appeal, and he accepts that it made all of the points he wished to make. He did not wish to, and did not attend the appeal meeting and as a result Ms Wilcox posed some written questions to which the claimant responded in writing. By a letter dated 4th September 2019 she decided to uphold the decision to dismiss. She gave detailed reasons in respect of all of the claimant's points of appeal but in summary she concluded that he had at least by April 2019 received and had not appealed the earlier final written warning She did not conclude that in the circumstances that it had been unfair to proceed with the original disciplinary hearing in the claimant's absence. There was no evidence to overturn the factual conclusions that the claimant had committed the misconduct alleged against him. He had committed several acts of misconduct during the currency of the final written warning. He had essentially chosen to ignore the respondents policies and procedures and she accepted that dismissal was the appropriate sanction.

Conclusions

18. The claimant was dismissed for misconduct which is a potentially fair reason for dismissal. Having heard from both Mr Evans and Ms Wilcox I am satisfied that the reasons they gave for dismissing the claimant and dismissing the appeal were the genuine reasons for those decisions and accordingly the respondent has satisfied the burden on it.

19. That leaves the well-known Burchell questions in respect of the issue of the fairness of the dismissal: did the respondent carry out a reasonable investigation, did it draw reasonable conclusions as to the misconduct from that investigation; and was dismissal a reasonable sanction. To each of those questions the range of reasonable responses test applies. Before dealing expressly with those questions it is necessary to address the question of the final written warning. As set out above both Mr Evans and Ms Wilcox expressly took into account the fact that the misconduct which

they had found proven had occurred during the currency of the final written warning in reaching their decisions. Neither expressly states that they would have reached the same conclusion irrespective of the final written warning so it is of considerable significance.

20. The law can be relatively simply stated. It is not as a general proposition appropriate or necessary, particularly where there was no appeal against the warning, for a tribunal to investigate the circumstances of it. However if the warning was issued in bad faith, was manifestly improper or if there were no prima facie grounds for it the tribunal may conclude in conducting an analysis of the fairness of the dismissal that it was not fair or reasonable to rely on it. In this case the claimant alleges that the first and final written warning was made in bad faith and/or maliciously and/or that there was no basis in fact for it. The first point to make is that the claimant's last assertion is obviously incorrect. There was clear evidence supporting the allegations in the form of the statements of Mr Dean and Mr Greening. If those accounts were correct the conclusion that the claimant had committed misconduct was clearly a rational one open to Mr Stevens. Neither in this litigation or the previous litigation has there been any allegation of bias or animosity against Mr Stevens and on the face of it the conclusions were ones he was fully entitled to reach. Certainly on the evidence before me there is nothing which would allow me to conclude that the decision was made in bad faith, was manifestly improper or that there was no prima facie basis for it. It follows that in my view both Mr Evans and Ms Wilcox were entitled to take the previous warning into account in reaching their conclusions.

21. To return to the Burchell questions the claimant asserts that there was a failure to adequately investigate as the initial investigation did not include all the matters that subsequently formed the basis of the disciplinary allegations. There is in addition a procedural question of whether it was fair to proceed with the disciplinary hearing in the absence of the claimant. In respect of the first of those it is not obligatory to hold an investigatory meeting prior to a disciplinary meeting. Fairness simply requires that an employee be given the opportunity to understand and answer the charges against him; and that in the event that there are factual disputes as to what occurred that the employer undertakes sufficient investigation to be able rationally and reasonably to resolve them. As the claimant accepts that both that the disciplinary charges were clearly identified, and that the information on which they were based was supplied to him prior to the disciplinary hearing the absence of an earlier investigation into some of them does not appear to me fundamentally to affect the fairness of the decision. Similarly in my judgement it was open to the respondent to continue with the hearing. Even if am wrong as to either or both of those conclusions, in my judgement when looked at overall, particularly as the claimant accepts that at the appeal he made all the points he wanted to make that the overall process was a fair one.

22. In terms of the conclusions in my judgement for the detailed reasons given by both Mr Evans and Ms Wilcox, their conclusions were reasonably and

rationally open to them and given that the misconduct occurred during the currency of the final written warning dismissal certainly fell within the range reasonably open to them.

23. It follows that all the Burchell questions having been answered in the respondent's favour that the claimant's claim for unfair dismissal must be dismissed.

Costs

24. Following promulgation of the earlier Judgment in the discrimination claims the respondent made an application for costs of those proceedings in the total sum of £32,780. There has been no application in respect of this hearing, although as set out below, part of the respondents claim relates to the number of preliminary hearings including that relating to the application to amend to include the claim of unfair dismissal. The earlier decision is the subject of an appeal to the EAT which has not yet finally been resolved and I raised with the parties whether this application should await the outcome. However the claimant indicated that he was proposing to withdraw his appeal and in those circumstances both parties were content for me to determine the application at this stage.

25. The starting point is that the Employment Tribunal is a costs free forum unless the principles as set out in Rule 76 apply. The respondent bases its application on the propositions that the claimant conducted the proceedings unreasonably (R76(1)(a) and/or that his claim had no reasonable prospects of success (R76(1)(b)).

26. It is sensible to deal with the second application first as, if the whole claim was misconceived the threshold for an order for costs will been crossed irrespective of any further consideration of the claimant's conduct of proceedings. The submission is put very briefly in the respondent's application and is based essentially on the proposition that all of the claimant's claims have been dismissed, and many because the factual allegations were themselves dismissed irrespective of and before consideration of the legal merits. In my judgement that is insufficient, without more, to allow the tribunal to conclude that the claims were misconceived. The tribunal frequently has to determine fundamental factual disputes and necessarily will prefer one party's account. This does not in and of itself expose the other party to the risk of costs. In addition in this case as set out at paragraph 9 of the original decision the claimant asserted that in order to discern the underlying pattern of discrimination it was necessary to examine not only the individual incidents but the overall picture. Whilst we did not ultimately find in his favour the task required careful analysis and was not obviously doomed to failure. In the circumstances in my judgement the threshold for making an order for costs on this basis has not been crossed in this case.

27. The second part of the application relates to the claimant's conduct of the proceedings. The respondent complains that because the claimant sought

to add to and to amend his claim regularly throughout the proceedings that it was compelled to attend six preliminary hearings between 4th September 2018 and 11th September 2019. Ordinarily it would be reasonable for a case of this type and complexity to need no more than one or at most two preliminary hearings. However the fact that a party makes a number of preliminary applications is not evidence that any of the applications is in and of themselves unreasonably made. I note that there is no specific suggestion that any of the individual applications was itself misconceived or unreasonably, nor was there any individual application made for costs arising out of those hearings. In those circumstances it appears to me impossible to say simply by reference to the number of applications itself that the claimant has behaved unreasonably. It equally follows that I am not persuaded that the threshold for an order for costs has been reached on this basis either; and I those circumstances the respondent's application for costs must be dismissed.

Employment Judge Cadney
Date: 22 March 2021

Judgment and Reasons sent to the parties: 1 April 2021

FOR THE TRIBUNAL OFFICE