EMPLOYMENT TRIBUNALS

Claimant: **Mr D De Costa**

Respondent: **London Fire Commissioner**

Heard by Cloud Video **On: 4-6 January 2021**

Before: **Employment Judge Reed**

Representation
Claimant: Mr J Scott-Joynt, counsel
Respondent: Mr B Amunwa, counsel

JUDGMENT

The judgment of the tribunal is that the claimant was fairly dismissed and his claim fails.

REASONS

1. In this case the claimant Mr De Costa said he had been unfairly dismissed by his former employer, the London Fire Commissioner. For the Respondent it was accepted that Mr De Costa had been dismissed but it was said that the reason for his dismissal was conduct and furthermore that that dismissal was fair.

2. I heard evidence on behalf of the Respondent from Mr S Bessa, who undertook the investigation into the alleged misconduct of Mr De Costa; from Mr R Welch, who dismissed Mr De Costa; and from Mr Ellis, who rejected his appeal against dismissal.

3. I also heard evidence from Mr De Costa himself and I was shown a number of documents as a consequence of which I reached the following findings of fact.

4. The Mr De Costa began working for the Respondent in 2003. He was a firefighter and was subject to two terms within his contract of employment that were relevant for my purposes. The first was that he had to seek express consent to undertake outside work ie not for the Respondent. The second was that if he was working during a period of sickness, that was liable to be

regarded as an act of gross misconduct meriting summary dismissal.

5. He was aware of those terms and in fact he applied for and was granted permission to undertake outside work - gardening maintenance - which he did from 2010. His business was successful to the extent that it was subsequently incorporated.

6. In June 2017 the Claimant attended the Grenfell Tower fire and as a consequence from 22 July 2017 he went off sick with what was diagnosed as post traumatic stress disorder. He never returned to work. From that date until his dismissal, he was on full pay.

7. In 2018 it was apparent that Mr De Costa was not attending all the occupational health meetings he was supposed to. Mr Newing, on behalf of the Respondent, suspected that the reason for that state of affairs might be that he was actually working albeit that he was claiming sick pay and he instigated an investigation which was effectively taken up by Mr Bessa in March 2019.

8. On 1 April 2019 Mr De Costa had an occupational health appointment with a Doctor Adenekan.

9. On 4 April 2019 he was written to by the Respondent to tell him that a disciplinary investigation was being undertaken in connection with a breach of the outside employment policy.

10. Mr De Costa was not prepared to meet Mr Bessa but sent a written statement on the 8 April responding to the allegations against him which became part of the disciplinary investigation report produced by Mr Bessa on 14 May.

11. Mr De Costa was called to a disciplinary meeting which took place on 11 July 2019 before Mr Welch. He denied having worked while he was on sick leave. He claimed that he had sold his business to a Ms Ashik in Spring 2018, or at least that she had taken control of his company at that time, after which he did not work for it.

12. Mr Welch did not believe him. At the end of that meeting, Mr Welch expressed the view that Mr De Costa had committed gross misconduct and he summarily dismissed him. That was confirmed in a letter dated 18 July.

13. Mr De Costa appealed against dismissal and that appeal came before Mr Ellis on 1 October. His appeal was unsuccessful.

14. Under s98 of the Employment Rights Act 1996 there are 5 potentially fair reasons for dismissal, of which conduct is one. Mr De Costa suggested that the real reason for dismissal was not a genuine belief on the part of Mr Welch that he had been in breach of the Respondent's policies but rather that it was inconvenient and expensive for him to be retained in employment on full pay during a period of sickness.

15. I did not recall that case being put to Mr Welch but, in any event, it clearly was not why Mr De Costa was dismissed. I was satisfied that the reason for dismissal was a belief that Mr De Costa had been working during sickness

absence. The reason was therefore conduct and the dismissal was therefore potentially fair.

16. I must then go on to consider whether the Respondent acted reasonably in treating that conduct as justifying dismissal – was it reasonable to conclude that Mr De Costa had committed the misconduct alleged against him and, if so, was dismissal a reasonable sanction?

17. It was suggested on Mr De Costa's behalf that procedural aspects of the investigation and appeal rendered the dismissal unfair.

18. It was said that Mr De Costa missing occupational health appointments was not something that should have led the Respondent to investigate the possibility of his working elsewhere. I did not accept that was the case but even if it had been, it is difficult to see where it would take him. What if the Respondent had been carrying out random checks, where there was no suspicion of misconduct? If that had turned up evidence of misconduct, would the Respondent have been somehow prohibited from taking the matter forward? I could not see that that would be the case.

19. Next, it was pointed out that at the occupational health appointment on 1 April 2019 Mr De Costa was asked questions relating to outside work. It appears that the doctor went beyond her brief in doing so. It is clearly possible to imagine circumstances in which that might be relevant to the fairness of the dismissal. The Claimant might have prejudiced his position by the way that he behaved at that meeting, which was not part of the disciplinary process. In fact, he refused permission for the report produced as a result of that appointment to be disclosed to the Respondent so if he did, for example, make some damning admission, it was not something taken into account because the Respondent was wholly unaware of it.

20. It is true that he then refused to be interviewed in connection with the disciplinary matter. Again, if he had been prejudiced by that state of affairs, that might have been relevant to fairness. However, it was not relevant at all to the rationale of Mr Welch in concluding that he had worked while being absent. Nor could Mr De Costa seriously contend that he might have been able to head off the investigation if he had engaged more thoroughly at the time. That was wholly unlikely given the nature of the evidence that was actually produced.

21. The next allegation was that there was a failure to properly investigate all the circumstances of the case. It was suggested that there were others who the Respondent could have interviewed - particularly, Ms Ashik and perhaps his accountant. But the obligation on the Respondent is not to undertake a wholly exhaustive enquiry, it is to do what is adequate. It seemed to me that what they did in these circumstances, in the light of the evidence that was in fact produced (see below) was indeed adequate.

22. The criticism then leveled at the appeal is that there was additional evidence produced at that stage. Clearly if that new evidence would reasonably have had the effect of in some way undermining the original decision, then it might have resulted in an otherwise fair dismissal being unfair.

23. The additional evidence in this case was a letter from the accountant of Ms Ashik. This certainly confirmed to an extent the evidence that the Claimant had himself given in relation to certain matters. It was not, however, such that it rendered the conclusion reached by Mr Welch or the rejection of the appeal unreasonable.

24. I therefore concluded that the manner in which the investigation and appeal were conducted did not have the effect of rendering the dismissal unfair. The real issue for me was one of substance. I had to decide if it was reasonable for Mr Welch to conclude that Mr De Costa had worked whilst he was off sick and if so, was dismissal was an appropriate sanction?

25. There was reference made to confirmation bias. It was suggested that Mr Welch had decided Mr De Costa was guilty and chose to disregard evidence to the contrary. Consideration of that matter, however, is rather to put the cart before the horse.

26. If the evidence before Mr Welch was such as to justify a reasonable belief that Mr De Costa was guilty and dismissal was merited then the dismissal would be fair. If on the other hand, the evidence before him was not such as to justify that conclusion, one could go on to speculate as to why it was he acted unreasonably one might conclude that he had made his mind up before he heard the evidence. That would be a somewhat academic exercise because, of course, the Claimant would have already won his case.

27. It is necessary then to analyse the evidence that Mr Welch did have before him and it fell into a number of areas. For the period in question, there were a number of reviews of Mr De Costa's garden maintenance business on two sites, Google and Checkatrade, which on the face of it indicated that he was actually undertaking work for his company at the relevant time. He was also named as the owner of the business on the Checkatrade site and his mobile number was given there. That number also appeared on the website of the company itself. He continued to be a director of the company until a few days after he was told of the investigation, when Companies House was notified that he no longer was. His Linkdin profile identified him as a director of the company.

28. To say all of that is suspicious is understating the matter. He was being personally identified as the person carrying out the work. His explanation for that was that although he had transferred control of the business by the dates of the reviews and was undertaking no work, he had expressly agreed with the person to whom he transferred it in May 2018 that she could continue to use his name.

29. It is unsurprising that Mr Welch was somewhat sceptical about that assertion. Of course, even if Mr De Costa's account was true, he was guilty of being party to a fairly fundamental deceit, but Mr Welch was bound to ask how likely was it that that truly represented the situation – that workers were undertaking the work and representing themselves as being Mr De Costa.

30. Very shortly after Mr De Costa was made aware that the investigations were underway, somebody contacted one of the review sites to remove the references to him. That was again highly suspicious. On the face of it, it

could clearly amount to someone trying to hide a trail of evidence that implicated him in precisely the misconduct alleged against him.

31. There was further suspicious activity in relation to the transaction that Mr De Costa claimed he had entered into with the purchaser of his business. He said that he had agreed in May 2018 that the business would be transferred to Ms Ashik and that the appropriate steps would be taken to make the notifications to Companies House.

32. In fact it was not really possible to tell what Mr De Costa's position was in relation to that matter. He contradicted himself both in the course of the disciplinary hearing and in the course of his evidence in this Tribunal. At one stage he indicated that it was agreed in May 2018 that the notifications would not be made to Companies House and the transaction finalised until the following April to tie in with the financial year of the company itself. At another point he claimed to Mr Welch that that was not the position. In fact, he seemed to claim that it came as something of a surprise that the accountants had not completed the paperwork relating to the transaction shortly after May 2018 as one might have expected they would do.

33. That contradiction of itself is not highlighted by Mr Welch as being a particular aspect of his consideration but it had to be relevant to whether his determination was a reasonable one.

34. Finally, there was a complete lack of contemporaneous documents from Mr De Costa in relation to these matters. Mr De Costa told Mr Welch the expectation on the part of Mr Welch that there would be documents was the result of ignorance on his part of as to the way in which companies operate. In fact, Mr Welch was absolutely right when he considered it highly unlikely that a transaction of this sort would take place without paperwork of any sort. It would be wholly remarkable if there were no such documents in existence and in fact in the course of this hearing Mr De Costa confirmed as much. In response to questions from the tribunal he said there was a share purchase agreement.

35. So as it turned out, and on Mr De Costa's own admission, there was at least one document produced at the time, and a potentially highly important one, since it would surely make clear how the transaction had been set up and whether Mr De Costa's account was accurate. He did not produce it to Mr Welch. Indeed, he did not produce it for this hearing, notwithstanding the possibility that the tribunal would consider contribution and have to consider his actual "guilt".

36. It was possible to say with precision when matters were reported to Companies House. It was immediately after the receipt by Mr De Costa of the letter indicating to him that he was being investigated. Again, this was highly suspicious.

37. It was fair for Mr De Costa to point out that the evidence against him was circumstantial. Nobody witnessed him actually undertaking the work. There comes a stage, however, where such evidence is sufficient to justify a reasonable belief in guilt.

38. The question for me was whether Mr Welch's conclusion – that Mr De Costa had been working during a period of sickness absence – was a reasonable one. I concluded that it was. The story put forward by Mr De Costa to explain the references to his involvement with his company; the amendment of the reviews so soon after he became aware of the allegations; his being held out as the owner of the business on various websites; the inconsistent story of the transfer of ownership/control; the timing of the changes at Companies House; and Mr De Costa's failure to produce documentary evidence – these were all matters that suggested guilt. There were further steps Mr Welch could have taken, and in particular he could have spoken to Ms Ashik and perhaps her accountant. His failure to do so, however, did not, in my view, render his conclusion an unreasonable one.

39. Finally, I had to consider whether it was reasonable for him to conclude that Mr De Costa's actions amounted to gross misconduct. I did not understand it to be suggested on his behalf that it was not. There was a "surrogate warning" to that effect in the terms on which he was employed. In any event, what was alleged against him amounted to fraud - presenting himself to the Respondent as incapable of working and therefore entitled to sick pay in the circumstances where he knew full well that he was not. That would have amounted to gross misconduct whatever the terms of his contract.

40. The only remaining issue was therefore whether dismissal was an appropriate sanction.

41. There will be occasions where, notwithstanding that an employee has committed gross misconduct, no reasonable employer would have dismissed. This case illustrates how that might come about. Mr De Costa had PTSD as a result of his attendance at the Grenfell Tower fire. He could have claimed, for example, that, because of that condition, he was simply incapable of properly appreciating the gravity of what he was doing. Instead, he came up with a frankly wholly implausible explanation and tried to "brazen it out". He certainly had long service with the Respondent and he had PTSD. Notwithstanding those matters, in the light of the conclusion Mr Welch had reached, dismissal was an option reasonably open to him. It followed that Mr De Costa was fairly dismissed and his claim failed.

_____

Employment Judge Reed
Dated: 18 March 2021