



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4102617/20 (V)**

**Held by Cloud Based Video Platform on 12 January 2021**

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**Employment Judge A Jones**

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**Mr A Johnson**

**Claimant  
Represented:  
Mrs D Johnson  
(mother)**

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**Sky In-Home Service Limited**

**Respondent  
Represented:  
Mr M Leon, solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The claimant was not unfairly dismissed by the respondent and does not succeed in his claim of unlawful deduction from wages. Therefore, the claimants are dismissed.

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**REASONS**

## Introduction

1. The claimant presented a claim of unfair dismissal arising out of his dismissal for alleged gross misconduct. He also alleged that he had not been paid a bonus to which he was entitled at the date of the termination of his employment. The claimant was represented by his mother, Mrs Johnson before the Tribunal and the respondent was represented by Mr Leon, a solicitor who was instructed to conduct the final hearing. The final hearing took place on the Cloud Video Platform and written witness statements formed the evidence in chief of the witnesses. The witnesses were all cross examined. A joint bundle of documents was produced together with a list of issues.
2. The Tribunal heard evidence from Mr Iain Hardwick, the claimant's manager, Mr Peter Stephenson, who took the decision to dismiss the claimant, Mr Steven Seager, who chaired the appeal hearing and Mr Craig Warren, who had taken notes during the reconvened disciplinary hearing. The claimant gave evidence on his own behalf.

## Findings in fact

3. Having considered the evidence and the documents to which reference was made, the Tribunal found the following facts to have been established:
4. The claimant was employed by the respondent in the role of Engineer from 26 June 2017 until his dismissal on 7 February 2020.
5. The claimant's role was field based and involved the fitting of satellite dishes and cabling on customer premises. The claimant's work was largely unsupervised.
6. The claimant was supplied with an ipad from which he could access training manuals and other documentation while carrying out his duties.

7. The respondent's disciplinary policy included in the examples of gross misconduct 'any action that puts your or anyone else's health and safety at risk'. (P66 of the bundle)
- 5 8. The claimant underwent various training courses during his employment.
9. The claimant signed a document setting out 'Sky UK ER guidelines for Engineers' on 26 February 2019, which stated under the heading 'health and safety' 'Where an employee chooses not to use either equipment and/or  
10 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 unsafely. P72
10. The claimant carried out a job on 11 November 2019 which involved fitting  
15 cabling and a satellite dish at the home of a Mr Todd.
11. Prior to 11 November, the claimant had been absent from work for a number of days as his young daughter was in hospital suffering from pneumonia. He had been granted emergency leave by Mr Hardwick for 8<sup>th</sup> to 10<sup>th</sup> November  
20 inclusive.
12. The claimant and Mr Hardwick had a telephone call on 10<sup>th</sup> November during which the claimant indicated that he would return to work on 11<sup>th</sup> November.
- 25 13. The claimant had been placed on a performance capability plan with effect from 26 September 2019.
14. When Mr Hardwick was reviewing customer feedback in preparation for a meeting with the claimant in relation to this plan, he came cross feedback  
30 from the job carried out by the claimant on 11 November. The feedback made negative comments about the quality of the work carried out, indicated that the claimant had 'spent most of the time on the phone' and also said that the claimant had used the customer's ladder rather than his own.
- 35 15. A meeting had been planned between the claimant and Mr Hardwick on 9 December. Mr Hardwick advised the claimant shortly in advance of the

meeting that this would now be an investigatory meeting into allegations of misconduct.

- 5 16. Notes of the meeting were taken by Mr Hardwick and a summary of the investigation carried out including this meeting was produced by Mr Hardwick on 13 December (pp107/8). At the meeting, the claimant denied using the customer's ladder. The claimant admitted that the job had not been completed to an acceptable standard. The claimant was asked if there was any reason for this and replied 'I have a couple of personal reasons at home,  
10 but I don't want to go into detail now.'
17. Mr Harwick pressed the claimant to elaborate on any reasons and said 'Are you sure as this is as serious as it gets', but the claimant declined to elaborate. The claimant was then suspended from work and this was  
15 confirmed to him in writing (p106).
18. Mr Hardwick then arranged for further investigation to be carried out and the customer was contacted again to ask him to go over the feedback he had given. The customer again stated that the claimant had used his ladder rather  
20 than the claimant's own ladder.
19. The claimant was invited to a disciplinary hearing on 15 January. The allegations against the claimant were that there had been a breach of health and Safety in relation to the use of the customer's ladder and that the  
25 claimant had failed to complete the job to a professional standard. The claimant was advised that the first allegation, if established, could amount to gross misconduct and the second allegation could amount to misconduct.
20. In the event, the hearing took place on 28<sup>th</sup> January. The claimant had initially  
30 believed that his father could accompany him to the hearing, but was advised that he could only be accompanied by a colleague or trade union representative.
21. At the hearing on 28<sup>th</sup> January, the claimant was accompanied by a trade  
35 union representative, a Mr Fatturusso. The hearing was chaired by Mr Stephenson and a Mr Hammond was the notetaker.

22. At the hearing, the claimant again denied using the customer's ladders, but admitted that the job had not been completed to a professional standard. The claimant said that this was because he was stressed as his daughter had pneumonia. (page 181). The claimant said he had not taken extra time off as he was concerned that he would hit three absences and 'end up in a hearing'. Mr Stephenson advised the claimant that he was referring to sickness absence not where a manager was supporting him with time off. The claimant also alleged that the customer was making false accusations for financial gain, so that he would have additional work carried out without additional charge.
23. Mr Stephenson adjourned the hearing as he wished to carry out additional investigation. Mr Stephenson spoke to Mr Hardwick to find out more information in relation to the claimant's absence from work and his knowledge of the illness of the claimant's daughter.
24. The hearing was reconvened on 7 February and on this occasion a Mr Warren was taking notes. The claimant indicated that he had looked through the information provided to him regarding the further investigations and indicated 'I don't want to say what I really think but its bollocks what Ian has said'. He went on to say 'I am going to take my rep's advice and not answer any other questions on anything else. I was told that I was here for a decision only.'
25. Mr Stephenson then advised the claimant that he was upholding both allegations and that the claimant would be dismissed. The decision was confirmed to the claimant in a letter and the claimant was advised of his right to appeal.
26. After the conclusion of the proceedings, Mr Stephenson asked the claimant to say 'off the record' whether he had in fact used the customer's ladders. The claimant indicated that he had, and that he had already got another job.
27. The claimant appealed against his dismissal. The appeal was dealt with by Mr Seager. The claimant's appeal was based on four grounds:

- That the respondent should not have believed a customer over him
- That there were mitigating circumstances for him being on the phone, in that his daughter was in hospital
- 5 • That he had been suffering from mental health issues and that this was known in the workplace, and that
- There was an ulterior motive for his dismissal, either to remove an employee with mental health issues or sack an employee who had time off due to a sick child.

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28. An appeal hearing took place on 4 March. The claimant was represented by a Mr Stacey.

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29. At the beginning of the appeal hearing, Mr Seager advised the claimant that it had been brought to his attention that after the disciplinary hearing he had said to Mr Stephenson and Mr Warren that he had used the customer's ladder, that he was going to resign anyway, and that he had had an argument with the customer in question, which could have come to blows.

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30. The claimant denied he had made this admission but indicated he did have an argument with the customer in relation to the number of times he had been on the phone during the job. The claimant also indicated for the first time that he had asked for the day off but had been told to come into work.

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31. Thereafter the claimant's representative read a preprepared statement setting out the appeal and the claimant refused to discuss the matter further. The claimant also indicated that he did not wish his job back.

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32. Following the appeal hearing, Mr Seager conducted further investigations, by speaking to Mr Hardwick, Mr Stephenson and Mr Warren.

33. Mr Seager did not uphold any of the grounds of the claimant's appeal and his decision to dismiss the appeal and his reasons in relation to each ground were set out in a letter to the claimant dated 9<sup>th</sup> March.

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34. Thereafter, there was some correspondence between the claimant and the respondent's HR team in relation to the final payments due to the claimant. The claimant was advised that as he was dismissed prior to the payment date of bonus in March, he was not eligible to receive any bonus.

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### **Issues to be determined**

35. The Tribunal was required to determine two issues. Firstly, had the claimant been unfairly dismissed and if so, what compensation, if any should be awarded. Secondly, had the claimant been entitled to receive a bonus payment on the termination of his employment.

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36. However, during the course of the claimant's evidence it was clear that the schedule of loss which had been produced for the claimant was not accurate or up to date. The claimant gave evidence during cross examination that he had in fact received income from June onwards which was not included in his schedule of loss. The Tribunal therefore indicated that in the event that there was a finding of unfair dismissal, it would not be in a position assess what compensation might be awarded and that a further hearing on remedy would be required in those circumstances.

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### **Observations on the evidence**

37. The witness evidence was very short and there was little cross examination of the witnesses, other than the claimant. The Tribunal was required to advise the claimant's representative on at least three occasions that she should not in any way seek to influence the evidence of the claimant. While the Tribunal was sympathetic to the situation where Mrs Johnson was not legally qualified and was the mother of the claimant, nonetheless, the Tribunal was very concerned that having advised her once she should not communicate with the claimant when he was giving evidence, it was necessary to advise her of this on two further occasions.

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38. There was little dispute on the majority of the evidence. There was a dispute in relation to the content of the call which took place between the claimant and Mr Hardwick on 10 November. The claimant indicated that he had asked Mr Hardwick if he could take the following day off work and was advised he could not. Mr Hardwick's position was that the claimant had said he could come back to work and his daughter was getting out of hospital and arrangements had been made for childcare. The Tribunal preferred the evidence of Mr Hardwick. There was no evidence produced by the claimant to suggest that the respondent had a policy whereby he would be disadvantaged for taking time off for family reasons. Mr Hardwick had previously agreed to the claimant having had time off in relation to a family bereavement and also in relation to illness of his children. Further the first time the claimant made this allegation was during the appeal hearing. While the claimant may have felt under pressure himself to return to work, there was no evidence to suggest that Mr Hardwick or anyone else in the respondent's organisation pressured the claimant to return to work on 11 November.
39. The other material dispute on the evidence related to the 'off the record' conversation which was alleged to have taken place at the conclusion of the disciplinary hearing. Both Mr Warren and Mr Stephenson indicated that the claimant had admitted to using the customer's ladders. The claimant denied he had said this, although the main focus in cross examination seemed to be where the conversation had taken place and why reference was being made to an 'off the record' discussion rather than the content of that discussion. The Tribunal preferred the evidence of the respondent's witnesses in this regard. It could see no reason why, having already reached a decision that the claimant should be dismissed, both Mr Stephenson, and Mr Warren, who had no decision-making authority, would lie about this conversation.
40. The Tribunal was also concerned that the claimant had submitted an inaccurate schedule of loss in this case shortly before the hearing. On that basis, the Tribunal found that it could not rely on the schedule of loss and



therefore if the claimant were successful in his claim of unfair dismissal, a further hearing on remedy would be required.

41. Finally, the Tribunal was surprised that as the claimant was alleging that he was due a bonus payment, he did not lead any evidence in relation the bonus scheme he said was applicable or any evidence led regarding the amounts he said were due.

### Submissions

42. Mr Leon made oral submissions on behalf of the respondent. He reminded the Tribunal of the statutory test in relation to unfair dismissal and the three part test in terms of *British Home Stores Ltd v Burchell 1980 ICR 303, EAT* and that the relevant question for the Tribunal to consider was whether dismissal was within the band of reasonable responses (*Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*). He also reminded the Tribunal that, referring to *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*, that it could not substitute its own view of whether or not the claimant ought to have been dismissed.

43. In addressing each limb of the *Burchell* test, the respondent submitted that firstly it was uncontested that misconduct was the reason for dismissal. It was also submitted that the respondent had reasonable grounds on which to conclude that the claimant had committed the conduct alleged, in that there was no reason for the customer to make up the allegation, and that the suggestion that he could have done so for financial gain had not be borne out by the evidence. Mr Leon said that the respondent had conducted as much investigation as was reasonable in the circumstances.

44. It was also submitted that the respondent was entitled to take into account that the claimant had changed his position in relation to how he had used his ladder at the job in question during the disciplinary hearing itself.

45. The respondent submitted that the alleged 'confession' of the claimant was relevant for the purposes of the appeal as it was the claimant who had

opened up the matter by making the 'confession'. Alternatively, the issue of the alleged confession would be relevant for the purposes of any compensation which might be awarded to the claimant and the issue of contributory fault.

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46. In terms of dismissal being within the band of reasonable responses, it was said that the safety critical nature of the work the claimant was carrying out had not been challenged. The claimant had been working from height and had to be trusted to follow the procedures to the letter given that he was unsupervised. It was clear from the disciplinary procedures that a breach of health and safety could amount to gross misconduct, and that indeed the claimant had accepted that use of a customer's ladder could be gross misconduct.

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15 47. Therefore, it was submitted that dismissal was well within the band of reasonable responses, and that dismissal was fair.

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48. Turning to the issue of the bonus, it was highlighted that there was no evidence in chief in relation to this claim. The respondent's position was that the claimant had to be in employment when the bonus was payable and that the relevant time for this was March. It was said that in addition to being the respondent's policy, the requirement to be in employment when a bonus was paid was consistent with the market generally.

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49. It was also argued that the claimant would not have received a bonus in any event had he been employed at the relevant time. The claimant was being performance managed and had committed further misconduct, therefore would not have been entitled to a bonus.

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50. On behalf of the claimant, it was submitted that men with mental health issues do not talk about them and that the respondent was aware that the claimant was suffering from mental health issues. It was said that the claimant's daughter was seriously ill in hospital and called his manager to ask for further time off which was denied. Therefore, the job on 11 November was the claimant's first day back at work since he had been in hospital for three

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days and nights with his daughter. It was submitted that the claimant had used his Sky issued combi ladder and that there was no evidence to the contrary. Further, the installation of the satellite dish would have been impossible had the claimant used the customer's ladder as it was too high up. Finally, it was said that poor workmanship was not grounds for gross misconduct.

51. Turning to the issue of bonus, it was suggested that the claimant had received a bonus when he was under the performance improvement plan. However, the respondent objected to this submission on the basis that no evidence had been led in this regard. The objection was upheld and the Tribunal explained to the claimant that this was the opportunity for submissions and not for the leading of further evidence by the claimant's representative.

## **Discussion and decision**

### **Bonus payment**

52. The Tribunal accepted the respondent's submission that no evidence was led by the claimant in relation to the basis on which he said he was entitled to a bonus payment or how that was calculated. There was nothing in either of the written witness statements provided by the claimant and the claimant did not make any reference to the bonus in his evidence. There was no documentation before the Tribunal in relation to the bonus scheme whatsoever. Therefore, the Tribunal simply had no information to allow it conclude that the claimant had been entitled to a bonus on the termination of his employment.

### **Unfair dismissal**

53. Section 98(2)(b) of the Employment Rights Act 1996 ('ERA') provides that conduct is a potentially fair reason for dismissal. There is no dispute in this case that conduct was the reason for dismissal. Although the claimant did

raise a question in his appeal that his dismissal was because of his mental health or that he took time off to care for his ill daughter, he accepted in evidence that he was dismissed because the respondent believed that the claimant had used a customer's ladder.

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54. Section 98(4) of ERA however also requires that even if a potentially fair reason for dismissal is established, determining whether a dismissal was fair or unfair, will depend upon whether an employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing an employee.

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55. As highlighted by the respondent, a Tribunal cannot substitute its own view as to whether the claimant ought to have been dismissed or not. Rather the Tribunal must have regard to whether the dismissal was within the band of reasonable responses of an employer.

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56. The claimant did not seek to argue that the procedure which had been followed in relation to his dismissal was unfair. Although he was concerned that he was only given very limited notice of the investigatory meeting, and suggested that he was advised that he did not need to be accompanied at the disciplinary, it was not suggested that these issues rendered his dismissal unfair. In any event, the Tribunal concluded that the respondent had followed a fair procedure. The respondent had investigated matters fully and had given the claimant the opportunity to put forward his side of the case at each stage of the procedure.

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57. The Tribunal concluded that the question of the fairness or otherwise of the claimant's dismissal came down to the issue of whether or not the respondent was entitled to prefer the version of events in relation to the use of the customer's ladder which was given by the customer over that of the claimant.

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58. The claimant accepted that use of a customer's ladder would amount to gross misconduct.

59. The Tribunal concluded that it was reasonable of the respondent to have preferred the version of events provided by the customer over that of the claimant. It reached this conclusion for the following reasons:

- 5           - The version of events of the customer was only discovered in the context of a review of customer feedback given of the claimant's work. The customer had not raised a formal complaint in relation to the matter. There was no evidence that the customer had an ulterior motive for making the allegation.
- 10          - When the claimant denied the use of the customer's ladder, the respondent made further investigations, by going back to the customer to clarify his position.
- The claimant changed his version of events in relation to the use of his ladder during the disciplinary hearing.

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60. Having found that the respondent was entitled to prefer the customer's version of events to that given by the claimant, the Tribunal concluded that dismissal was within the band of reasonable responses, that the respondent had otherwise acted reasonably in dismissing the claimant and that therefore  
20 that the claimant was fairly dismissed by the respondent.

61. In these circumstances, the claimant's claims are dismissed.

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Employment Judge: Amanda Jones  
Date of Judgment: 19 January 2021  
Entered in register: 20 January 2021  
30 and copied to parties