



EMPLOYMENT TRIBUNALS

Claimant: Mr R Price
Respondent: Churchill Contract Services Ltd

Heard at: London South **On:** 28 September and
13 November 2020

Before: EMPLOYMENT JUDGE CORRIGAN

Representation

Claimant: In person
Respondent: Mr Kerr, Consultant

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed by the Respondent.
2. The Claimant's claim is dismissed.

REASONS

Claim and issues

1. By his claim dated 1 March 2019 the Claimant brings a complaint of unfair dismissal. The issues were discussed with the parties and agreed to be:
2. What was the reason for the dismissal? Was it misconduct? Was it the alternative reason put forward by the Claimant that the Respondent could no longer afford to pay him as they had made cuts?
3. If the reason was misconduct, did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation?

4. Was it within the range of reasonable responses to dismiss?
5. If the Respondent had adopted a fair procedure would the Claimant have been fairly dismissed in any event?
6. Did the Claimant contribute to the dismissal?

Hearing

7. I heard evidence from Ms Stacey Bee (Account Manager), Ms Judi Sloman (Operations Manager) and Mr Gregory Dingle (Regional Director) on the Respondent's behalf. I also read a statement prepared by Mr Anthony Brown (Former Operations Manager) who no longer works for the Respondent. I also heard evidence from the Claimant on his own behalf.
8. There was a 156 page bundle. I heard oral submissions from each side.
9. Based on the evidence heard and the documents before me I found the following facts.

Facts

10. The Respondent provides cleaning services, with various commercial contracts to clean client premises. The Claimant's employment commenced 3 December 2006. His employment transferred to the Respondent about two years before his dismissal. By the relevant period he was employed as a Mobile Supervisor covering Croydon. He also held an additional contract of 10 hours a week to clean public toilets at Westow Street.
11. The Claimant was provided with a Company van. He says that prior to his employment transferring to the Respondent he had permission to use the van to attend cricket matches. Ms Bee agreed that he used the van for cricket prior to the transfer.
12. He was issued with a new van after the transfer. I accept that he had not been given permission to drive that van to cricket or to otherwise use it for personal use, save on one occasion when he requested to attend the dentist and Ms Sloman agreed. He was also at that time provided with a copy of the Respondent's driving policy (p24) which states that "where an employee is able to take a van home they must be aware that this may then only be used for travelling to the usual place of work and **in genuine company business**. Company vans must **not** be used for personal use under any circumstances. Breach of this policy could lead to disciplinary action and would almost certainly lead to a tax liability for the employee which the company would not fund". He completed and signed the declaration on page 26 of the bundle on 30 June 2016. This involved answering a number of questions about his driving licence along with a declaration he had received and read the driving at work policy and agreed to follow it, and understood that failure to do so could lead to disciplinary

action. The Respondent's disciplinary policy lists serious breach of company rules as gross misconduct (p34).

13. The Claimant said he did not read the policy as he did not have his glasses with him but I agree with the Respondent that he had been informed about it and its importance, and had had the opportunity to familiarize himself with it. Despite the absence of his glasses he had been able to complete the form and answer the questions about his licence.
14. A new type of tracker was installed on the van on 17 July 2018. An investigation in respect of an unrelated customer complaint led to the tracker on the Claimant's van being examined and to the concern being raised that the Claimant was using the van for non company purposes and that he was not performing the hours in respect of the Westow Street contract.
15. The Claimant was interviewed on 8 August 2018 by Ms Sloman, with Ms Bee taking notes, about the complaint and the fact his van was sighted in the Beckenham Area on 1 August 2018 (pp45-53). At that meeting he said he had been in the area to drop some money to his sister who lives in that area. He also has a cousin who lives in that area and he would pop in there. He said a colleague was in the van as she helped him clean Westow Street. He also said he went to his sister's for dinner and to drop money with the cousin. He also said he used the van for cricket in Wallington and Morden, New Malden "etc" and said that both Ms Sloman and Ms Bee were aware of this.
16. The Claimant's colleague (who was also his partner) was also interviewed on 9 August 2018 (pp 55-61). She said she did go in the van if the Claimant took her to work or picked her up otherwise she would be on the bus. She said on 1 August he had picked her up from the bus stop after her work and then they went to his sister's for dinner and to drop money at his cousin's. She did not mention Westow Street.
17. The Claimant was invited to an investigatory meeting to discuss this with Ms Sloman on 20 August 2018. He prepared a statement in which he said he had not used the van for personal use. However he also said he did use it to visit a relative local to his sites during or after work and to go to cricket which he said was work related as it is with Croydon Council. He said he had been doing this for 9 years and that both Ms Sloman and Ms Bee were aware (pp62-63). He also mentioned that it was well known that his other sister had died three months before, and that he had also had a lengthy sickness absence for shingles. He said if he was emotional or in pain he would go home but would always do his hours. He said he regularly texted Ms Sloman to let her know his whereabouts. He was asked specifically about use of the van on 15 August and he confirmed that he had gone in his van to Dinsdale Gardens due to his partner visiting her best friend there who had been attacked. He also said initially he had returned to Westow Street, explaining the absence from the tracker by saying he went in his car to clean, but eventually accepted he probably did not. He said that he would go to Westow St in his car and that would sometimes be in the early mornings. He also mentioned a window screen being smashed on a Sunday, with his union representative adding that

this was his car window and that was why he used the van. He was asked about being in Hampton on a Sunday and he confirmed he was playing cricket. He then claimed to have gone to Westow St although there was no record on the tracker, saying he probably used his car. A number of locations including the South Circular were mentioned. It was put to him the tracker only showed him at Westow Street for 2 hours and 15 minutes over a 22 day period. He said sometimes he goes in the early hours of the morning.

18. The Claimant was invited to a disciplinary meeting with Mr Brown (then Operations Manager). The relevant charges were using a company vehicle for private use and fraudulently appropriating the company's money, namely being paid for contracted hours that he had failed to work. He was provided the notes to his own meetings, his colleague's meeting on 9 August 2018 and the tracker information spreadsheet and the document detailing Westow Street times and visits. The Claimant confirmed using the van to go to his sister's for dinner and to his friend's to play dominoes, as he said he went straight from work. It was put to him that there was personal use on the majority of days. He said he would take his own car to go and clean Westow Street. Tulse Hill was mentioned as a place he visited. He was asked about the South Circular which he said was the dentist. His union representative said that he accepted the private use. He only went for food to family's houses, that he had been doing this for a long time and not been reprimanded and that he apologized. In the meeting his union representative repeatedly suggested that he needed to apologise and he himself is recorded as saying he believed he could use the van within reason. He also provided the GP letter at page 123. At one point his union representative is recorded as saying "let's hope you still have a job" and "you need to accept you have done wrong".
19. Mr Brown made the decision to dismiss the Claimant. This was communicated by letter dated 15 November 2018. The reason given was the Claimant had used a company vehicle for private use and fraudulently been paid for hours that he had not worked. He listed that the Claimant had admitted using the van to drop off money with a relative, to go to his sister's for dinner, to go to a friend's to play dominoes, to dentist appointments and to attend Cricket. He said that at no point had the Claimant requested or informed anyone that the cricket (which the Respondent encouraged) would involve use of the vehicle. He also said that the tracker did not show any occasion when the Claimant had attended Westow Street for the time he was contracted to be there. It did show he dropped in briefly throughout the day, which was not required. He did not believe the Claimant's account that he used his own car to go to Westow Street when he cleaned, given that he used his van for personal use. He also took account that the Claimant had admitted to having a drink before returning to clean Westow Street.
20. The Claimant appealed and the appeal was heard by Mr Dingle. The basis for the appeal was that there was no evidence that the toilets were not cleaned. He chose to use his car and to go at 11pm which he was entitled to do. Reference was made to the site scoring 95% on a spot check and that it was not the kind of site that would score this if it was not being

cleaned. With respect to personal use it was said that the use was mostly on the way home save for a very sad and unsettled period in his life following a bereavement. It was submitted that dismissal was too severe a sanction.

21. The appeal hearing took place on 13 December 2018. The Claimant was represented by his union and the notes show the representative was able to make a number of points on the Claimant's behalf. I accept Mr Dingle's evidence that he did not prevent the Claimant's representative making points.
22. In that meeting the Claimant said he used his own car to go to Westow Street so he could combine this with visiting his daughter who lives out of his area of responsibility, particularly around the time his sister had died. In terms of visiting his other sister 1 mile out of the borough in Beckenham he said that he used it as an opportunity to see his sister and did not think the Respondent would object. He said it was only once or twice. He asserted that both Judy Sloman and Anthony Brown knew when he used the van for cricket. He referred again to the toilets receiving 4 out of 5 on two previous audits. He also referred to messaging Ms Sloman when he started and left site. His representative again said that a final written warning would have been an appropriate outcome. He also asked that consideration be given to whether the Claimant was only using the vehicle for personal use once or twice rather than consistently. The Claimant was asked to clarify why he used his car to go to Westow St. The Claimant said he went after going to see his daughter or family late, he did not explain about their living out of the borough. The Claimant mentioned that he texted Ms Sloman start and finish times at particular sites.
23. The Claimant sought to interpret the comment from Mr Dingle at the bottom of p144D as confirmation he had had permission to use the van for cricket. However I accept Mr Dingle's account that all this reflects is that he agreed with the Claimant in the meeting that he would clarify with the line managers whether the Claimant had permission from them for the cricket use.
24. The outcome was that the decision to dismiss was upheld. This was communicated by letter dated 4 January 2019. The explanation given was that at the meeting the Claimant did not provide any new evidence or mitigation. He had admitted using the company vehicle for private use. Mr Dingle said that after reviewing the tracker he was satisfied that there were several occasions that the Claimant had failed to work his contracted hours.
25. Mr Dingle checked with Ms Sloman and Mr Brown in respect of whether either had given the Claimant permission to use the van for personal use. They confirmed they had not.
26. Mr Dingle explained his rationale further in evidence. He said if it had just been one or two occasions of personal use he would have taken a more lenient approach but the Claimant had used the vehicle many occasions out of borough for non company events when the company would not expect the Claimant to be in the vehicle. He did not accept that the

Claimant was just going slightly out of his way on the way home. There were a number of extreme journeys when he should have been working. The Claimant himself accepted he had used the van for cricket. When asked neither Ms Sloman nor Mr Brown said they had given permission. He also took account that the tracker showed the Claimant repeatedly returning home throughout the day, that it did not support that the Claimant was dropping off employees, and that he was starting late, finishing early and lying to his Line Manager about where he was at what times. He considered the Claimant's assertion that he used own vehicle to go to clean Westow St illogical when he was regularly using the van late into the night.

27. In evidence he said he understood now that it was because the Claimant was going on to stay at his daughters' out of Borough but this was not mentioned at the appeal. The Claimant had mentioned not wanting to take van to his daughter's late but not that he was staying there and it was out of the borough.
28. I accept there were no ulterior motives for the Claimant's dismissal. Although Ms Sloman considered resigning I accept this was because of the pressure of work and had nothing to do with the Claimant's disciplinary process and had no effect on it (as the Claimant alleged). Although there have been savings this has not affected the Claimant's role. There are still two mobile supervisors as there were at the time of his dismissal.
29. The tracker report is in the bundle at pages 95-102. The final column of the table shows the messages the Claimant sent to Ms Sloman along with his shift times. This shows a number of occasions when the Claimant said he was at or leaving Westow Street when in fact this was not correct and the tracker places him elsewhere. With respect to page 97 and 25 July the Claimant sought to say that South Norwood Hill was more or less Westow Street but there were other occasions where there is no record of being at Westow St. It also shows that there were a number of occasions when the Claimant was out in his van from early until 11pm at night and so was not also in his car cleaning Westow St at those times. See for example 18 July when he was out in the van until 23.08, 31 July when he was out in the van until 21.44, 1 August when he was out in the van until 23.45, and evening of 3- 4 August when he was out until 00.55 (pp 95,99, 101). The tracker also shows he went to Dulwich, Penge, Hampton, West London, Banstead, West Norwood, Tulse Hill, and Beckenham which were all out of borough.
30. During the hearing the Claimant was questioned in more detail about the tracker record. It was put to him that on 21 July and 1 August 2018 he went back out in the van for personal reasons after he reached home and yet there was no record of his visiting Westow St. The Claimant said this was because he would have been transporting his then partner, who was also staff, and he believed he could use the van to pick up staff anywhere. It was put that there were 7 other similar occasions and he said he would pick up his partner whenever she rang him.

31. In evidence he also said that the van was tracked at the South Circular/ Tulse Hill because he was visiting/staying with a new partner who lived not far out of the Borough (10 minutes drive from one of his work sites). He had not mentioned this in the disciplinary process, despite being expressly asked about both those locations. He also said in evidence that his van went where he went. If he was staying with friends or girlfriends that was where his van would be.
32. He also said it had come up prior to his employment transferring to the Respondent that his van was somewhere not work related and he had explained he had visited his daughter and agreed he would use his car in future.
33. During the disciplinary procedure the explanation had been offered that the car windscreen was broken on one occasion so the Claimant had to use the van. However in evidence the Claimant said it was only the van that that had had a broken windscreen.

Relevant law

Unfair dismissal

34. The law in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the 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 holding the position which the employee held.**

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

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an**

enactment.

(3) . . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on 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.

35. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

36. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

Conclusions

What was the reason for the dismissal? Was it misconduct? Was it the alternative reason put forward by the Claimant that the Respondent could no longer afford to pay him as they had made cuts.

37. I am satisfied the reason for the dismissal was misconduct. The Claimant's tracker showed the Claimant was using the vehicle outside of work for personal use, which he and his union representative also admitted. Conversely there was no evidence on the tracker that he was fulfilling his hours cleaning Westow Street. These are the reasons for the dismissal. In particular the Claimant was not dismissed to save costs. I accept that the Respondent continued to require two Mobile Supervisors and the Claimant's role has not been cut.

If the reason was misconduct, did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation?

38. I accept for the same reasons as above that the Respondent had genuine belief in the misconduct. I note that the misconduct was accepted by the Claimant's representative and to some degree by the Claimant himself.
39. The Respondent believed the Claimant was using the vehicle for personal use, against the company policy, based on the tracker records and the Claimant's own admissions. The Claimant admitted to going to family and friends after work and to using the van for cricket. He also said he gave some lifts to his partner outside of work. These journeys were made on a regular basis. The Claimant had signed the policy in respect of driving at work.
40. The Claimant had a number of opportunities to explain his use and gave the above explanations. He said at various times that Ms Bee, Ms Sloman and Mr Brown were aware of his movements. Mr Dingle checked with Ms Sloman and Mr Brown whether they had given permission for the van to be used for cricket. They said they had not. There is no evidence anyone checked with Ms Bee but she was present as note taker at the relevant meeting and did not say she had given permission. The Claimant did not ask Mr Dingle to check with her in the appeal, only Ms Sloman and Mr Brown.
41. The Respondent had reasonable grounds to believe the Claimant was using the van for personal use without permission, and on the Claimant's own admission had done this for a lengthy period.
42. With respect to whether the Claimant was cleaning Westow Street the Respondent based the belief on the absence of any record of long enough visits to Westow Street. They did not accept the Claimant's account that he returned using his car to Westow St when he was otherwise spending so much time in the van and using it for personal use. There were a number of occasions when the Claimant was still using the van at the time he said he would have cleaned Westow St. He was also out long days in the van.
43. The Respondent again gave the Claimant the opportunity to explain. The Claimant had at the outset made reference to his colleague helping him clean. She had been interviewed in respect of the original complaint, but not in respect to whether or not the Claimant was cleaning Westow St. Some employers might have asked her whether or not she did help on a regular basis. However I do not consider it was unreasonable not to do so in all the circumstances. She did not confirm that she had assisted the Claimant on the one date she was interviewed about. The Claimant who was represented did not ask for her to be interviewed. Indeed in evidence when asked the Claimant said he did not see why she would need to be interviewed and that he had made the decision not to involve her. In any event if she had been helping the Claimant that would have raised another issue about whether that was appropriate, as she was not employed to do so. The Respondent considered the issue of the spot checks but took the view that this only showed the toilets were in an acceptable state at the time of that spot check. I do not find the Respondent's approach unreasonable.

44. It's not clear that the Claimant's texts and the suggestion he was lying to his manager about being at Westow St were put to him in the interviews. This should have been done if reliance was placed on this, as Mr Dingle says it was. However I consider there were sufficient grounds to find the Claimant had not been attending Westow St without this, and therefore do not find the dismissal unreasonable on this basis. In any event this was only one charge out of two, and makes no difference to the allegation and finding, based on his own admissions, of extensive personal use of the van. It also appears that he was not systematically taken through the tracker records in the way he was by Mr Kerr in evidence. Nevertheless I consider he was given the opportunity to comment on the different journeys he made, and did so.

Was it within the range of reasonable responses to dismiss?

45. I note that I am not considering what I myself would do, but whether the dismissal was within the range of responses open to a reasonable employer, even if others might have given another sanction. I note that the Claimant had long service dating back to 2006. Nevertheless I do not consider I can find the Respondent's approach unreasonable or outside the range of reasonable responses. The Claimant held a position of trust as a supervisor and mobile member of staff.

46. There had been a clear reissuing of a van and the driving policy after the transfer. It is clear that serious breaches of policy are considered gross misconduct. There is also a suggestion that the Claimant's use of the van prior to transfer had been flagged to him as that was the reason he gave for using the car to go to Westow St. His personal use was regular and was not just on the way home from work. He sometimes went back out after reaching home and he also went far away for cricket. His own representative argued for a final written warning and strict monitoring to avoid dismissal, but commented to the Claimant that he would be lucky to keep his job. His union representative also drew a distinction between occasional personal use and regular personal use. The Claimant came within the latter category.

47. There were also two separate and independent serious charges, as there was also the matter of not fulfilling his contractual hours at Westow St. In these circumstances I cannot find dismissal unreasonable.

If the Respondent had adopted a fair procedure would the Claimant have been fairly dismissed in any event?

48. If I am wrong, and the failure of the Respondent to give the Claimant an opportunity during the disciplinary process to comment on the issue of the text messages to Ms Sloman and their inconsistency with the tracker renders the dismissal unfair, I nevertheless consider that doing so would have made no difference. There were occasions when the tracker placed him somewhere other than Westow St at times he claimed to be there and

the Claimant was unable to explain this. Giving him the opportunity to comment would be unlikely to have made a difference to the outcome. Moreover it is likely he would in any event have been dismissed for the personal use, which he admitted.

Did the Claimant contribute to the dismissal?

- 49. Had I found the dismissal unfair it is clear from the Claimant's own evidence before me that the Claimant treated the van as his own and used it wherever he went after work and even on days he was not working, to play cricket. He used it both within and outside the Borough. He used it to give lifts to his partner. He interpreted the rules to suit, justifying this for example because she happened to be a colleague though he was giving lifts to her as his partner not as his colleague. As Mr Dingle put it, it was not his job to be a taxi for colleagues.
- 50. Although it is hard to understand the spot checks and the fact that there was no evidence that the toilets were not clean, I agree with the Respondent that the use of the van is so extensive that the absence of any evidence that the Claimant was attending Westow St means it is likely he was not. However even if he was, he says his colleague was helping him which itself would have raised further issues.
- 51. I find the Claimant's contribution to the dismissal was high and agree with the 75% put forward by the Respondent, taking into account the Claimant's own representative's comments that the conduct merited a final written warning and strict monitoring.

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Employment Judge Corrigan
31 March 2021

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