



EMPLOYMENT TRIBUNALS

Claimant

Mr S Page

v

Respondent

Cathedral Controls Limited

Heard: by video conference (CVP)

On: 11 March 2021

Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: Mr C Murray (counsel)

For the Respondent: Mr D Howells (counsel)

RESERVED JUDGMENT

The decision of the tribunal is:

1. The claimant's complaint of unfair dismissal succeeds.
2. The claimant is entitled to compensation in the sum of £3,203.08, comprising:
 - a. a basic award of £1,968.75 and
 - b. a compensatory award of £1,234.33.
3. The claimant's complaint of wrongful dismissal in respect of notice fails and is dismissed.

REASONS

Claim, hearing and evidence

1. The claimant worked for the respondent as a gas service engineer from 1 January 2014 to 15 April 2019.
2. In a claim form presented on 15 July 2019 the claimant made complaints of unfair dismissal and wrongful dismissal (notice pay). Early conciliation took place from 2 to 3 July 2019. The respondent presented its response on 29 August 2019. The respondent defends the claim and says the claimant was fairly dismissed for gross misconduct.
3. The hearing took place on 11 March 2021 by video conference (CVP).

4. There was an agreed bundle of 153 pages (page numbering ran to 124). Page references in this judgment are references to the bundle.
5. I heard evidence from the respondent's witnesses Mr Giles and Mr Ram, followed by evidence from the claimant. All the witnesses had exchanged witness statements. Both parties' representatives made oral submissions.
6. I reserved judgment. I apologise to the parties and their representatives for the delay in promulgation of this judgment.

The Issues

7. The issues I have to decide are set out in an agreed list of issues. In summary, they are:
 - 7.1 Unfair dismissal: whether the claimant's dismissal satisfied the test set out in British Home Stores v Burchell and was fair; and
 - 7.2 Breach of contract: whether the claimant fundamentally breached the contract of employment entitling the respondent to dismiss him without notice.

Findings of fact

8. I make the following findings of fact based on the evidence I heard and read.
9. The respondent is a small company specialising in the manufacture and installation of heating, ventilation and air conditioning controls, commercial electrical installation and gas boiler repairs and servicing. It has four employees. The claimant is a gas service engineer. He joined the respondent on 1 January 2014.
10. The respondent's disciplinary policy was included in the staff handbook (page 71 to 72). It provided:

"No disciplinary action will be taken until the matter has been fully investigated and at every stage you will have the opportunity to hear the case against you and state your case..."
11. The policy said that dismissal is the last of a four-stage procedure:

"If your misconduct is sufficiently serious or if conduct is still unsatisfactory following a final written warning and you still fail to reach the required standards, you will normally be dismissed. The decision to dismiss will be taken by the director or a person nominated by him as appropriate, following a review of the evidence."
12. The policy provided for a disciplinary interview:

"Before any warning is given or any disciplinary action or decision to dismiss is taken, an interview will be held with you. At this interview you will have every opportunity to comment on the complaint/s against

you. You will normally be given at least 3 working days' notice, in writing, of any disciplinary interview and will be provided with written confirmation of the complaint(s) against you, along with copies of any relevant papers. A fellow employee of your choice, who may be a friend may accompany you at any disciplinary interview. Alternatively, a full-time officer employed by a Trade Union may accompany you."

13. The policy included a non-exhaustive list of examples of offences warranting instant dismissal. There was no example about poor or unsafe working practices.
14. In around 2016 the respondent was told by one of its clients, an Oxford college, that the claimant had failed to find a serious fault when he attended on a number of occasions to repair a gas boiler. The client decided to use another company, and did not renew their contract with the respondent. The owner and director of the respondent, Mr Philip Giles, had an informal conversation with the claimant about this, and showed him a list of faults which the client said the claimant had overlooked.
15. On 30 October 2017 a carbon monoxide alarm was triggered at a property where the claimant had serviced the gas boiler on 10 October 2017. The Oxford City Council gas team attended the property, and a report was made to the Health and Safety Executive. The cause of the alarm was found to be a missing combustion analysis cap. A 'Gas Safe' inspector from the city council visited the claimant and decided no further action was required. No action was taken under the respondent's disciplinary policy.
16. In September 2018 a smell of gas was reported at a property in Oxford. The claimant had serviced the boiler there on 28 August 2018. The claimant was on holiday from 3 to 10 September 2018. Mr Ram, another of the respondent's gas engineers, attended the property and found a leak which he repaired. He used a leak detection spray to check the connections. He took a video of the checks he carried out before and after his repair.
17. Mr Giles asked the claimant to meet with him on 12 September 2018, after his return from holiday. Mr Giles did not tell the claimant in advance what the meeting was about. At the meeting, he told the claimant that a gas leak had been found. The claimant said that he had checking the connections , using an electronic gas detector, not a leak detection spray. Mr Giles said the claimant should use a leak detection spray in future. He issued the claimant with a final written warning for one year. The warning said that the claimant's performance was unsatisfactory and immediate improvement was required (page 85). It said that the claimant's employment would be terminated if there was another incident of poor or unsafe practice.
18. The final written warning was due to be reviewed on 12 December 2018 but no review was carried out. The claimant had started looking for another job, so he did not appeal the final warning or follow up the failure to carry out the review.
19. In February 2019 Mr Giles spoke to the claimant again about his work. Mr Ram had carried out work at a property in Oxford and had concluded that

the work done by the claimant at the previous visit in November 2018 was poor and unsafe. No formal action was taken by the respondent in respect of this matter.

20. In early April 2019 Mr Ram had a conversation with the claimant about a repair the claimant had carried out on a boiler at a school in Oxford on 4 April 2019 and the following week. The claimant told Mr Ram that he had drilled out a broken stud on the boiler, and replaced it with a nut and bolt. Mr Ram told the claimant that he thought this was against manufacturer's instructions.
21. Mr Ram reported his concern to Mr Giles, and Mr Giles asked Mr Ram to carry out an investigation of the work done by the claimant. Mr Ram investigated the work on 10 and 11 April 2019. He found high levels of carbon monoxide. Mr Ram spoke to the manufacturers who said that the repair would not normally be done in that way and that carbon monoxide levels should not be high. Mr Ram checked the whole boiler. He found that there was a seal missing. The respondent said, and I accept, that the missing seal and the high carbon monoxide levels meant that the boiler was left in an unsafe condition. Mr Ram repaired the boiler and made it safe. He completed service check lists on 10 and 11 April 2019. He prepared a typed report.
22. I find (for the purpose of the breach of contract complaint) on the balance of probabilities that the seal was missing because the claimant had forgotten to fit it when he was working on the boiler. This is the most likely explanation.
23. Mr Giles asked the claimant to meet with him on 15 April 2019. He did not tell the claimant what the meeting was about or provide him with any written documentation. At the meeting Mr Giles told the claimant that his repair to the boiler at the school was done in a way not recommended by the manufacturer and a seal was not fitted which resulted in combustion products leaking from the area of the repair. The claimant asked if the meeting was a disciplinary meeting. Mr Giles said it was. The claimant said he was entitled to advance notification of the meeting and evidence of the complaint. Mr Giles dismissed the claimant for gross misconduct, with immediate effect.
24. The dismissal letter was dated 15 April 2019. It referred to the final written warning of 9 September 2018. The letter said that at the meeting it was decided that:

"Your performance is still unsatisfactory and that you be dismissed.

The reasons for your dismissal are:

Gross misconduct – continued poor/unsafe working practice following final warning letter.

...

The reasons for this disciplinary action are: Another instance of unsafe working practice within 12 months following final written warning letter..."

25. The claimant appealed his dismissal in a letter dated 23 April 2019. The appeal hearing took place on 3 May 2019, the decision maker was Mr Giles. The claimant said he did not know the case he had to answer. He did not agree that the repair he carried out at the school was unsafe. Mr Giles confirmed in a letter of 7 May 2019 that the dismissal was upheld. The letter did not include any reasons for the appeal being unsuccessful.
26. The claimant has seen Mr Ram's check lists and investigation report in the course of the employment tribunal proceedings. He raised a question about Mr Ram's checklists, which appear to have been wrongly dated. He contacted the boiler manufacturer to obtain their view on the repair he carried out, they would not say whether the claimant's method was recommended or not. He contacted the local gas training centre and they told him that the type of repair he had carried out was common.
27. The claimant started new employment on 1 July 2019.
28. The claimant presented his claim on 15 July 2019 after early conciliation from 2 July to 3 July 2019.

The Law

Unfair dismissal

29. Potentially fair reasons for dismissal are set out in section 98(2) of the Employment Rights Act 1996. These include reasons which:
 - (a) *relate to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
 - (b) *relate to the conduct of the employee."*
30. In a complaint of unfair dismissal which the employer says is for conduct reasons, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Guidance set out in British Home Stores v Burchell requires the tribunal to consider the following issues:
 - 30.1 whether, at the time of dismissal, the employer believed the employee to be guilty of misconduct;
 - 30.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
 - 30.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
31. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996):

"whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a fair reason for dismissal."

32. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer, and must not substitute its own view of the appropriate penalty for that of the employer.

Breach of contract notice pay

33. A dismissal without notice for misconduct is a dismissal in breach of contract unless the respondent can show that:

- 33.1 the claimant actually committed the misconduct; and
33.2 the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.

34. The approach is not the same as in a complaint of unfair dismissal. It is not sufficient for the employer to demonstrate a reasonable belief that the employee was guilty of gross misconduct. (Shaw v B&W Group Limited UKEAT/0583/11).

35. The question of whether the misconduct was sufficiently serious to justify summary dismissal is a matter of fact for the tribunal to decide. In Briscoe v Lubrizol Ltd [2002] IRLR 607 CA, the Court of Appeal summarised the test as whether the conduct "so undermine[s] the trust and confidence between the employer and the employee that the employer should no longer be required to retain them."

36. The conduct must be a deliberate and wilful contradiction of the contractual terms, or amount to gross negligence (Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 1 WLR 698 CA. In a case involving an allegation of gross negligence, the question is whether negligent 'dereliction of duty' is 'so grave and weighty' as to amount to justification for summary dismissal (Adesokan v Sainsbury's Supermarkets Ltd [2017] IRLR 346).

37. The terms of the contract of employment and the employer's policies, and whether the employer has made clear that certain acts will lead to summary dismissal, are also relevant factors (Dietmann v Brent London Borough Council [1988] ICR 842 CA).

Conclusions

Unfair dismissal

38. I have first considered the reason for dismissal. The respondent said the reason was that the claimant carried out a repair to a boiler in a dangerous and negligent way after being issued with a final written warning about unsafe practices. The respondent said that although this would most naturally be described as a reason related to conduct, it could also be capability or some other substantial reason (loss of trust and confidence).

39. Conduct does not have to be deliberate or wilful to amount to misconduct. Misconduct can encompass serious negligence as well as deliberate wrongdoing. In the context of the work the claimant did, where carrying out work in a negligent way could have very serious consequences, I accept that the reason put forward by the respondent may in principle amount to a reason relating to conduct as the respondent suggests.
40. I have therefore gone on to consider whether the respondent has shown that misconduct was the reason for dismissal, by applying the three-stage test set out in British Home Stores v Burchell. The employer must show that:
- 40.1 it believed the claimant to be guilty of misconduct;
- 40.2 it had reasonable grounds for believing that the claimant was guilty of that misconduct; and
- 40.3 at the time it held that belief it had carried out as much investigation as was reasonable.
41. The decision to dismiss was taken by Mr Giles. I accept that at the time of dismissal Mr Giles believed that the claimant had carried out a repair to a boiler in a dangerous and negligent way while he was subject to a live final written warning about unsafe practices, and that this amounted to misconduct.
42. At the time Mr Giles made this decision, he had reasonable grounds for believing that the claimant was guilty of this misconduct, and he had carried out as much investigation as was reasonable. Mr Giles had issued a final written warning to the claimant in September 2018 about unsafe practices and this was still live. Mr Ram had reported concerns about the work the claimant had done at the school in April 2019, based on information he had been given by the claimant. Mr Giles had asked Mr Ram to carry out an investigation and he was aware of the results of Mr Ram's investigation which identified high levels of carbon monoxide and two matters of concern with the work done on the boiler, namely the use of a nut and bolt to replace a boiler part, and the missing seal. Mr Giles reasonably believed that the claimant had not replaced the seal when he carried out work on the boiler.
43. I conclude therefore that the dismissal of the claimant was for a reason relating to conduct and was potentially fair. I need to go on to consider whether dismissal was in the range of reasonable responses. The burden of proof at this stage is neutral.
44. It was reasonable for the respondent to consider that the claimant's conduct amounted to gross misconduct, in the particular context of the work the claimant did. The consequences of negligent work by the claimant were potentially very serious, given the importance of gas safety.
45. It was reasonable of the respondent to take the claimant's previous final written warning into account. There was no suggestion that the warning was not issued in good faith. Although the procedure the respondent followed when issuing the warning was not in line with the Acas Code of Practice on Disciplinary and Grievance Procedures or its own disciplinary policy, the

claimant did not appeal against the warning, and it was not manifestly inappropriate to have issued a final written warning in circumstances where a gas leak occurred days after the claimant had worked on a boiler.

46. The procedure the respondent followed when dismissing the claimant was in breach of a number of requirements of the Acas Code. For example:
 - 46.1 The respondent failed to notify the claimant in writing of the disciplinary case to answer (paragraph 9);
 - 46.2 The respondent did not provide the claimant with copies of the written evidence (for example Mr Ram's report and checklists) (paragraph 9);
 - 46.3 The respondent failed to notify the claimant of the time and venue for the disciplinary meeting and of his right to be accompanied. He was called into a meeting with no notice of what the meeting was about (paragraph 10);
 - 46.4 The claimant did not have a proper opportunity to answer the allegations which had been made (paragraph 12);
 - 46.5 A fair disciplinary process is required before dismissing for gross misconduct (paragraph 23).
47. The respondent's own disciplinary policy also incorporated these elements, and so the process adopted in the claimant's case was also in breach of that policy.
48. I have considered whether these departures from the Acas Code were reasonable in the circumstances. I have concluded that they were not. The flawed process adopted by the respondent deprived the claimant of the opportunity to properly consider the allegations against him and to prepare to answer the case, for example by obtaining evidence to respond to the allegations. He was presented with the allegations in a meeting and expected to respond without advance notice of them and without having seen any of the evidence. His ability to respond in these circumstances was very limited. He was not able to take steps he might otherwise have done to respond. For example, he did not have the opportunity to present any evidence about whether the repair he made to the boiler was outside the manufacturer's instructions or not. The opportunity for an employee to state their case when facing allegations of misconduct is a central requirement of the Acas Code and a fundamental protection for the employee.
49. The claimant also had no opportunity to consider whether he would like to be accompanied, as he had no notice of the fact that he was facing a disciplinary hearing.
50. The appeal hearing did not remedy these failings. Some of the evidence, such as the checklists completed by Mr Ram, was only provided to the claimant as part of the employment tribunal proceedings.
51. I have concluded that the procedure adopted in this case was not within the range of reasonable responses. In doing so, I have taken into account the

very small size of the respondent's business, and its limited administrative resources. However, the respondent would have been able, at very little cost and without additional resources, to introduce the required additional stage into the procedure it adopted by simply writing to the claimant ahead of the disciplinary meeting and providing him with written details of the allegations against him and copies of the evidence it had in support of those allegations. In circumstances where it had in place a disciplinary policy as part of its staff handbook, a reasonable employer, even a very small employer, would have followed the clear steps set out in that policy. This would have ensured that it was also complying with the Acas Code.

52. I have concluded that the unfairness of the procedure adopted in this case meant that dismissal was not within the range of reasonable responses open to the respondent.
53. The claimant's complaint of unfair dismissal therefore succeeds.

Unfair dismissal remedy

54. Compensatory award: As I have found that the dismissal was procedurally unfair, I have considered whether, if a proper procedure had been followed, the claimant could have been fairly dismissed in any event.
55. The claimant and the respondent differed as to whether it was appropriate to have carried out the repair to the boiler in the school by replacing a stud with a nut and bolt. The evidence adduced by the claimant on that point might have been accepted by the respondent if a proper procedure had been followed. However, that was not the only issue the respondent was considering. Mr Giles believed that when carrying out the work, the claimant had also failed to fit a seal in the boiler, causing high levels of carbon monoxide to be released and leaving the boiler in an unsafe condition. This was a very serious failing. Even if the respondent had followed a fair procedure and in the course of that process had accepted the claimant's evidence about the repair to the broken stud, I conclude that there would not have been another explanation for the missing seal which would have been accepted by the respondent. That would have resulted in the claimant being dismissed in any event.
56. A fair procedure would have required notifying the claimant of the purpose of the disciplinary proceedings and providing him with the evidence in advance of the meetings. A fair procedure could have been conducted in 4 weeks.
57. It is just and equitable to reduce the compensatory award under section 123(1) of the Employment Rights Act 1998 to losses during the period of 4 weeks after dismissal, to reflect my conclusion that the claimant would have been dismissed at that end of that period in any event, even if a fair procedure had been followed.
58. The claimant's net losses during the 4 week period after his dismissal are:
 - 58.1 Loss of net weekly pay of £549.23 x 4 = £2,196.92

58.2 Loss of weekly pension payment by employer of £11.83 x 4 = £47.32.

58.3 In total the losses for this period are: £2,244.24.

59. The claimant did not earn any sums in mitigation of his losses in the four weeks after his dismissal. The respondent has not suggested that the claimant failed to mitigate his losses during this period.
60. It would not be just and equitable to make an award in respect of loss of statutory rights in light of my conclusion that the claimant would shortly have been dismissed in any event.
61. Next, I have considered whether the award should be increased under section 207A of the Trade Union and Labour Relations Act 1992 because of the respondent's failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures. The claimant's claim is one to which the Acas Code of Practice on Disciplinary and Grievance Procedures applies and it concerns a matter to which the code applies (a disciplinary procedure).
62. I have found that when conducting the disciplinary process, the respondent failed to comply with a number of the requirements of the Acas Code of Practice on Disciplinary and Grievance Procedures. The failure to comply with the code meant that the claimant did not have a proper opportunity to respond to the allegations against him. I have taken into account the small size of the respondent. However, the respondent had a disciplinary procedure in place which included the steps required by the Acas Code, suggesting that it did not regard it as unreasonable to comply with those steps. The additional steps required to comply with the code would have required little additional work and resources. I have concluded that the respondent's failure to comply with the Acas Code was unreasonable.
63. I have therefore considered whether it is just and equitable to increase the claimant's award. The maximum increase is 25%. I take into account that the respondent did take some steps including holding a meeting and offering an appeal; I have decided that it is just and equitable to increase the claimant's award by 10%.
64. After the 10% increase has been applied to the losses of £2,244.24, the compensatory award is £2,468.66.
65. Next, I have considered whether the compensatory award should be reduced under section 123(6) to reflect the extent to which the dismissal was caused or contributed to by any action of the claimant.
66. For conduct to be the basis for a finding of contributory fault under section 123(6) ERA, it must have the characteristic of culpability or blameworthiness. The tribunal must make its own assessment of whether the employee is culpable or blameworthy, by considering what the employee did or failed to do, it must not rely on the employer's assessment of the employee's actions. The employee's conduct must be shown to have actually caused or contributed to the employer's decision to dismiss.

67. I have found on the balance of probabilities that the claimant did not replace a seal when carrying out the repair at the school and this left a boiler in an unsafe condition. I have found that this took place while the claimant was on a final warning in respect of poor/unsafe workmanship. In this context and in the context of the work the claimant did, that conduct was culpable and blameworthy. It was conduct which contributed to the dismissal of the claimant, as it was one of the issues referred to by the respondent in the dismissal meeting. I can reduce the compensatory award by any percentage from 0% to 100%. I have decided that in this case it is just and equitable to reduce the amount of the compensatory award by 50%. This reflects the extent to which the dismissal was caused by the claimant, taking into account the fact that compensation has already been limited by my conclusion that the claimant would have been dismissed in any event because of the same conduct.
68. Applying this reduction to the figure of £2,468.66, the compensatory award is £1,234.33.
69. Basic award: The claimant had five years' service and was aged 60 at the time of his dismissal. He is entitled to a basic award of $5 \times 1.5 \times £525 = £3,937.50$.
70. For reasons similar to those set out above, I have decided that it is just and equitable to reduce the basic award pursuant to section 122(2) in respect of the claimant's conduct in failing to replace a seal and leaving a boiler in an unsafe condition, which I have concluded was culpable or blameworthy conduct. I have decided that the basic award should also be reduced by 50%.
71. Applying this reduction to the basic award gives £1,968.75.
72. In summary, the claimant is entitled to compensation in the sum of £3,203.08, comprising a basic award of £1,968.75 and a compensatory award of £1,234.33.

Breach of contract (notice pay)

73. The approach in relation to the claimant's breach of contract complaint is not the same as in the complaint of unfair dismissal. I have to consider whether the claimant actually committed the misconduct; and whether the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.
74. I have found that the school's boiler was left in an unsafe condition with a missing seal and that the claimant omitted to fit. This contributed to the respondent's decision to dismiss the claimant.
75. I have considered whether this amounted to misconduct which was sufficiently serious to justify summary dismissal. The following matters suggest that it did:

- 75.1 the claimant forgot to include the seal when he was working on the boiler; this was negligent rather than deliberate conduct, however the result of the claimant's omission was that the boiler was left in an unsafe condition with high levels of carbon monoxide;
 - 75.2 there were potentially very serious consequences of leaving a boiler unsafe and leaking high levels of carbon monoxide;
 - 75.3 the claimant had a live warning at the time of the incident, which said that if there was another incident of poor or unsafe practice, the claimant's employment would be terminated. He knew that dismissal was a likely consequence if he did not comply with the warning.
76. I have taken into account the fact that the respondent's disciplinary policy did not include this type of conduct as an example of conduct justifying summary dismissal, although the list in the policy was said not to be exhaustive.
77. Weighing up these factors, I have concluded that this was conduct which was 'so grave and weighty' that it was of a sufficiently serious nature to justify summary dismissal. It was a repudiatory breach of contract as it undermined the trust and confidence between the claimant and the respondent, such that the employer was entitled to dismiss the claimant without notice.
78. The claimant's complaint of wrongful dismissal in respect of notice therefore fails and is dismissed.

Employment Judge Hawksworth
Date: 7 May 2021

Judgment and Reasons sent to the parties
on:.....

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For the Tribunal Office