



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Robert

**Respondent:** Trigion Security Services Limited

**Heard at:** London South

**On:** 2 and 3 December 2020

**Before:** EMPLOYMENT JUDGE CORRIGAN

## Representation

**Claimant:** In person

**Respondent:** Mr G Hines, Solicitor

## RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed.
2. The Claimant was not wrongfully dismissed.
3. The Claimant's claim of unlawful deduction of wages is well founded and the Respondent is ordered to pay to the Claimant the sum of £771.12 subject to tax and National Insurance.

## REASONS

1. By his claim dated 6 July 2019 the Claimant brings a complaint of unfair dismissal, wrongful dismissal and unlawful deduction of wages.
2. The issues in respect of unfair dismissal were set out in the Case Management Order dated 29 October 2019 and discussed with the parties at the outset of this hearing, and agreed to be:
3. What was the reason for the dismissal? Was it misconduct?
4. If so did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation?

5. Was it within the range of reasonable responses to dismiss?
6. If the Respondent had adopted a fair procedure would the Claimant have been fairly dismissed in any event?
7. Did the Claimant contribute to the dismissal?
8. It was also agreed with the parties I would consider wrongful dismissal and unlawful deduction of wages due to the Claimant's wages being stopped from 26 April 2019. It was agreed that the issues in respect of those claims were as follows:

**Wrongful dismissal**

9. Whether or not on the balance of probability the Claimant did in fact commit misconduct sufficiently serious to justify withholding the notice pay.

**Unlawful deduction of wages**

10. Whether or not the Claimant was entitled to be paid after 26 April 2019?
11. Whether or not the Respondent had written authorisation to deduct the pay?
12. By the end of the hearing the Respondent conceded the unlawful deduction of wages claim and agreed to the payment of the above sum and Judgment in the above terms.

**Hearing**

13. I heard evidence from Ms Lara Ementa (HR Advisor) and Mr Sean Titheridge (Operations Director) on the Respondent's behalf. I also heard evidence from the Claimant on his own behalf.
14. There was an 84 page bundle. I heard oral submissions from each side.
15. Based on the evidence heard and the documents before me I found the following facts.

**Facts**

16. The Respondent provides Security Services. The Claimant was employed as a Security Officer from 19 August 2015. The Claimant worked at a College Site from October 2015. The Respondent relies on its security officers for its reputation with clients.
17. The Respondent's employee handbook states that the following are examples of gross misconduct: use of drugs; leaving the place of work without due permission; and destruction/sabotage of any property on premises. Negligent damage and failure to report damage to property caused by an employee are listed as misconduct (pp35-36).

18. On 5 November 2018 the Claimant sent two emails to the Respondent raising issues including that his colleague was not undertaking his patrol (pp 38-39).
19. On 6 April 2019 the Control raised with the Contract Manager, by the email sent at 17.20, that the Claimant's same colleague had reported that the Claimant had "flipped", that he was "smoking cannabis on site", the colleague could smell it in the gatehouse and the Claimant had "smashed up a chair belonging to the college". That message said (incorrectly) it had been caught on video and the receptionist was also present. It also said the Claimant had walked off site and not returned. The Control had tried to call him but not received an answer (p40).
20. The Contract Manager investigated this and obtained from the other security colleague the statement at page 41 (written the next day). He said that at about 4.02pm on 6 April 2019 he had discovered the Claimant had smashed the chair they were using at the gatehouse into pieces for no reason and left the site. He said he had informed Control and the Site Manager. They all looked for the Claimant but he was nowhere to be found. He went on to say "I think [he's] under the influence of weed, because I can smell it on him all day." He said it was not the first time he had behaved irrationally and that he was not safe to work with. I did not see the video but the image of the chair is in the bundle at page 42 and shows that it has been broken into pieces, and some appear to have been snapped off as they have uneven edges.
21. The matter had come to the client's attention and on 8 April 2019 the College Director asked for the Claimant's removal from site as a result of the above incident, on the basis that he had willfully damaged College property and may have been under the influence of an illegal substance (p43). He mentioned that the Claimant had separately been in an argument with a Duty Manager and that there would be an incident report. He also mentioned that his Deputy Operations Manager had mentioned a smell resembling cannabis on the Claimant.
22. The Claimant was suspended and invited to an investigation meeting on 12 April 2019. The allegations put to him were that he willfully and maliciously damaged client property; attended work under the influence of an illegal drug, namely Cannabis; left his place of work without permission and his aggressive/concerning behaviour towards management. He was told that the College had requested he no longer complete shifts at their site (p44).
23. Prior to the meeting, on 10 April 2019, an email was received from the College Deputy Operations Manager saying that on 6 April when the Claimant said good morning she noticed a smell that could have been Cannabis but she was not sure. She also said that the other security guard had said that the Claimant had smashed up the tall chair provided for them. She said the other security guard had also reported the smell of cannabis and that the Claimant does odd things when he smokes it. She concluded from that that it was not the first time that the security officer had smelt it (p46).

24. There was a further statement received on 12 April about an altercation between the Claimant and the Duty Manager about pitch bookings on 2 April 2019.
25. The meeting was chaired by the Respondent's Senior Contract Manager (p46). At the meeting the Claimant first disputed that the chair belonged to the client as he said he had removed it from a bin. He said that when he returned from patrol at 3pm the chair was already broken. He said he did not report this because he had picked it out of a skip and the College did not want it. When asked how it got broken he said the Senior Contract Manager would have to ask the other security guard. He disputed leaving the site at 4pm and said he had checked the pitches and the showers. He said that as he was walking to the gatehouse his security colleague was driving toward him at speed. He agreed he had left at 4.30pm not 5pm stating it was something they normally did and the Contract Manager was aware. This was disputed by the Contract Manager within the meeting who said that both officers should stay together to the end (5.00pm) and leave together. The Claimant said he had been at the pitches until 4.30pm and spoke to the Deputy Operations Manager at the Client at about 4.15pm. He did not contradict that he had not spoken to anyone when he left early. It was put to him that the chair was smashed up not just broken. He confirmed that it was just him and his security colleague who worked there implying it was one of them responsible. He disputed that his colleague was afraid of him due to his size. He denied smoking cannabis. The Senior Contract Manager asked the Claimant about additional information that was not in the above emails. He said that the Claimant's security colleague had said the Claimant had kicked his tyre as he passed him. He also said that the Duty Manager had looked for the Claimant, which is not in her email although it is implied by the security colleague's statement.
26. When it was put to the Claimant in the Tribunal hearing that the first time he mentioned the serious allegation of his colleague trying to run him over was at this investigation, 6 days after the event, he said he reported it the same day by email. There is no such email in the bundle. When he was questioned about the timing of this incident in relation to the chair he gave fluctuating answers, including at one point saying for the first time that there were two incidents of his colleague driving at him, one before and one after the chair being broken. He said the second was also reported to Control by phone only. Although he then back tracked to saying the chair incident was first and then the car incident.
27. The Claimant accepted he was provided with the minutes of that meeting. It's not clear that there was any follow up investigation with the witnesses involved though the disciplinary officer says she believes they were followed up by the Senior Contract Manager and confirmed what they had already said in the emails.
28. The Claimant was invited to a disciplinary hearing on 26 April 2019 (by letter dated 23 April 2019). The allegations remained as above. The Respondent

said that if substantiated they would be considered gross misconduct and the Claimant's employment may be terminated without notice. The Claimant was also informed that there would be a separate meeting about the client's request that he be excluded from the site and the Respondent would then be able to make formal representations with the aim of having the Claimant reinstated. He was warned that if the Respondent was unable to persuade the College to allow him to continue to work at the site, and the Respondent was unable to provide alternative work, the contract could nevertheless be terminated due to some other substantial reason, namely third party pressure. He was told the Respondent would seek to avoid this if possible. He was told his contractual pay would continue. There is no reference to this ceasing if he failed to attend a meeting.

29. The Claimant failed to attend due to misreading the letter and so the meeting was rescheduled for 3 May 2019.
30. The Claimant attended the rescheduled meeting, which was chaired by Ms Lara Ementa, the Respondent's HR Advisor. The meeting addressed all four allegations, but the disciplining officer did not in the end rely on the 4<sup>th</sup> allegation and the detail of that is not therefore relevant.
31. In the meeting the Claimant said again he did not damage the chair and that he had picked it out of the skip so did not believe it was the Client's property. He said he spoke with his colleague about it who was just laughing and "taking the piss". He said his colleague was trying to victimize him since he had spoken to the Contracts Manager about him (a reference back to the Claimant's emails in November 2018). He agreed that one of them (either himself or the colleague) had broken the chair. He said he had not left the site early. The Claimant's account differed from the account recorded in the minutes of his investigation meeting about calling the College Deputy Operations Manager at 4.15 pm and leaving at 4.30pm (referred to at paragraph 25 above). He said instead that he did not say he called her and that he left at 5pm. He said that was what he had said in the investigation (though in his evidence in the Tribunal hearing he reverted to saying he left at 4.30pm). He said he spoke to her face to face at 4.40pm. He said he walked past his colleague driving his car and the colleague had tried to run him over but admitted that he had not reported that. He had not kicked the tyre as alleged by his colleague (as put to him by the Senior Contract Manager).
32. The decision was to summarily dismiss based on allegations 1-3. Ms Ementa considered that the Claimant's explanation in relation to the chair was unsatisfactory as he should have reported the damage and did not, whereas his colleague did. She considered that the fact that two people had reported a smell of cannabis at different times was strong evidence that he had taken cannabis that day which was gross misconduct. She also considered that the degree of damage to the chair was evidence that the Claimant had lost his temper and been very angry. She considered this behaviour so out of place or unpredictable that it also supported that he had been under the influence of cannabis.

33. She said she had spoken to the Senior Contract Manager to confirm the accuracy of the meeting minutes (as recorded in the dismissal letter) and to check he was not aware of the Claimant leaving early. She said she found it hard to believe the Claimant's explanation when he had changed his story. She found he did indeed leave the site early without permission as no one knew where he was from 4.30pm and the Control could not reach him. She did not speak to the witnesses herself but said that the Senior Contract Manager had spoken with them and they had stood by their earlier statements. She said the College Duty Manager had confirmed that she had not been able to find the Claimant after the chair had been broken. This had not been documented.
34. She decided that there was a fundamental breach destroying trust and confidence. She said in the dismissal letter she had had "regard to policy which does not permit recourse to lesser sanction". This is not correct as the policy does reference a final written warning. Nevertheless she said she had taken account of the Claimant's length of service but considered leaving site without permission and smelling of cannabis to be gross misconduct and dismissal was more appropriate in this situation.
35. The Claimant appealed on 13 May 2019 saying the decision was based on unproven facts and the sanction was too severe. He particularly emphasized that his co worker had set out to damage his character after he had complained about him. He mentioned his trying other "plots" against him. He mentioned that he believed his colleague anticipated he would bring a complaint for his nearly driving his vehicle over his feet and so in damage limitation broke the chair, videoed it and sent it to management. He said the Manager who thought she had smelled Cannabis had not come close to him. He denied leaving before time and said that whenever he had it had been with the permission of management.
36. The Claimant was invited to an appeal hearing on 21 May 2019 chaired by Mr Sean Titheridge, the Operations Director.
37. There the Claimant raised issues in respect of a serious allegation to the police that was, he said, instigated by his security colleague against him dating back to February 2019. He had no firm evidence from the police about this. He brought up other allegations of criminal conduct by his colleague. He said that the three colleagues who had made statements against him were from the same country and working together against him.
38. The decision was to uphold the dismissal. Mr Titteridge said in evidence he accepted that the damage to the chair was not a significant issue. He accepted it had been pulled from the skip. To him the most important issue was that the Claimant had potentially been taking cannabis and been aggressive to others, with an impact on the Respondent's reputation with the client. The Claimant's colleague had reported feeling unsafe working with the Claimant. The chair was "collateral damage". He considered the Claimant was raising other issues about his colleague as a distraction technique. The Claimant had not reported the matters until he himself was being investigated. Like Ms Ementa, Mr Titteridge also relied on the fact the other colleague was the one who reported the matter, thereby following

policy, whereby the Claimant's failure to do so led him to believe the Claimant had broken the chair. With respect to the Cannabis he recorded that whilst the security colleague might make this allegation because they did not get on, there was no reason offered for why the member of the client's staff would make up her allegation. He accepted that the Claimant had been leaving when the client management said but that the Claimant ought to have made his manager know. As he was paid hourly he had been overpaid and customer overcharged. He said in his experience of the industry officers leaving early tends to be a gross misconduct matter unless there is mitigation like sickness or a home emergency. Despite the fact the disciplinary officer had said that she did not rely on the aggressive behaviour allegation the appeal officer reintroduced this.

39. He said that had had had more than one discussion about the case with and was confident from these, and from what he knew of the Senior Contract Manager and the industry, that he would not have allowed the Claimant to leave early. These were not formal discussions as part of the disciplinary process.
40. He decided to put the police matter raised to one side. Had the dismissal not been upheld this would have been investigated. It raised other potential issues such as that the Claimant was a licensed security officer and there was potentially a problem his working for the Respondent whilst he was being investigated by police.
41. The Respondent spoke with the client and the College had not been prepared to commit to have the Claimant return. The Respondent did not have a lot of sites in the Catford area and some are not just man guarding. Mr Titteridge could not recall any vacancies in the area at the time. The College itself is also no longer a client.

### Relevant law

### Unfair dismissal

42. 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.

43. 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.

44. 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?*

45. I am satisfied the reason for the dismissal was misconduct, namely that the Respondent considered he had been smoking cannabis and was



responsible for breaking the chair, and had then left his duty early without authorization.

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

46. It is worth noting that the test I need to apply is that set out in the above question, and the Respondent does not need to show that the Claimant had, on the balance of probability, committed the misconduct.
47. I accept that both Ms Ementa and Mr Titteridge had genuine belief in the misconduct. Neither was influenced by any ulterior motive. In particular their decisions were not influenced by the Claimant's emails at pages 38-39.
48. Turning to whether they had reasonable grounds for the belief after a reasonable investigation. There are some issues with the investigation process followed. The only actual evidence collected from the witnesses were the emails from the Claimant's security colleague, the Client's Duty Manager and the Respondent's Control. The investigating officer clearly had other discussions as details that are not in the emails were discussed in the investigation meeting. However the details have not been recorded in statements or otherwise. Further the Senior Contract Manager is believed to have checked details with the witnesses after the Claimant had given his account but this is also not documented. Both Ms Ementa and Mr Titteridge have relied on their own conversations with the Senior Contract Manager, which were also not documented, other than the mention made of confirming with the Senior Contract Manager the accuracy of the investigation notes in the dismissal letter.
49. Nevertheless the Respondent did have the undisputed evidence that the chair had been broken, and from the way the edges have broken, that it was done with some force. The Claimant does not dispute that it had been broken by either himself or his colleague. The colleague's account was preferred as he had reported the matter, whereas the Claimant had not. In respect of the cannabis issue, the Respondent based their belief on the fact there were two witnesses to the fact the Claimant had been smoking cannabis and it was considered that there was also corroboration in that breaking the chair was unpredictable behaviour.
50. It is really in respect of the leaving early that the further undocumented investigation was relevant. The minutes of the investigation meeting suggest the Claimant himself had admitted leaving at 4.30pm, before back tracking and changing his account in the disciplinary meeting. The Respondent took into account the inconsistency of the Claimant's account

in preferring the accounts of his security colleague and the Control that they had not been able to find or contact him.

51. I find the Respondent's above rationale reasonable. It would have been better to document any further investigation, especially in respect of confirming with the Client's Duty Manager whether she had seen or spoken to the Claimant that afternoon. The Claimant specifically said he had spoken to her, albeit his account was inconsistent as to how and when. The Respondent says this detail was checked with her, and the investigation officer is recorded as saying she had not been able to find the Claimant. I find the matter borderline, but in all the circumstances, consider the flaws in the investigation do not alter the fact that the Respondent had reasonable grounds to find the Claimant had committed the alleged misconduct.
52. I note that the appeal officer reintroduced allegation number 4 when the dismissing officer had not relied on it, though in circumstances where the Claimant had also raised it in his appeal letter. Although the matter was discussed on appeal and there is a subheading in respect of this in the appeal letter, nevertheless it is clear from the letter and from Mr Titteridge's evidence that the main reason he upheld the dismissal related to the other three allegations. Although it would have been better not to reintroduce it after it had not been relied upon at dismissal stage, I do not find this makes the Respondent's approach to the other three allegations (which were the reason for dismissal) unreasonable, especially as the Claimant himself had mentioned it in his appeal letter.
53. I considered the fact that the two witnesses for the Respondent placed different emphasis on the importance of the damage to the chair and whether or not the Claimant had permission to leave early. However, the essence of the reason for dismissal was the same for both, that there was evidence the Claimant had been smoking cannabis and he had behaved unpredictably and aggressively and had left early without the appropriate permission. Again, I do not find any difference of approach to be unreasonable, but both are within the range of reasonable responses.
54. To conclude I find there were reasonable grounds to support the belief the Claimant had been smoking cannabis, had aggressively broken the chair and had left his duty early.

*Was it within the range of reasonable responses to dismiss?*

55. I note that I am not considering what I myself would do, but whether the dismissal was within the range of responses to the misconduct open to a reasonable employer, even if others might have given another sanction. I note that the Claimant had been working for the Respondent for almost four

years and I am not told there had been any other disciplinary issues. The Respondent's representative appeared to acknowledge in his submissions that I could take the view the penalty was harsh. In some employment situations dismissal for a one off incidence of unpredictable and aggressive behaviour, destroying a chair, and leaving duty up to an hour early, would be somewhat harsh. However that does not make it outside the range of reasonable responses.

56. I do not find dismissal to be outside the range of reasonable responses taking into account that the Claimant worked as a security guard at an educational establishment with under 18 year olds; in circumstances where his manager was not supervising him on site and the business relies on the reputation of security officers; and all three matters are clearly labelled as gross misconduct under the Respondent's policy. Moreover I consider that dismissal where the Respondent has reasonable grounds for believing the Claimant was under the influence of cannabis is well within the range of reasonable responses, especially in respect of a position such as a security guard.
57. I considered the fact that the dismissal letter suggests that the dismissing officer fettered her discretion by considering that the policy required her to dismiss, however having heard her evidence I find that she did believe dismissal to be the correct penalty for the offence, irrespective of the policy. In any event the matter was considered further at appeal. I do not find this rendered the dismissal unreasonable.

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

58. If I am wrong, and the issues in respect of the investigation and procedure identified are sufficiently serious to render the dismissal unreasonable, I nevertheless consider the Claimant would have been dismissed in any event. I find it unlikely that further or better documented investigation with the witnesses would have made a difference given the Claimant's inconsistent evidence about what happened after the broken chair was discovered and the concessions made in both the disciplinary process and the Tribunal hearing that he had left early, in circumstances where the other evidence before the Respondent is that he could not be found or accounted for.
59. Even if the procedural issues made a difference and the Claimant was not dismissed for misconduct, the Respondent was nevertheless in the position where the College did not want the Claimant back on site. What might then have happened has not been fully explored, however from the evidence of Mr Titteridge it is unlikely that there would have been a suitable alternative venue for the Claimant within the Catford area and the Claimant did not suggest a wider area should have been considered.

*Did the Claimant contribute to the dismissal?*

60. If my conclusions in respect of the fairness of the dismissal are wrong I find the Claimant contributed to the dismissal. I refer to my findings in respect of wrongful dismissal below. I have found that the Claimant committed misconduct serious enough to justify withholding notice. I therefore also consider he contributed to the dismissal to a very high degree. As I found the dismissal fair, it was not necessary to consider an exact percentage.

*On the balance of probability did the Claimant in fact commit misconduct sufficiently serious to justify withholding the notice pay?*

61. This is a different test to that in respect of unfair dismissal. This does require me to find that it was more likely than not that the Claimant did commit misconduct so serious as to justify dismissal without notice. In submissions the Respondent's Representative conceded that there is insufficient evidence to find on the balance of probability that the Claimant had taken cannabis. I agree. The Claimant is adamant that he had not and I have not heard directly from either witness that the Respondent relied upon. Moreover, although the witnesses independently report smelling cannabis, the Client's Duty Manager records that she was not certain. In these circumstances, I cannot find it more likely than not.
62. Turning to the damage to the chair and disappearing from his duty early, and being uncontactable by colleagues and the control, here the Claimant has made some concessions. He agrees the chair was deliberately broken by someone and the two possibilities are himself and the other security officer. I accept the Respondent's proposition that the fact that it was the other security guard that reported the issue tends to be evidence that it was not him (and therefore was the Claimant). I also accept the contention that the photographic evidence suggests that the chair was completely smashed up with some force.
63. Although I have not heard evidence from the other security guard and the control, they corroborate each other that the Claimant disappeared from his duty. On the other hand, the Claimant gave inconsistent accounts of what happened after the chair was broken and whether he left early, both during the disciplinary process and in his evidence in the tribunal hearing. In my view this made his evidence in respect of the chair and his behaviour afterwards unreliable. Ultimately, he conceded that he did leave early. However he also asserted for the first time, incredibly, that his colleague had tried to drive into him twice, both before and after the chair incident.
64. Taking all the above into account I do find it more likely than not that the Claimant broke the chair and then left his duty without permission and without informing his colleague or the control.

65. I then have to consider whether this was conduct so serious as to justify terminating the employment without notice. In the context of the Claimant's employment to work on an educational site as a security guard, without supervision on site, I find the conduct, along with the behaviour in the disciplinary process, as being sufficient to seriously damage trust and confidence and therefore to justify dismissal without notice. I note the Claimant was not apologetic but instead accused his colleague of a number of matters yet had not reported them at the time, but only once he himself was being disciplined.
66. I therefore find the Claimant was not wrongfully dismissed.

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Employment Judge Corrigan  
6 May 2021

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