Case No: 2302287/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

BETWEEN:

Mr F Agbonkhese

Claimant

and

APCOA Parking UK Limited

Respondent

ON: **6 & 7 May 2021**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr W Lane, Solicitor**

REASONS
for the Judgment dated 7 May 2021
provided at the request of the claimant

1. In this matter the claimant complains that he was unfairly dismissed.

Evidence & Submissions

2. I heard evidence from claimant and from Mr Barraclough, Deputy Contract Manager, and Mr Jaffrey, Senior Contract Manager, for the respondent. The respondent also submitted a witness statement from Mr Bangura, the claimant's line manager, who did not attend the hearing because, according to the respondent, he is on sick leave and unfit to attend. I listened to a recording of a telephone call the claimant made of his conversation with Mr Bangura the day before this hearing which the claimant says shows that is not true. In fact the recording does not show that but does show that the claimant and Mr Bangura have a positive relationship. The claimant also said that in fact Mr Bangura has been demoted but there was no evidence before me to support that statement. In the event I attached limited weight to the contents of Mr Bangura's statement as it is unsigned.

3. Both parties relied upon written submissions. Both had the opportunity to add to them orally but chose not to.

Relevant Law

4. By section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his or her employer.

5. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

6. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

7. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

    Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

8. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

9. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

10. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

Findings of Fact

11. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

12. The respondent provides car parking enforcement services for the London Borough of Lambeth including issuing penalty charge notices (PCNs) to illegally parked vehicles. The respondent has a disciplinary policy which sets out its processes and gives examples of offences normally regarded as gross misconduct.

13. The claimant was employed by the respondent as a Moped Civil Enforcement Officer (CEO) based at Clapham and reporting to Mr Bangura. He commenced employment with the respondent in October 2016 but had continuous employment since 2005 having transferred in.

14. Certain parking contraventions are subject to a mandatory five-minute observation period. This means that when a CEO sees a vehicle that is illegally parked in a residents' bay, he or she must wait for at least five minutes (whilst keeping the vehicle in sight) before issuing it with a PCN.

15. Every CEO has a hand-held computer terminal which is a smartphone with specialist software supplied by Farthest Gate Limited ("FGL") and which remotely communicates with FGL's computer system. At the start of each shift, a CEO is issued with a hand-held and logs into it using his unique ID and then generates a "test ticket" to check that the hand-held is working properly and is set to the correct date and time.

16. During his or her patrol, if a CEO sees q potentially illegally parked vehicle he or she scans its registration plate using the hand-held's camera. The software then uses automatic number-plate recognition to check whether the vehicle has a valid parking permit.

17. If the software confirms that it is illegally parked, the CEO formally logs the vehicle. The CEO types in the vehicle's make and model number, confirms its location, and uses the hand-held's camera to take a photo. As well as saving the vehicle's registration and photo, the software automatically saves the date and time of sighting (using the hand-held's internal clock).

18. The CEO then observes the mandatory five-minute observation period. During this period, the software displays a five-minute countdown timer on the hand-held's screen. If the mandatory five-minute observation period elapses without any developments, the CEO confirms to the software that the vehicle remains illegally parked. After double-checking the vehicle's registration, the software generates a PCN (which is printed out on the

portable printer). The CEO attaches the PCN to the vehicle, and takes various photos of it with the PCN attached.

19. The software concludes the process by saving the details of the PCN and the various photographs (which are uploaded to FGL's computer system). It also saves the date and time when the PCN was issued, again using the hand-held's internal clock.

20. The software is pre-programmed to ensure that the CEO complies with the mandatory five-minute observation period. The software will not allow a CEO to generate a PCN for a vehicle unless – according to the hand-held's internal clock – at least five minutes have elapsed since the CEO logged the initial sighting of the vehicle. Accessing the time settings of the hand-held's internal clock requires an administrator password. CEOs are not permitted to have this password.

21. A further feature of the software is that FGL can remotely view a live video feed of a hand-held's screen.

22. On 12 February 2019 concerns were raised by Mr Brooker, the Operations Director of FGL, with Mr Bangura that the claimant had apparently changed the handheld's internal clock so as to avoid the 5 minute grace period on six occasions that day. Mr Bangura reported this to his manager, Ms Copperthwaite, who asked him to investigate further.

23. An investigation meeting was held between Mr Bangura and the claimant on 20 February. Notes of that meeting were produced and signed by the claimant as a true record. At that meeting the claimant confirmed that he had been at work on 12 February and had been using the relevant handheld. He said that he had no access to unlock it and did not know the relevant password to do so. He said that he had not changed the time on the handheld. At conclusion of the meeting the claimant was suspended. The suspension was confirmed in writing on 21 February.

24. On 5 March Mr Brooker emailed Ms Copperthwaite setting out how his observation of the handheld had come about and what he had observed and attached a copy of the video recording. He also confirmed that he had then changed the administrator password on all devices.

25. On 13 March Mr Barraclough received copy screenshots and a tour report showing the relevant activity of the claimant. On 15 and 21 March he wrote to the claimant requiring him to attend a disciplinary hearing in order to answer charges of deliberate falsification of records, misuse of company property or the company's name and bringing the company into serious disrepute. He was informed of right to representation and that a possible outcome could be dismissal. Copies of the evidence gathered thus far were enclosed and he was told that there would be an opportunity to view the relevant recording at the hearing. In the event the claimant requested and was allowed to view the recording in advance of the hearing.

26. The disciplinary hearing took place on 29 March at which the claimant confirmed he was happy to proceed without representation, that he had issued the PCN in question entirely properly and denied any wrongdoing. He also raised three questions that he ask be put to FGL which Mr Barraclough did by email later that day. Those questions and the replies received on 1 April were:
    a. Q: why did you wait until the sixth PCN to be issued before recording the footage? A: "the first couple were just observed as we couldn't quite believe what we were seeing. We then tried to capture the details using the record function…but this failed for the next few attempts. As a result we resorted to filming the screen using a mobile phone."
    b. Q: How can the CEO access the system settings without the supervisor password? A: "the CEO cannot access the settings without knowing the supervisor password."
    c. Q: Why was the video footage tampered? A: "the video has not been tampered with. What you have been sent is what we were seeing on the screen recorded on a mobile phone."

27. On 3 April 2019 Mr Barraclough wrote to the claimant informing him of his conclusion that his actions amounted to gross misconduct and that he was dismissed without notice with immediate effect. He concluded that the claimant had known what he was doing on the day in question and accessed the system to override observation times thereby misusing company property in order to deliberately falsify records and thereby had brought the company into disrepute. The claimant was advised of his right to appeal.

28. On 5 April the claimant appealed by letter.

29. That appeal was dealt with by Mr Jaffrey on 24 April and during that meeting he informed the claimant of the answers obtained from FGL to the three questions he had asked.

30. Mr Jaffrey wrote to the claimant with the appeal outcome on 26 April. He responded to each of the matters raised in the claimant's appeal letter but concluded that the decision made by Mr Barraclough had been correct, company policy had been correctly followed and the appeal was not upheld.

Conclusions

31. I am satisfied that the reason for the claimant's dismissal was conduct and that the respondent had a genuine belief in the claimant's guilt of the alleged misconduct. Both Mr Barraclough and Mr Jaffrey gave clear evidence of that which I accept.

32. I am also satisfied that the respondent carried out a fair and sufficiently thorough investigation and that the process followed by the respondent was a fair and reasonable one. The only criticism I have of the process is that Mr Barraclough, before he made his decision, did not feedback to the claimant the answers he had obtained from Mr Brooker to the specific questions that the claimant had requested be asked. However, that was not

in itself sufficient to make the process unfair and in any event Mr Jaffrey did communicate those replies to the claimant at the appeal stage. The claimant has criticised the respondent for not having a specific policy that deals with collecting video or audio recordings as evidence. The respondent says that it does in fact have such a policy but no copy was provided to me and there was no evidence that it had ever been provided to the claimant. In any event, I am not troubled by this. It is reasonable for an employer to monitor as the respondent did and the video recording that was taken by FGL did not show the claimant but simply the device.

33. The claimant has also complained that the respondent did not investigate other PCNs that he issued either before 12 February or between 13 & 20 February when he was suspended. It was not necessary for the respondent to carry out that further investigation. They had sufficient on the basis of the one PCN that had been video recorded.

34. The real issue in this case is whether the respondent had reasonable grounds for believing that the claimant was guilty of the alleged misconduct. I emphasise the word reasonable. It is not for me to come to a view as to whether the claimant was in fact guilty of what he was accused nor for me to decide this case on the basis of what I would have done. My role is limited to assessing the reasonableness or otherwise of the respondent's grounds.

35. I understand why the claimant challenges the reasonableness of those grounds. There does not seem to be any apparent motive for him to have changed the clock – he did not gain financially nor was he under any particular pressure to issue more PCNs in a day because of any performance and/or capability concerns. There is also no explanation of how the claimant did what the respondent believes him to have done i.e. access the settings of the app and change the clock. To do so he must have had access to the administrator password which of course the claimant says he did not and the respondent has no evidence, apart from the fact that they believe he in fact changed the clock, that he did have access.

36. However, given the video evidence provided by FGL to the respondent of the clock being altered by the holder of the claimant's handheld when issuing a PCN on the relevant date to the relevant vehicle, there are reasonable grounds for the respondent believing that this happened. I also conclude that there are reasonable grounds for the respondent to conclude that it was the claimant who did this, notwithstanding that the video footage does not show the claimant himself and a query from the claimant about the printing status bar. The paper trail of the evidence and indeed the claimant's own admission that he was issued with the particular numbered device that was used to issue that PCN supports the respondent's conclusion.

37. The claimant has raised other concerns about the respondent's position. In particular he says that this was a deliberate act by the respondent to target him and falsely accuse him because he had TUPE transferred into their employment. There is no evidence to support this allegation. He had transferred in more than two years previously and there was nothing to suggest that he had been a problematic employee in any way for the

respondent. Further, even if the respondent had wanted to remove the claimant, to do it as they did they would have had to have the agreement and very active participation of the Operations Director at FGL. The claimant says that he believes FGL in fact manipulated the clock. The respondent's evidence that it was not possible for them to do so contradicts that. I do not have sufficient evidence before me to make a finding on whether FGL had the capability to do what the claimant says however there is absolutely no evidence to suggest that they did or there was a conspiracy of that nature.

38. Having reasonably come to the decision that the claimant was guilty of the misconduct alleged, notwithstanding his long service and previously clear conduct record, summary dismissal must be within the band of reasonable responses to that conduct.

39. Accordingly the claim fails.

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Employment Judge K Andrews
Date: **5 July 2021**

Written reasons sent to the parties and entered in the Register on: **14 July 2021**.

For the Tribunal Office