EMPLOYMENT TRIBUNALS

Claimant: M Hussein

Respondent: Carlisle Support Services Group Limited

Heard at: London Central (Remotely by CVP)
On: 30 July 2021

Before: Employment Judge Heath

Representation
Claimant: In person
Respondent: Ms Evans-Jarvis (Senior Litigation Consultant)

JUDGMENT having been sent to the parties on ***30 July 2021*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By an ET1 presented on 17 January 2021 the claimant claimed for unfair dismissal and for sums in respect annual leave accrued but untaken at the termination of his employment. The respondent conceded that it had failed to pay the claimant his full annual leave entitlement and I made an order for them to pay this in the sum of £860.

Issues

2. The issues were discussed with the parties at the outset of the hearing, and agreed to be as follows:-

    a. What was the reason for dismissal? The respondent asserts it to have been for a reason relating to conduct.

    b. Did the respondent have a genuine belief in the claimant's misconduct?

    c. Was such a belief based on reasonable grounds?

d. Following a reasonable investigation?

e. And following a reasonable procedure?

f. Was dismissal within the range of reasonable responses open to a reasonable employer?

Procedure

3. I was provided with a bundle of 272 pages. The claimant provided a witness statement, and for the respondent Mr Ismail, Mr Liversidge and Mr Taylor provided witness statements. All these people gave live oral evidence. At the conclusion of the hearing Ms Evans-Jarvis provided written submissions which she expanded on orally, and the claimant gave oral closing submissions.

The facts

4. The respondent is a company that provides support services, including security personnel, to other businesses. It employs around 4000 employees throughout the UK.

5. The claimant was employed as a security guard from 1 March 2016. From June 2017 he worked the night shift as a security guard at Lulworth House, a residential tower block in Camden north London, which houses tenants of the London Borough of Camden.

6. The claimant was provided with the company handbook, which has a disciplinary section which outlines a disciplinary procedure. Gross misconduct is described within this, and a non-exhaustive list of examples of gross misconduct is set out. This list includes "*Persistent refusal to obey reasonable instructions given by a line manager"* and *"Leaving your place of work during working hours without authorisation from your manager*".

7. The claimant worked in a concierge area on the ground floor of Lulworth House. As part of his role he would be responsible for allowing access to Lulworth House, greeting visitors, assisting with emergencies, writing incident reports, accepting deliveries and monitoring the CCTV. The concierge area was behind a glass or Perspex screen in which there was a glass or Perspex hatch which itself had small perforated holes in it. This hatch part of the screen can be raised in order to accept items, for example. One part of the window area had a piece of wood blocking a gap. At the back of the concierge area was a small kitchen area.

8. As set out above, part of the respondent's job was to monitor CCTV screens and other systems and to monitor people coming in and out of the building. From the kitchen area the claimant could not monitor the screens or other systems and could not see people coming in and out of the building. Additionally, his ability to hear people would be diminished. At the desk behind the screen was a button which the claimant could press to allow people into the building. He could not do this from the kitchen area.

9. The respondent supplied the claimant to work as a security guard at Lulworth House for the night shift, but the building's managing agent supplied dayshift security.

10. On 25 June 2020 a Mr Sheehan, a security officer employed by the managing agent, returned to work his dayshift after a period off work where he was shielding in respect of the Covid-19 pandemic. When Mr Sheehan arrived at 6:30 AM the claimant was not in the concierge area. Mr Sheehan banged the door and gained entrance. A verbal altercation followed in which Mr Sheehan mentioned that the claimant was not at his desk and that he would bring this to the respondent's attention.

11. On 29 June 2020 Ms Neale, a housing manager from the London Borough of Camden notified the claimant's line manager, Mr Choudhry, that the claimant and Mr Sheehan had had a dispute, and that Mr Sheehan had put in an incident report. Ms Neale sought the claimant's input so that she could investigate.

12. During the course of his complaint, Mr Sheehan examined CCTV footage and he asserted that the claimant was not at the desk in the concierge for substantial periods of time, which he set out in tables which he emailed to Ms Neale. Ms Neale brought this to Mr Choudhry's attention in an email of 23 July 2021. She also mentioned the fact that there were allegations that the claimant may have been sleeping whilst on duty and that he left the middle door in the ground floor area open which was "a recipe for disaster" in that it compromised tenants' safety. She asked whether he could discuss these issues with the claimant.

13. On 3 August 2020 the claimant attended and "informal meeting" with Mr Ismail, the Senior Site Supervisor. This meeting was in the nature of an investigation meeting and there was a discussion about the allegations made by Mr Sheehan. In this meeting the claimant said that there were few residents coming in late at night to the desk to ask for help and that the desk was close to the passage area. He said that he moved the chair away from the desk to maintain his distance between the passage area and the desk for his own health and safety. He said also that he stayed away from the desk and sat inside the kitchen where he was monitoring the passage area and the door. Mr Ismail asked if the claimant had ever raised any health and safety issues with the housing manager or his own manager or reported any concerns about his work environment. The claimant said that he had not but that the housing manager had seen him sitting in the kitchen area before and had not questioned him. Mr Ismail said "*you are not supposed to change your work location without taking consent from the housing manager of your building*". Mr Ismail said that the claimant's conduct had been unacceptable and that he would be given a "*Final Warning Letter/Letter of concern for moving the workplace to kitchen area without consent, leaving the concierge unattended for long hours*". The claimant was told that he "*will be called for Disciplinary Hearing Meeting*".

14. For reasons which are not entirely clear the claimant was not called to a disciplinary meeting. The claimant made a grievance against Mr Sheehan, which Mr Choudhry heard and did not make a finding against Mr Sheehan. The claimant did not appeal this.

15. Stepping slightly out of the chronology, around a month after the 23 March 2020 "lockdown", various measures were taken by the respondent in respect of workers health and safety. There were "Toolbox talks", risk

assessments, regular emails to workers and workers were sent three washable masks. The respondent had over a thousand security workers in the south of England alone. These workers operated in various conditions, some indoors some outdoors and with some workers operating in environments with differing levels of safety. I accept the respondent's evidence that the presence of the screen, notwithstanding the perforations, would have represented more Covid security than most indoor workers would have had. It would have represented a similar or perhaps even more of a level of security than many frontline workers, for example supermarket checkout workers. Until the disciplinary issues arose, the claimant did not raise with his employer or a client any issues about health or safety or any fears he might have about the safety of his work environment. A risk assessment was carried out in respect of the working area at Lulworth House on 5 October 2020, which highlighted no health and safety concerns.

16. On 12 October 2020 Mr Choudhry again wrote to the claimant. He informed him that the respondent's client, which operated Lulworth House, had requested that the claimant be removed from site following the claimant's alleged failure to attend work during his contracted hours. The claimant was taken off site and was on paid leave. He was invited to attend an investigator meeting on 15 October 2020.

17. On a date unknown prior to 12 October 2020, Ms Morris, who had taken over from Ms Neale as the housing manager for London Borough of Camden, had written to Mr Choudhry outlining a number of concerns. She said that she had instructed their concierge to check CCTV footage of the claimant's last eight shifts to determine whether he was at his correct station. This investigation revealed that the claimant had been absent from his station on each shift for a total of between 1 hour and 2 minutes to 5 hours 27 minutes. A table set out the hours on which he was missing from his station for each shift. Ms Morris said that she had discovered a courier stuck in "no-man's land" in the building while the claimant was nowhere to be seen, and made it clear that she did not want the claimant working at Lulworth House again.

18. Mr Ismail conducted an investigation meeting on the 15 October 2020. During this the claimant did not deny the times he was alleged to have been absent from the reception desk but said that he was attentive from the kitchen next to the reception desk and was not absent for a continuous period of time checking back from time to time to see that everything was fine. Mr Ismail said that he was escalating the case for a disciplinary hearing at a time to be confirmed. On 17 October 2020 Mr Ismail played the videos of the CCTV footage in fast forward mode on his personal computer by WhatsApp video call. The reason this arrangement was adopted was because of technical difficulties with the work laptops.

19. On 26 October 2020 Mr Leversidge, Support Centre Manager, invited the claimant to a disciplinary hearing to take place on 28 October 2020. The disciplinary issue was that the claimant was alleged to have been "*absent from your post without any reasonable explanation*" on eight dates between 9 September 2020 and 2 October 2024 varying periods of time. Mr Leversidge explained that if the allegations were substantiated, they would be regarded as gross misconduct which could lead to the

termination of the claimant's employment without notice. The claimant was told that CCTV footage would be available prior to the meeting for the claimant to review for a second time if he wished. The claimant did not ask to do this.

20. On 28 October 2020 the disciplinary hearing in front of Mr Leversidge took place. The claimant was reminded of his entitlement to be accompanied, but was content to proceed on his own. The claimant indicated that he had been shown CCTV footage in respect of the 17 to 18 September 2020, a shift where he was alleged to have been away from his station for 5 hours 27 minutes. He considered that this timing might be excessive. He accepted that he was away for some hours but that there was a reason for it. He said that he had not been at his desk when a courier arrived because he was heating up his food. He was asked why he was heating up food when it was not his break time, and he said that he had medical issues. The claimant accepted that it was his job to sit at the window but he said he was uncomfortable. He said that he had talked about this discomfort in July. Mr Leversidge asked why he had not raised that he did not want to be there at this job. He was asked why he spent over five hours away from the desk and what he was doing, and he responded that he just sat in the kitchen to be away from the reception area as he is anxious about Covid. He agreed that he spent more time away from his desk and he should. He accepted that he had been told by Mr Ismail in August that it was unacceptable to be working away from the desk and he admitted that he had not consulted with anyone about moving his chair into the kitchen after this. He accepted that the end result of the August meeting was that he was told that he must remain at his desk. The claimant accepted that his place of work was the reception desk and that he is leaving the desk satisfied the definition of gross misconduct, namely "*Leaving your place of work during your work hours without authorisation from your line manager*". He said that he did not want to be in reception but didn't tell anyone or allow the respondent to find alternative employment. Mr Leversidge said that he would give his decision in 48-hours.

21. On 30 October 2020 Mr Leversdige emailed his decision letter to the claimant. He outlined the disciplinary charges, set out the claimant's explanations and set out how he considered those explanations unsatisfactory. He observed that the claimant had not sought any permission to take breaks at unscheduled times and had left his position unmanned at unexpected times compromising the security of the building. He also pointed out that the claimant's explanation, about taking a meal break, did not explain the other significant time periods where he was away from his post. Mr Leversidge pointed out that the claimant's workstation was Covid secure and that he had been provided with a glass screen with a small gap for communication purposes necessary for the claimant to carry out his role. It was pointed out that the claimant never raised any concerns concerning Covid or sought any agreements to leave his posts for periods of time on numerous occasions. It was pointed out that it was fundamental that the claimant was at his posts at all times when he is required to be there to ensure the safety of the building and those who are in it. The claimant was fully aware of this. Mr Leversidge also observed that the claimant actually did spend significant periods of time at his post despite the concerns he was articulating about health and safety.

Mr Leversidge considered on balance that this undermined the reason being put forward for the claimant saying that he left his post. Mr Leversidge set out that this conduct constituted gross misconduct which created a significant health and safety risk which resulted in a client asking for the claimant's removal from site. Mr Leversidge considered the circumstances and the claimant's responses but considered that the claimant's conduct irrevocably destroyed the trust and confidence necessary within an employment relationship, and considered the appropriate sanction was summary dismissal.

22. On 6 November 2020 the claimant appealed against his dismissal, saying that the manager investigating did not get enough evidence, and that some statements were inaccurate. He further said the disciplinary action was too harsh, inappropriate and severe.

23. The claimant's appeal hearing was heard by Mr Taylor, Head of Operations, on 26 November 2020 on Microsoft Teams. The claimant said he wanted to appeal as the root cause of the problem was not addressed. He described this as his concerns about health and safety, in that there was a huge gap in the window and perforations in the glass which made the claimant feel uncomfortable. He said that he had addressed this with his manager, and that he felt he was bullied and harassed at work. He considered that he left his post because the window is not Covid compliant and that he was risking his life. This rendered the decision unfair as the working environment was unsafe. During the hearing Mr Taylor said that he would investigate whether the claimant had told his manager of his difficulties. Mr Taylor asked if he was unhappy with Mr Choudhry's response why he had not escalated it, and he responded that he could not go above his manager.

24. On 30 November 2020 Mr Taylor wrote to the claimant dismissing his appeal. He observed that the claimant left his desk for long periods of time. He pointed out that he had investigated concerns about bullying and harassment allegedly raised with Mr Choudhry, and he was of the opinion that the disciplinary was unconnected. He furthermore pointed out that Mr Choudhry, in any event, had investigated the complaints and not upheld them. In terms of severity of punishment, Mr Taylor considered that the conduct had happened over numerous occasions for long periods of time and the level of risk that this would happen again was too high to consider any other sanction.

The Law

25. Under section 98(1) Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for dismissal and that such reason is potentially fair under section 98(2).

26. Fairness is determined under section 98(4) ERA, and depends on whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as sufficient reason to dismiss, and should be determined in accordance with equity and the substantial merits of the case.

27. In conduct related cases, the test applied is that set out in ***British Home Stores v Burchell*** **[1978] IRLR 379**, which mirrors the issues set out at paragraph 2 above.

Conclusions

Genuine belief

28. Mr Leversidge and Mr Taylor undoubtedly believed that the claimant had just absented himself from his workstation for substantial periods of time. The CCTV evidence was clear, and the claimant himself admitted that he had left his station without the permission of his managers. There was no real challenge by the claimant in the hearing to this element.

Belief sustained on reasonable grounds

29. Again, the belief was sustained on strong and unchallenged evidence, namely the CCTV evidence. The claimant admitted that he did not have his manager's permission to leave his station. It was clear from the dismissal letter that Mr Leversidge was relying on the September/October incidents and considering them as examples of the claimant leaving his workplace, and not as discrete acts of refusal to obey reasonable instructions given by a line manager (as set out in paragraph 23 of his witness statement). Mr Leversidge was clear that the July incidents highlighted for him that the claimant had specifically been instructed that he should not leave his desk, but the September/October incidents were not framed as failures to obey management instructions.

30. Additionally, the claimant had not raised any issues of health and safety before July. Although he did raise these concerns at the 3 August 2020 investigation meeting, he did not pursue them afterwards having been given a clear instruction to do his job from his desk.

31. In the circumstances, I consider that there were reasonable grounds for the respondent sustaining a genuine belief that the claimant had left his workplace without authorisation or reasonable excuse.

Reasonable investigation

32. The oddity here is that the July incidents were investigated and that Mr Ismail indicated at this stage that the claimant would be given a written warning. Mr Ismail would not have been empowered to do that under the respondent's disciplinary procedure. Mr Ismail was also simultaneously indicating that the matter would be referred to a disciplinary hearing. However, it never was.

33. The October disciplinary hearing was a discrete one. The earlier disciplinary issues only figured as evidence that the claimant had clearly been told not to absent himself from his desk. As indicated earlier, the respondent did not frame the October disciplinary issues as being a failure to follow a reasonable management instruction. It was also not framing this as following on from a previous warning.

34. The October disciplinary had all the key features of a reasonable disciplinary process, as set out in the ACAS Code in that:-

a. There was a prompt investigation to establish facts;

b. The claimant was informed of the problem and provided evidence about it. His viewing CCTV over a WhatsApp video call was not ideal, but there was no real unfairness following from this as the claimant admitted that he was away from his desk for substantial periods of time;

c. The disciplinary hearing was held promptly, the claimant was given an opportunity to be accompanied, Mr Leversidge went through the evidence and gave the claimant an opportunity to challenge it and put his account across;

d. A decision was made on appropriate action to take;

e. The claimant was given an opportunity to appeal, and his grounds of appeal were considered by a manager not involved in previous stages.

Fair procedure

35. This substantially overlaps with the paragraph above. The claimant was taken through a disciplinary process that complied with the ACAS Code, and no breach of the respondent's own procedures was identified.

Dismissal within a range of reasonable responses

36. It is not for me to substitute my own view for that of the employer. Some employers faced with one set of circumstances may choose to dismiss and others might not. Both responses might equally be reasonable. It is only when the employers action falls outside of the range of reasonable responses open to a reasonable employer such that no reasonable employer would dismiss that I can consider a dismissal unfair.

37. The following matters are relevant in this case:-

a. The misconduct that the claimant was accused of was set out in the employer's handbook as gross misconduct;

b. Although the dismissing officer did not rely on previous warnings, he observed that the October disciplinary issues took place against the backdrop of exactly the same issues having happened a matter of months beforehand;

c. There was clear evidence in the bundle that the claimant's misconduct had inconvenienced and antagonised their client who operated the building. Both the client and the respondent considered that the claimant's misconduct raised serious issues of health and safety;

d. In terms of the claimant's allegation of bullying, this was raised in July after Mr Sheehan had complained about him. It was investigated, not upheld, and this outcome was not appealed. More to the point, the claimant did not explain how this issue had anything to do with him not being at the desk for long periods of

time in September/October. In short, it provides no mitigation which might suggest that dismissal was outside the range of reasonable responses;

e. The claimant raised issues about his concerns about Covid. This is an illness which has killed more than 100,000 people in the UK alone and has disrupted our way of life for over 18 months. I do not downplay the legitimate concerns that many have about safety in the workplace during the pandemic. But I am satisfied that health and safety measures were in place in the form of a screen, masks and the ability to direct people to stand back from the screen. Very few workplaces eliminate all risks, and this is especially the case in public facing roles. I am persuaded by the respondent's evidence that there were more safety features in the claimant's workplace than in many others. But what is notable here is that the claimant only articulated concerns about Covid after he faced disciplinary investigation in August for absenting himself from his workstation. Concerns about Covid were not matters that he pursued after that date with his manager, human resources or senior management until, notably, he was again disciplined for absenting himself from his workstation. The appropriate way for the claimant to have dealt with this issue is to have raised it with his managers and not to have taken unilateral action. He took the decision not to do the job in a way he was clearly instructed to do. In all the circumstances I consider that this issue does not provide any mitigation to suggest that dismissal was outside the range of reasonable responses.

Conclusion on unfair dismissal

38. In all the circumstances I find that the claimant was not unfairly dismissed.

39. Had I found there had been procedural unfairness this would have been a case where I would have reduced compensation substantially on the grounds that any procedural unfairness would have made little to no difference in the outcome. Furthermore, I would have reduced contribution substantially for contributory fault.

Holiday pay

40. The respondent conceded in its ET3 that holiday pay was owing to the claimant, and its representative told me that it did not challenge the sums he advanced. I was told that this would be processed in the August payroll. Accordingly, I ordered that the respondent pay the claimant the sum of £860.

Employment Judge **Heath**

31 August 2021

REASONS SENT TO THE PARTIES ON

01/09/2021.

FOR THE TRIBUNAL OFFICE