



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M. Adams

**Respondent:** Dragon Fire & Security Systems Ltd

**HELD BY:** CVP

**ON:** 19<sup>th</sup> March 2021

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Mr Adams represented himself (assisted by his father, Mr D. Adams)

**Respondent:** Mr. J. Bromige, Counsel

**JUDGMENT** having been sent to the parties on 22<sup>nd</sup> March 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

### 1. Introduction:

1.1. The claimant withdrew his claim that the respondent failed to pay to him holiday pay due on termination of employment and that claim was dismissed.

1.2. The claimant withdrew his application to adduce audiotape recordings that had not been transcribed, in the face of opposition by the respondent.

1.3. I allowed the claimant to present three additional documents which were disclosed late, where the respondent confirmed that it would be able to deal with them during the course of the hearing and they were relevant.

### 2. The Issues: it was agreed at the outset that the following were the issues facing the tribunal to resolve:

2.1. Unfair Dismissal: whether the claimant was dismissed for a potentially fair reason (a reason related to conduct) and whether the respondent had a

reasonable and genuine belief that the claimant was responsible for that conduct based upon and following a reasonable investigation. Furthermore the tribunal had to consider whether all steps taken by the respondent fell within the range of reasonable responses of a reasonable employer. Subject to those findings there would also be remedy issues but in the event they did not arise.

2.2. Breach of contract: in a situation where the respondent was summarily dismissed I had to decide whether the respondent had breached the contract of employment by not giving the claimant notice of termination; conversely I had to consider whether the claimant had behaved in such a way that the respondent was entitled to withhold notice or pay in lieu. Subject to those findings there would be remedy issues but in the event they did not arise.

2.3. Witnesses: I heard evidence/read statements from the following witnesses:

- 2.3.1. David Bailey – a director of the respondent company with his brother;
- 2.3.2. Andrew Baker – an employment lawyer; grievance officer and disciplinary officer;
- 2.3.3. Pam Cannell – HR consultant; grievance and disciplinary appeals officer;
- 2.3.4. the claimant;
- 2.3.5. P. Hicks.

### 3. The Facts:

#### 3.1. The respondent:

- 3.1.1. the respondent is a family business specialising in the installation and maintenance of fire and electrical safety and security systems. It employs approximately 25 employees including 15 engineers. It has a customer-base of approximately 1000 contracted customers. It offers a 24-hour callout service. The respondent has achieved appropriate safety accreditation which it values highly.
- 3.1.2. The respondent does not have its own HR function but uses external consultants as required. In this case it called upon Mr Baker of P4B Law to deal with grievance and disciplinary issues and Ms Cannell of Ladybay HR Ltd to deal with both the grievance and disciplinary appeals.
- 3.1.3. Both Mr Baker and Ms Cannell presented written witness statements and gave oral evidence. I found them to be credible and plausible witnesses who dealt professionally and conscientiously with the issues facing them. I accept their respective statements as true accounts of their dealings with the claimant and the respondent, of their involvement generally and the rationale for their respective decision-making.
- 3.1.4. Mr Bailey was a plausible and credible witness. I find that he had some issues with the claimant; there were some commercial considerations and difficulties in his mind at around the time that he had to deal with

disciplinary issues facing the claimant however he referred matters appropriately to the two external consultants and conscientiously considered their findings. I accept Mr Bailey's witness statement as a true reflection of his dealings with the claimant.

- 3.2. The claimant gave plausible and credible evidence and understandably was trying hard to clear his name of any disciplinary allegation. He was ably represented by his father. The claimant was employed by the respondent from 7 February 2018 until his summary dismissal on 21 August 2020 as a senior, lead, or commissioning engineer. This meant that he was in effect in a supervisory capacity and he would "sign off" on completed jobs including those completed by less experienced engineers. This was his second period of employment with the respondent. At the material time he had acquired approximately nine years relevant experience including with the respondent company. He was trained as to the applicable safety standards and the requirements of his job both in respect of safety standards generally and of the respondent's safe method of working. Specifically and of relevance to the disciplinary allegation against the claimant, he was fully aware of the requirements relating to the safe securing of electrical cables in roof voids so as to avoid the risks that would be created by unsecured cables in the event of a roof collapse; there was a known and trained-upon risk of a tripping hazard or entanglement hazard. The claimant was trained upon and was aware of the respondent's practice securing the cable at given distances along a support to prevent looping. He also knew that each job had to be signed off by a senior or lead or commissioning engineer (those titles are interchangeable and denote one and the same role); he knew that by signing-off the job as having been safely completed the engineer in question was assuming responsibility for the safe completion of the work and so reporting it to both the client and the respondent (even if that engineer had not carried out the work but had merely supervised it). The claimant was aware that a signed-off completion statement would lead the client, the respondent and indeed any inspector to believe that the work had been completed in compliance with national safety standards and the respondent's safe practices.
- 3.3. During the period from the end of 2019 until the claimant's dismissal there were issues over his pay. He was informed that he would receive a pay rise by one of the directors but it had not been sanctioned by the other. There arose an issue as to whether the claimant should be paid more and if so how much more than he had previously been paid. There were issues over callouts. In March 2020 Wales entered into a national lockdown in relation to the COVID19 pandemic and there was general disquiet about working arrangements and who was on furlough and who was not. The claimant felt aggrieved about his pay and also the amount of work he was being required to undertake. Whilst all of these matters played on the claimant's mind and tainted his view of events in relation to the disciplinary matters that then faced him in 2020 they were irrelevant to the disciplinary proceedings and the outcome of them. I find that the involvement of the external legal and HR support distanced the respondent's decision-making, based on independent

recommendations, from any material influence of these issues relating to working conditions from the disciplinary issues.

- 3.4. In January and in April 2020 the claimant was the responsible person to either complete tasks or sign off the work of others as having been safely completed but those tasks were not safely completed in accordance with national standards and the respondent's standard practices. In the first instance the matter was detected on audit and the claimant was instructed to carry out remedial work. In the second instance the work was carried out by another engineer who failed to safely secure cables in a roof void and the claimant signed it off as properly completed work without ensuring that it had been. The respondent considered that these two failings on the claimant's part were indicative of misconduct or negligence but in any event serious issues in quick succession. The failure to properly clip the cables to a support could give rise to a risk to human life and property. The failures were breaches of national safety standards and the respondent's procedures.
- 3.5. Mr Baker was instructed to handle the disciplinary hearing. Upon his appointment he made it clear that he would reach an independent decision conscientiously and he would only accept instructions on this basis; he would not accept undue influence from the respondent; he did not.
- 3.6. The chronology of events is not controversial:
  - 3.6.1. 16<sup>th</sup> and 29 July 2020 the claimant raised grievances and these related at least in part to pay issues;
  - 3.6.2. the grievance hearing was held on 5 August 2020 conducted by Mr Baker;
  - 3.6.3. the disciplinary hearing was held on 11 August 2020 conducted by Mr Baker;
  - 3.6.4. the disciplinary outcome is dated 21<sup>st</sup> August 2020
  - 3.6.5. on 26 August 2020 the grievance outcome partially upheld the claimant's grievance recommending reinstatement of elements of pay;
  - 3.6.6. on 28<sup>th</sup> of August 2020 the claimant appealed against the decision to dismiss him (see below) and on 1 September 2020 he appealed against the grievance outcome.
  - 3.6.7. The appeal hearing was held on 11 September 2020 conducted by Ms Cannell; the appeals were unsuccessful. The outcomes were sent to the claimant on 24 September 2020.
- 3.7. Mr Baker, and then Ms Cannell, considered all available evidence and documentation hearing the accounts of both Mr Bailey and the claimant. The claimant was given access to the relevant documentation; he was given an opportunity to put his grievances and to answer the allegations facing him; he explained his position each time and it was taken into account along with his work record and all relevant matters and, in respect of the disciplinary issues, the mitigating factors put forward.
- 3.8. The grievance issues did not influence the decisions either at first instance or appeal in relation to disciplinary sanction.

- 3.9. Given the seriousness of the breaches of safety rules and regulations, and the respondent's practices in that regard, the disciplinary and appeals officers considered that dismissal as senior/lead/commissioning engineer was appropriate however Mr Baker proposed as an alternative that the claimant be demoted and given a final written warning. That recommendation was made to the respondent and the respondent reacted positively indicating that a position within the company could be found for the claimant on that basis.
- 3.10. Mr Baker's disciplinary decision and recommendation was set out in an email dated 21 August 2020 that commences at page 183 of the hearing bundle. I find that it is a full, accurate and conscientious statement of Mr Baker's involvement and his rationale in reaching his conclusions and recommendation. Mr Baker fully considered the eight disciplinary allegations facing the claimant and took into account not only the respondent's case but also the claimant's case and mitigating factors. He found evidence to suggest a regular failing to comply with expected safety standards notwithstanding which he recommended that there be no sanction with regard to the first allegation in time. This was in relation to work that even the claimant confirmed was not acceptable. In respect of other historic allegations of poor performance or those that he considered were not too serious Mr Baker took a similar view. He did not however absolve the claimant in respect of the latest disciplinary allegation being that in relation to work carried out on 27 April 2020, defective securing of cables in a commercial roof void. For the reasons set out in Mr Baker's letter he considered that the claimant ought to be summarily dismissed for gross misconduct including a wilful and serious breach of safety standards. He found insubordination. Taking all such matters into account he considered that there was the potential to bring the respondent into disrepute and there was a breach of trust and confidence in the relationship with the respondent. Mr Baker's conclusion was that the claimant ought to be dismissed as a senior engineer and it was at that point that he explained his alternative recommendation, being demotion on a reduced salary with a final written warning of 12 months duration.
- 3.11. The claimant refused the proposal, fearing that he would be on a "knife edge" facing the risk of dismissal and that in the meantime he would suffer a significant loss of pay. The claimant was suspicious believing that all of this played into the respondent's commercial concerns over rates of pay and its efforts to reduce overheads. In the light of the claimant's refusal of the proposal the respondent sanctioned the claimant by way of dismissal which was the alternative recommendation.
- 3.12. As already indicated I find that on appeal Ms Cannell also dealt with the matter impartially, independently, professionally and conscientiously. She dismissed the claimant's appeals for the reasons set out in her outcome letters of 24 September 2020 at pages 230 and 239 of the hearing bundle. I accept as genuine her statement of rationale at paragraphs 9 and 11 of her witness statement.

3.13. I find further as a fact that on 27<sup>th</sup> of April 2020 the claimant failed to follow reasonable management instructions with regard to safe practices and procedures and as such was insubordinate; he acted in breach of safety regulations; he negligently failed to check the work of another engineer and wrongly signed it off. His wilful and negligent conduct amounted to gross misconduct.

#### 4. The Law:

4.1. Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98 (2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98 (2) (b) ERA). Section 98 (4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the tribunal must determine whether in all the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).

4.2. Case law has established that the essential terms of enquiry for the Employment tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

4.3. Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588 and Iceland Frozen Foods Ltd. v. Jones - [1983] ICR 17).

4.4. As counsel for the respondent submitted an offer of an alternative sanction to dismissal does not waive a finding of gross misconduct where someone dismissal; and employer should always look at alternatives to dismissal. The range of reasonable responses was referred to as "a sliding scale" such that offering an alternative should not be taken as any inconsistency with a finding of gross misconduct and with summary dismissal where an offer of the alternative is refused.

4.5. The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness.

4.6. The law and tests are different with regard to the claim of breach of contract in relation to notice of termination. Here it is not a question of reasonableness and ranges of response but whether the contract has been breached. The issue is whether the respondent was entitled by virtue of a repudiatory breach of contract by the claimant, to dismiss without notice. It is implicit in the contract of employment that notice need not be given to an employee guilty of repudiatory conduct. The tribunal therefore has to consider not whether the respondent had a reasonable and genuine belief in the guilt of the claimant but whether the claimant had acted as alleged.

5. Application of the law to the facts:

5.1. In a situation where an employee is acting in a safety critical role and has been properly trained to carry out work to legal safety standards and in accordance with safe working practices failing to do so is misconduct. Where breach of standards and working practices is serious and/or repeated and/or contrary to express instruction then this conduct can reasonably be considered gross misconduct. In all those circumstances where an employee is in a supervisory/lead/commissioning role with authority to sign off work as having been carried out properly by another worker then failing to ensure that it has been, while continuing to certify safety, is negligent. In a safety critical situation signing off a safety certificate or its equivalent could lead to serious harm and amounts to gross negligence.

5.2. It must be open to an employer to dismiss an employee for gross misconduct and for gross negligence. Dismissal must fall within the range of reasonable responses of a reasonable employer. It is reasonable to assume that insofar as there is a range then it must be from a serious warning of dismissal to actual dismissal without notice. It would be reasonable for an employer to consider the range being from a final written warning to dismissal without notice. Leniency within that range is a matter for the employer.

5.3. In this case the claimant's breaches of safety regulations and instructions from his employer are apparent and serious. There was both documentary and oral evidence before the dismissing and appeals officers upon which they could make their assessment. They heard from all relevant parties considered all relevant documentation. The breaches were manifest. They therefore had a reasonable and genuine belief based on their investigation upon which to make their findings.

5.4. The recommendation to dismiss with an alternative sanction was a reasonable approach in all the circumstances. Mr Baker conscientiously concluded that it would not be appropriate for the claimant to continue as a senior/lead/commissioning engineer because of the misconduct and negligence referred to above. That said however, there was an acceptance that the claimant could perform technical work under supervision. To that more limited extent he could be valued as an employee provided he fully understood the risk facing him of dismissal if he acted negligently or in such a way as to amount to misconduct within a period of a 12 month final written warning. It was reasonable to conclude that any future role for the claimant

within a 12 month period would have to be in a more junior position but that could not be considered a waiver of the finding of gross misconduct and negligence as a senior engineer.

5.5. The alternative recommendation of demotion with a final written warning was a reasonable one. I am satisfied that it was a genuine recommendation. I understand the claimant's suspicion that this might have been a way of addressing the respondent's concerns over salary rates but I have found as a fact that the disciplinary and appeals officers were not unduly or improperly influenced by such considerations of the respondent. By his actions the claimant put his job in jeopardy regardless of any grievances he had with the respondent or issues over pay the respondent had with the claimant. The respondent acted fairly and reasonably delegating the grievance and disciplinary proceedings to external experts. The respondent acted fairly and reasonably in its consideration of recommendations made by those external parties. Had the respondent not delegated matters to the external consultants I may have shared the claimant's suspicions. I am satisfied however and find that the involvement of the external consultants, Mr Baker and Ms Cannell, have ensured the respondent acted fairly and reasonably and within the expected range of reasonable responses to the claimant's behaviour.

5.6. Furthermore, the claimant acted in repudiatory breach of contract. The respondent was entitled to dismiss him without notice. The respondent did not breach the claimant's contract by way of summary dismissal.

6. For all these reasons claimant's claims fail and are dismissed.

Employment Judge T.V. Ryan

Date: 5<sup>th</sup> May 2021

JUDGMENT SENT TO THE PARTIES ON 12 May 2021

FOR THE TRIBUNAL OFFICE Mr N Roche