THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Liam Tinkler**

Respondent: **Electronic Security Solutions Limited**

Heard at: **Newcastle Hearing Centre (by CVP)**
On: **Thursday 19th August 2021**

Before: **Employment Judge Speker OBE DL**

Representation:

Claimant: **In Person**
Respondent: **Miss Laura Forrest (HR Manager)**

JUDGMENT

The claimant was fairly dismissed and his claim is therefore unsuccessful.

REASONS

1. This claim of unfair dismissal is brought by Mr Liam Tinkler against Electronic Security Solutions Limited by whom he was employed as a service engineer. The claim had been considered at a preliminary hearing by Employment Judge Aspden on 24th February 2021 when she directed that the final hearing take place on 19th April 2021 but in the event that was postponed to 2nd June 2021 and then because of illness postponed until today, 19th August 2021, for a hearing by CVP.

2. A bundle of documents had been provided containing 36 items but not paginated. Although the case was listed for only one day, eight witnesses attended to give evidence virtually, although this had not been communicated earlier. In the event it was possible to hear the evidence of all of the witnesses, their statements being taken as read, ant complete the hearing of the case in one day.

3. The witnesses called on behalf of the respondent were Laura Forrest, Accounts and HR Manager, Mark Johnson, Operations Director, Lee Robinson, Service Supervisor, Lee Hill, Install Engineer, Richard Downes, Service Manager and

Stephen Bellamy, Managing Director. The claimant gave evidence on his own behalf and called one witness, Paul Bell. Neither of the parties was legally represented.

4. I found the following facts:

4.1 The Respondent is a company dealing in security and safety services for a large number of clients. They operate from premises in Darlington.

4.2 The claimant commenced employment with the company on 12th September 2016, initially as an apprentice, dealing with the provision of services as a security engineer.

4.3 The only previous issue arising from him occurred during the time he was an apprentice when he had been transferring oil from one container to another and there had been a spillage. Although the company maintained that this resulted in him being given a warning (which had already expired), Mr Tinkler did not accept that he had received any formal warning. No documents were produced as to that earlier incident or the warning referred to. The circumstances giving rise to dismissal commenced with an incident which occurred on the afternoon of Friday 26th June 2020. Mr Tinkler had been working away from the company premises and returned at approximately 1.30pm. It was a humid day; it had previously been raining. He had been using a Mercedes Sprinter Cherry Picker vehicle, parked it near to his own vehicle and was in the process of moving equipment between the vehicles. In the course of doing this a bottle containing FAAC barrier hydraulic fluid fell on to the ground and the lid or top came off. Mr Tinkler checked the area for oil as he thought that it was a possibility that oil had spilled. He maintained that he could not see any oil. He replaced the bottle in his van and did not invoke any of the safety procedures or policies in place with regard to dealing with spillages of oil including the application of absorbent material.

4.4 Two hours later the claimant received a telephone call asking if he was aware that there had a spillage of oil in the parking area and he said that he was not.

4.5 On the afternoon in question Mark Johnson, Operations Director, was walking across the yard with Lee Robinson. Mr Johnson stated that he had slipped and nearly fallen in what was described as a puddle which had seemed to be water from earlier rain. However, on checking Mr Robinson and Mr Johnson found that the substance on the ground was oil. This was reported to Mr Downes, Service Manager, (and also the claimant's line manager) who investigated. From further enquiries it was concluded that it was Mr Tinkler who had been involved in the oil spillage.

4.6 The claimant was spoken to about this and he conceded that an oil bottle had fallen out of the van, the lid was off, but that he checked and there was no spillage of oil or at least he could not find any.

4.7 The Respondent's CCTV service which covered the car park was checked although this was not seen by the claimant. The footage was reported as having shown the claimant in the yard moving his foot in a way which demonstrated that he was checking the surface of the ground. It was accepted throughout that the claimant did not report anything to Mr Downes or anyone else and did not put into effect any of the policies to clean up oil spillage.

4.8 Ultimately the matter was the subject of an investigation which led to the claimant being suspended and then called to a disciplinary hearing held by Laura Forrest. At the hearing the claimant did not accept that there had been a spillage and did not accept that he was at fault in not invoking any of the company's procedures. It had been put to the claimant in the letter inviting him to the disciplinary hearing that he was facing three charges. 1 serious breaches of the health and safety policy; 2 failure to carry out a reasonable authorised instruction and serious disregard of duties; and 3 dishonesty.

4.9 At the disciplinary hearing on 8th July 2020 Miss Forrest found that the charge of dishonesty was not established as this related to the account which Mr Tinkler had given as to who was present on the day in question and she accepted that this was merely a mistake on the part of the claimant. She did find that the other charges were established and she decided that this amounted to gross misconduct and she dismissed the claimant summarily for this and confirmed this in a letter of dismissal dated 8th July, the day of the disciplinary hearing. It was stated in the letter that dismissal was on the grounds of gross misconduct and based on ignoring/disregarding a serious health and safety risk and disregarding duties required to ensure the work area was safe. It was stated that Mr Tinkler had confirmed he had checked the area where the oil spill had occurred but chose not to notify his line manager and he had acknowledged that he was aware of the emergency spill procedure and the risks from an oil spill. The explanation he had given had not been found to be acceptable.

4.9 It was noted that from the notification to the claimant on the Monday morning of the week following the incident, he had been allowed to work for the Respondent away from site for a week before he was subsequently suspended until attending a disciplinary hearing.

4.10 The claimant appealed out of time but his appeal was heard by Stephen Bellamy, Managing Director. The main ground of appeal raised by the claimant was to the effect that he had been allowed to work for one week notwithstanding that he was accused of having committed a serious offence and that the claimant had spoken to ACAS and the Citizens Advice Bureau. He put forward that allowing him to work on, was inconsistent with the allegation of gross misconduct. The appeal was heard on Thursday 13th August by Stephen Bellamy who reviewed the grounds of appeal and upheld the dismissal.

4.11 Although reference was made to CCTV footage, this was stated to be no longer available as it had been covered by subsequent filming and there was

no procedure in place at the time for such footage to be preserved or archived, a point which the respondent conceded was erroneous and which has now been remedied. The only evidence from the CCTV footage was verbal evidence from those who had viewed it, which did not include the claimant.

Submissions

5. On behalf of the respondent, Miss Forrest argued that health and safety matters were taken very seriously by the Respondent and that spillages of oil could lead to very serious incidents. This had also been referred to by Mr Bellamy and Mr Johnson to the effect that if anyone in the car park stood in oil and then drove a vehicle, their feet could slip on the pedals which could cause serious or fatal accidents. Miss Forrest submitted that the company took the view that it was essential that procedures are taken very seriously and that the claimant did not take the policies in this way. Throughout the disciplinary process, he continued to deny that there had been a spillage of oil notwithstanding the evidence. she said the Company could no longer trust him. She maintained that in these circumstances it was appropriate to dismiss the claimant rather than invoke any other penalty.

6. On his own behalf the claimant submitted that the dismissal was unfair. He complained that he had not seen the CCTV and that despite his inspection of the ground he had not seen any oil spillage. He had maintained that the CCTV would back him up in the sense that it would show that he was checking the ground for CCTV. He further submitted that it was unfair for him to have to work for a week after the incident if he was being accused of such a serious offence. Nothing had been said to him about the fact that there was to be a full investigation until a week later. He reiterated that if he was guilty of gross misconduct he should not have been used to work away from site for a week. He was shocked when he had been suspended and felt that all that would happen was that he would receive a talking to.

7. Miss Forrest further stated as to the claimant working away and not being notified, many of the workers are operating away from home and it would not be policy to cause them distress by raising serious matters with them when they were away from home and away from their loved ones and support networks. She conceded that there would be some cases of gross misconduct where it would be considered appropriate to suspend an employee immediately rather than them continuing to work. In Mr Tinkler's case she suggested that he did not set a lot of store in the health and safety procedures.

Findings

8. The issues identified by Employment Judge Aspden and as set out in her orders were in standard form for unfair dismissal cases where the respondent admits dismissal and gives the reason as misconduct:-

    8.1 What was the reason or principal reason for dismissal i.e. what were the facts known, or the beliefs held, which caused the respondent to dismiss the claimant?

8.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In connection with this it will be for the tribunal to decide:

(a) there were reasonable grounds for believing the claimant had committed misconduct;

(b) at the time the belief was formed the respondent had carried out a reasonable investigation;

(c) the procedure followed by the respondent was otherwise reasonable ie within the range of reasonable responses open to a reasonable employer (the dismissal was within the range of reasonable responses open to a reasonable employer).

9. In accordance with Section 98 (1) of the Employment Rights Act 1996 I considered what was the reason, or if more than one, the principal reason for dismissal and whether it was a reason falling within Section 98 (2). I find that the reason for dismissal as stated by the respondent was a reason related to conduct which is a potentially fair reason.

10. I considered the enquiry and investigation undertaken of the matter according to the test set out in the well-known case of British Home Stores Limited v Burchell 1978 IRLR379EAT which involves three elements:

10.1 I found that the employer established fact of the belief and that the respondent when dismissing the claimant genuinely believed that the claimant was guilty of the misconduct alleged, namely failing to follow health and safety procedures and failing to take appropriate steps to remove or minimise a danger.

10.2 I find that the employer had reasonable grounds upon which to sustain that belief which arose as a result of the investigation and the direct evidence of employees seeing the oil spillage on the ground near the claimant's vehicle and seeing the bottle from which it was concluded that the leakage came, as well as the claimant being in the direct vicinity.

10.3 I find that in forming this belief on these grounds, the respondent carried out as much investigation into the matter as was reasonable in all the circumstances. This involved interviewing all of those witnesses who had any connection with the incident or any supervisory responsibilities and this was demonstrated from the six witnesses who gave evidence at the tribunal and included those who had actually seen the oil on the ground and Mr Mark Johnson who had slipped on it. It also included interviewing the claimant and having him attend a disciplinary hearing at which he was given the opportunity to explain the circumstances. He conceded the essential facts namely that he knew of the bottle oil being on the ground without its cap on carrying with it the obvious consequence that oil could have spilled even though he continued to maintain that he saw no evidence of a direct spillage.

11. In considering the fairness of the dismissal I take into account the established case of Iceland Frozen Foods Limited v Jones 1982 IRLR429 which establishes that the function of the employment tribunal is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. I also take into account that in judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. On the basis of the evidence, I find that the implementation of, and observance of, health and safety procedures in relation to oil spillages is something of considerable importance in the business of the respondent. Taking into account the claimant's actions and his attitude exhibited both at the disciplinary hearing and the appeal, dismissal was decided upon as the appropriate sanction. Miss Forrest conceded that there were other possible sanctions such as a warning, final written warning or additional training. However, the accounts given of the disciplinary hearing and the appeal hearing showed that there was no evidence of any remorse, apology or assurance given by the claimant with regard to what occurred or any demonstration that he took seriously issues regarding spillage. Even though it was obvious to him that there could well have been an oil spillage, he took no steps to report this to his line manager or anyone else which left open the possibility that there had been such a spillage with possible serious consequences.

12. Whilst the claimant made much of the fact that he was allowed to carry on working for approximately one week after the incident that had occurred and argued that this was inconsistent with him being considered to be such a risk and having committed gross misconduct, this was not a point which I consider invalidates the decision made by the employer to dismiss. Some employers may have suspended the claimant at an earlier stage but the fact that he was not suspended does not validate the decision to treat his misconduct as gross misconduct after the full investigation and a disciplinary hearing.

13. Taking into account all of the circumstances of the case including the serious consequences of oil spillages and the nature of the respondent's business, I find that for the respondent to have decided to dismiss the claimant in these circumstances was within the band of reasonable responses which a reasonable employer might have adopted. The fact that some employers may have taken a different view does not mean that I should categorise the actions of this respondent employer as unreasonable and I do not do so.

14. Accordingly applying the statutory test of unfair dismissal as set out in Section 98 (4) of the Employment Rights Act 1996 I find that the claimant was fairly dismissed and accordingly his claim fails.

15. There were shortcomings with regard to the way in which this incident was dealt with by the respondent although I do not find that they are to an extent which makes the dismissal unfair. This included the failure by the respondent to safeguard and retain the close-circuit TV footage of the area at the time of the relevant incident as it should have been obvious that this would have been of value. It is noted that the

procedures of the respondent are said to have been changed subsequently. It was also noted that the company could have shown more express consideration to alternatives to dismissal such as final written warning or refresher training. However, applying the relevant legal tests to this case, I find as stated that the decision to dismiss, after the investigation undertaken, was one which was within the range available to a reasonable employer.

EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 24 August 2021