



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Cherifi

Respondent: Waltham Forest Services Ltd

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 10 September 2021 and 1 October 2021

Before: Employment Judge W Anderson

Appearances
For the Claimant: In Person
For the Respondent: Mr S Thakerar

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed.

REASONS

Claim

1. By a claim form presented on 16 March 2021, the claimant, Ziad Cherifi, complains of unfair dismissal. The claimant claims that he was dismissed unfairly, following an unfair disciplinary process, on 3 March 2021. The respondent filed a response on 21 April 2021 resisting the claim. The respondent said that the claimant was dismissed fairly after a disciplinary procedure, due to misconduct matters.

Issues

2. No list of issues for the tribunal to determine having been agreed between the parties, the following list was agreed at the outset of the hearing:
3. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment

Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

4. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant stated that the dismissal was unfair because the matters which the respondent investigated were not matters amounting to gross misconduct under the respondent's policy.
5. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that misconduct as a sufficient reason to dismiss the claimant? In particular the tribunal will consider whether:
 - a. there were reasonable grounds for that belief;
 - b. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - c. the respondent otherwise acted in a procedurally fair manner;
 - d. dismissal was within the range of reasonable responses.

Remedy

6. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8; *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; and *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604.
7. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent?
8. Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

The hearing

9. I received an agreed bundle of 334 pages. There was some discussion about late additions to the bundle and an earlier version of the bundle, however, it was agreed that pages 330 to 334 of the bundle contained the claimant's extra disclosure. A further document was submitted by the respondent on the morning of 10 September 2021 which was an email from Ashwin Kerai to Shahbaz Khan. I agreed that these extra documents should form part of the evidence. I received extracts of CCTV footage. In addition, I received three witness statements from the respondent and five from the

claimant including his own. All of the witnesses attended the hearing and gave evidence.

10. The hearing was listed for a single day but due to the number of witnesses it was not possible to hear all the evidence in one day. With the agreement of the parties the hearing was completed on a second day on 1 October 2021.

Relevant findings of fact

11. The claimant was employed by the respondent as a senior operating officer in an emergency command centre. The claimant's employment commenced on 29 March 2017 and he was promoted to the role of senior operating officer on 1 March 2019. The purpose of the centre includes the provision of monitoring of CCTV cameras throughout Waltham Forest, on behalf of the council, commercial clients and in partnership with the Metropolitan Police Service, as well as responding to call outs on behalf of vulnerable residents, who may, for example, have fallen. The respondent is a company wholly owned by the London Borough of Waltham Forest that provides a range of services for residents and businesses in east London.
12. The claimant worked night shift and amongst other duties including the monitoring of output from CCTV cameras across Walthamstow, his role was to supervise the night shift team.
13. One of the services provided by the respondent is to attend vulnerable residents in an emergency. The respondent had a process for dealing with such emergencies, the responder procedure. The respondent had a pool of employees who were authorised to attend emergency call outs. Attendees received a payment of £75 for any out of hours call that they attended. Attendees were allocated to a call out by way of a WhatsApp group. The senior operating officer in charge of a shift would advertise a call out in the group and anyone who could attend would confirm that by WhatsApp to the group. The responder procedure includes an instruction to allow five minutes after sending out a message asking for responders before escalating to an escalation list of senior managers. It also includes the instruction, for out of hours calls, that a senior on shift can decide whether staff on shift are able to respond and it is noted that '*The decision should not compromise the services provided by the Operations Centre.*'
14. On 24 September 2020 John Akhigbe, the claimant's then line manager, sent an email to various emergency command centre staff, including the claimant, about the responder procedure, reminding colleagues to follow the rules. The email included the instruction for critical situations to put the call out for five minutes and if no response '*then a member of staff from the control room can attend.*' The email went on to note the importance of not leaving the control room short of staff. The process set out in Mr Akhigbe's email differed from that set out in the respondent's procedure document, but not in any way that is relevant to this claim.

15. The claimant was on sick leave from 4 January 2021 to 11 January 2021 (four working days). He returned to work on 12 January 2021 and worked night shifts over 12/13 January 2021 and 13/14 January 2021. John Akhigbe conducted a return-to-work interview with the claimant on 18 January 2021 in which it was recorded that the claimant was absent with coughing and a headache.
16. On 21 January 2021, when at the centre on night shift, the claimant received an emergency call out which he advertised on the responder WhatsApp group at 01:17. He requested a single attendee and a member of the group responded immediately. The claimant then put out a second request for the same call and responded himself at 01:19. He attended the call with the first responder.
17. The call was logged on the respondent's Live Responder List and the call taker was listed as Shahbaz Khan. There was some dispute between the parties as to whether the column in which this was recorded, headed 'operator' actually referred to the person that took the call or that the claimant understood this to be the case. I am satisfied on the evidence that the column headed 'operator' was the column in which would be recorded the details of the person who took the call, and also that the claimant knew that.
18. Later in the morning of 21 January 2021 the respondent's Head of Commercial Development, Ashwin Kerai, attended the centre and looked at the Live Responder List. He noted that the call at 01:17 was logged as having been taken by Shahbaz Khan who was on the day shift on 21 January 2021 and Mr Kerai was concerned that Mr Khan was working a double shift.
19. Also on 21 January 2021 the claimant emailed John Akhigbe, his line manager, and explained his actions in relation to the 01:17 call. That explanation confirms that the claimant did not follow the responder procedure and sets out the reasons why the claimant attended the call out without following the procedure.
20. Mr Kerai asked David Nash, the Deputy Operations Centre Manager, to look into whether a double shift had been worked. He did, and this led him to investigating how the call that came in at 01:17 was handled, including reviewing CCTV of the control room at the time the call was received. Mr Nash, suspecting a breach of the responder procedure, invited the claimant to an investigatory meeting on 27 January 2021.
21. On 28 January 2021 David Nash suspended the claimant from the responder list by way of an email. On 29 January 2021 the claimant responded to a call out. Later that day David Nash removed the claimant from the responder WhatsApp group. The claimant said in evidence that as he was not at work he had not read his emails when he responded to the call on 29 January 2021 and I accept that evidence.

22. On 11 February 2021 an anonymous email was sent to Mr Nash and Ashwin Kerai asking the respondent to check CCTV for the night shift of 13 January 2021 alleging that night shift operators were sleeping on duty and abusing the responder system. Mr Nash reviewed the CCTV for 12/13 January 2021 and 13/14 January 2021. The CCTV footage, some of which I have viewed, shows the claimant to be inactive for long periods of time and he appears at some points to be asleep. Mr Nash interviewed the claimant in connection with this matter on 15 February 2021.
23. Mr Nash concluded that there was a misconduct case to be answered by the claimant in relation to both matters. The claimant was advised in a letter dated 17 February 2021 that he was required to attend a disciplinary hearing on 25 February 2021, to be chaired by Nicolas Licardo, the respondent's Operations Centre Manager. The allegations of misconduct were described as '*a breach of the Responder policy*' on 21 January 2021 and that the claimant '*failed to carry out your role to the required standard and potentially have been sleeping whilst on duty*' on 12 and 13 January 2021. The letter advised the claimant that dismissal was a possible outcome.
24. At the hearing on 17 February 2021 the claimant made a request to be allowed to record the meeting on his telephone and this request was granted. The claimant said at the meeting that he did not follow the responder procedure as he was experienced in these matters and knew that no one else on the list was able to respond, also that the escalation procedure did not work. He said that he had been using his initiative in a critical situation and denied that those left in the centre were not experienced enough to deal with any matters that may arise in his absence. He noted that he was absent when he went on breaks in any event. He said that he had come into work on 12 January 2021 despite being unwell, as in a call with John Akhigbe earlier that day Mr Akhigbe had told him he had been unable to find anyone to cover his shift. The claimant said in oral evidence that Mr Akhigbe was alluding to the fact that he could not find cover and asking if the claimant could come in even if unwell. Mr Akhigbe, who was called by the claimant as a witness, said in oral evidence that he could not recall speaking with the claimant on 12 January, was unlikely to call someone after a four-day absence for a welfare check, and would not expect team members to come to work if they were unfit for work. I am satisfied on the evidence that Mr Akhigbe did not put pressure on the claimant to come into work if he was too unwell to do so. During the disciplinary hearing the claimant said he had been absent due to having nosebleeds and feeling weak. He said he did not contact his GP.
25. Following the meeting Mr Licardo made the decision to summarily dismiss the claimant for gross misconduct. This was set out in a letter that is undated but was hand delivered to the claimant on 3 March 2021, and included the line, that the claimant was '*dismissed with immediate effect from 3 March 2021.*' The reasons given for his dismissal were:

'Following a full review of the facts presented at the hearing by David Nash as investigating officer and your response to the case, I consider your

explanations to be unsatisfactory for the following reasons: The information provided by yourself in relation to the decision to attend the responder request on the 21st January was not supported with any justification or rationale. The decision did not factor nor take into consideration previous instructions from the Team Leader and Management instructions on updates to procedures which you acknowledged on receiving. On the 12th/13th January night shift, it was witnessed on CCTV that there was a lack of supervision and direction given by yourself which in turn impacted productivity / pro-active monitoring of life safety systems. On occasions, it was shown that the CCTV and other systems were left unmanned with no trained/qualified staff operating the system(s) and non-CCTV staff actioning Life Safety Alarms. The actions from this night shift could have led to severe/fatal consequences as the reaction/response times to incidents (either identified through CCTV, requested by Met Police or signalled through other Life Safety systems) would have either been delayed or potentially not identified.

This issue of sleeping is perhaps the most significant based on the fact that your role as a Senior CCTV Operative requires you to be alert and engaged at all times. It is totally unacceptable to believe how you could think it would ever be appropriate to fall asleep for any period of time. This could have significant ramifications if a serious incident occurred within the borough and you were asleep and therefore not responsive in an emergency.'

26. The claimant appealed the dismissal on 4 March 2021 and attended an appeal hearing with his union representative on 11 March 2021. Mr Kerai was the appeal manager. Mr Kerai upheld the dismissal in a letter dated 16 March 2021.

Submissions

27. For the respondent, Mr Thakerar noted that there were two separate acts of misconduct alleged, that of lack of supervision on the shifts of 12 to 13 of January and 13 to 14 January 2021 and secondly a failure to follow process on 21 January 2021. In relation to the first allegation, there had clearly been a lack of supervision of junior employees and the CCTV was unmanned. The claimant was sleeping or inattentive and unresponsive. Mr Thakerar said that on 21 January, the claimant failed to follow process despite being aware of that process. The respondent therefore had genuine grounds to suspect misconduct. This was based on a reasonable investigation.
28. Mr Thakerar said there was no need to turn over every stone when conducting an investigation. There were two separate investigations conducted by Mr Nash. He noted that the initial allegations of forgery in relation to the live responder list did not form part of the reasons for dismissal and therefore in relation to the investigation carried out in respect of that incident on 21 January 2021 there was no need for further investigation involving witnesses.

29. Mr Thakerar said that in relation to the incident from 12 to 14 of January 2021, there was a more in-depth investigation. Mr Nash spoke to witnesses and looked at CCTV footage. He noted that the footage was also viewed subsequently by the decision manager and the appeal manager. Mr Thakerar said the interviews with Mr Abdinasir and Mr McCarthy, were not conclusive evidence as to whether the claimant was sleeping and noted that the claimant had said in oral evidence that he could not remember being asleep, rather than denying it outright. In any event, taking the claimant's case at its highest the claimant was doing little or no work, as evidenced by the CCTV footage. There is no evidence that he is monitoring the screens and is clearly not using the joystick. He is also not engaging with other members of the team for significant parts of the shift.
30. In relation to the incident on 21 January 2021 the claimant has clearly failed to follow process. The process was made clear to him on at least two occasions. The claimant had made assumptions about who would or would not respond in a WhatsApp group of 24 people. Mr Thakerar said the claimant could not have known that no one else would respond.
31. Mr Thakerar said that the decision to dismiss the claimant for gross misconduct clearly fell within the range of reasonable responses. He noted the claimant's complaint that his mitigation had not been taken into account but said that was not correct. It had been taken into account but sleeping on the job and failure to carry out core responsibilities were matters of gross misconduct. They may not be mentioned in the respondent's disciplinary policy, but they do not need to be. The list is not exhaustive and it was a reasonable decision to dismiss on the basis of these incidents.
32. The claimant said that the tribunal should find in his favour. He referred to case law which he said showed that relying on anonymous acts was not a reasonable ground for dismissal and case law setting out that HR advice should be limited to matters of law and procedure, as opposed to questions of culpability and sanction. The claimant said that neither of the people questioned about the events of 12 to 14 January 2021 said he was asleep and also said that David Nash was not a suitable person to carry out investigations into his conduct. The claimant said that Mr Nash was too new to the business to understand the systems and also that he had malicious intent as complaints had been raised about his behaviour by the claimant and other employees.
33. The claimant said that he was disadvantaged in terms of witness evidence as the respondent's employees had been told that Mr Nash should be informed if they were to provide a witness statement for the claimant.
34. The claimant noted that there were no complaints from service users for the period 12 to 14 January 2021, and that no responses were missed and therefore this behaviour was not enough to constitute gross misconduct. He pointed out that Mr Licardo had confirmed in evidence that the claimant had not received formal leadership training and yet he had been sacked for lack of leadership. He said that Mr Kerai, the appeal manager, agreed in

evidence that the claimant could have improved, but failed to give him the chance to do so, and noted that he had an unblemished work history prior to these events. The claimant noted that if he did fall asleep Mr Licardo had said in the disciplinary hearing that it seemed he was doing his best to keep himself awake. The claimant said that if he was unwell this shows that his behaviour was not deliberate.

35. The claimant said that HR had been involved in transgressions in the disciplinary process and pointed to a number of examples in the documentary evidence where the respondent's HR advisor, Ms Stringer, made comments during the disciplinary process. He said that these went beyond giving HR advice. The claimant said that his dismissal was not based on a genuine belief but one of speculation.

Decision and Reasons

36. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.
37. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. I am satisfied on the evidence that the Claimant was dismissed for misconduct.
38. At the outset of the hearing the claimant confirmed that the claim he was making was that the dismissal was unfair because the matters which the respondent investigated were not matters amounting to gross misconduct under the respondent's policy. During the hearing, including in closing submissions, he put forward a claim that Mr Nash had started the investigations with malicious intent due to complaints made about him by the claimant and other members of staff. Mr Nash was asked by Mr Kerai to look into the matter of the call out on 21 January 2021 and discovering some anomalies went on to investigate those, he was alerted (as was Mr Kerai) to the claimant's conduct on 12-14 January 2021 by an anonymous email. He investigated the matters, and his managers made the disciplinary and appeal decisions. I find that there was no reason for the claimant's dismissal other than the respondent's belief in his misconduct.
39. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and 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.
40. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide

whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439*, *Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*, and *London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

41. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant on his own admission did not follow the respondent's responder procedure on the night of 21 January 2021. CCTV footage viewed by the respondent for 12-14 January 2021 shows the claimant to either be asleep, or at least failing to actively monitor computer screens, for significant parts of his shifts. Again, as admitted by the claimant, proactive monitoring of the screens is part of his job.
42. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.
43. As noted above the claimant admitted that he did not follow the respondent procedure on 21 January 2021, both during the disciplinary process and during this hearing. The respondent's Mr Nash investigated the incident, interviewing the claimant, as well as checking WhatsApp messages, viewing CCTV, and obtaining evidence about the dissemination of the procedure to employees. He did not interview anyone other than the claimant and that may have been pertinent in relation to the matter of whether the claimant deliberately falsified or asked someone to falsify the Live Responder List, however, that matter was not relied upon by Mr Licardo, the decision manager, when making his decision to dismiss the claimant. The matter relied upon was failure to follow the responder procedure.
44. In relation to the incidents of 12-14 January 2021, following receipt of an anonymous email, Mr Nash viewed CCTV footage of the two relevant night shifts, interviewed two witnesses and interviewed the claimant. The matter investigated was simply whether the claimant was fulfilling his duties on the shifts in question. The claimant referred to case law concerning reliance by an employee on anonymous witness evidence. In this case, whilst the investigation was triggered by anonymous evidence, the investigator's conclusions were based on the information obtained from watching CCTV footage and interviewing employees on the same shifts. This was information independent of the anonymous email.

45. I find that the investigations into both matters were adequate and reasonable.
46. Following the investigation, the claimant was invited to a disciplinary hearing, he was given the opportunity to be accompanied and he was granted permission to record the meeting. After the respondent dismissed the claimant, he was given the opportunity to appeal the decision. He attended a hearing with the appeal manager and had a trade union representative with him at the meeting.
47. The claimant said that the interventions of the respondent's HR representative, Ms Stringer, during the meetings were such that she went beyond the role of giving HR advice and was actively encouraging the decision makers to find against him. I do not agree. Ms Stringer has asked some questions which the decision makers did not but there is no evidence that her interventions were such that they materially influenced the decision makers so that their decisions were not independent. There is no evidence that Ms Stringer sought to influence the decision managers to make a particular decision.
48. I find therefore that the disciplinary process carried out was reasonable and must then consider whether the decision to dismiss was within the range of reasonable responses. The claimant made a number of points on sanction. He said that the conduct of which he had been accused did not fall within the definition of gross misconduct in the respondent's policy. The respondent pointed to the description 'serious act of subordination' and the claimant's general conduct. Mr Thakerar noted that the list is not exhaustive. I have no hesitation in finding that failure to follow a procedure, the purpose of which is to ensure assistance is provided to vulnerable adults, and sleeping on duty (or failing to actively attend to duties), could reasonably be construed as acts of gross misconduct warranting summary dismissal. The claimant provided explanations for his actions, including pointing out failures in the responder procedure, his experience of dealing with the procedure, and also noting his ill health on 12-14 January 2021. He also pointed out his record and put forward that the purpose of the disciplinary process was to help employees improve. Whilst the respondent must take these matters into account when considering the sanction to be imposed, it is clearly within the range of reasonable responses to decide that the misconduct was serious enough to warrant dismissal despite the explanations. In his letter of 16 March 2021 dismissing the claimant's appeal Mr Kerai set out that he had considered all of the claimant's mitigation, including his record and concluded that the seriousness of the claimant's conduct was such that it could not be ignored. I find that this decision is one that was open to the respondent on the evidence.

49. I therefore conclude that the dismissal of the claimant by the respondent on 3 March 2021 was fair, and the claimant's claim is dismissed.

**Employment Judge W Anderson
Date: 11 October 2021**