EMPLOYMENT TRIBUNALS

Claimant: **Mr R Lidford**

Respondent: **Winn's Security Services Limited**

Heard at: **East London Hearing Centre**

On: **2nd September 2021 and 11th November 2021**

Before: **Employment Judge Reid**

Representation

Claimant: Ms Ahari, Counsel

Respondent: Mr Stebbings, director (day one); Mr Hines, Peninsula (day two)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT (Reserved)

The judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996. Compensation is set out below.

2. The Claimant was not wrongfully dismissed by the Respondent and that claim is dismissed.

Compensation for unfair dismissal

A. Basic award

20 complete years'' service x 1.5 x £523.17 = £15,695.10

Less deduction at 75% under s122(2) ERA 1996 (£11,771.32)

= £3923. 78

B. Compensatory award

4 weeks x net pay £421.15 = 1,684.60

Plus loss of statutory rights £350

= £2034.60

Plus increase under s124A ERA 1996 for breach of ACAS Code at 25% (£508.65)

= £2,543.25

Less deduction under s123(6) ERA 1996 at 75% (£1907.43)

= £635.82

A + B total compensation = £4,559.60

REASONS

Background and claim

1 The Claimant was employed by the Respondent from 1st October 1993 to 21st September 2020 when he was dismissed for gross misconduct with immediate effect. He had had different roles during that period but at the time of the dismissal had reverted to being a security guard since 2012. At the time of his dismissal he was assigned to a client of the Respondent, EGL, to provide security services at EGL's site.

2 The Claimant presented a claim on 26th February 2021 claiming unfair dismissal and wrongful dismissal. The Respondent's case as put in its response was that he had been fairly dismissed for gross misconduct based on two allegations namely that he had urinated outside by a lorry and that when doing that that he had left the EGL site unsecured for this period.

3 The Claimant's case was that his dismissal was unfair and wrongful firstly because he had not breached any security protocols about leaving the site unsecured, secondly his 27 years' service with the Respondent was not taken into account when he had apologised for urinating outside (an incident he admitted to), thirdly the Respondent characterised his conduct as ' unsatisfactory' when it dismissed him which was not the same thing as gross misconduct, thirdly another employee who had misbehaved at the site was moved to another site and was not dismissed, fourthly the Respondent had breached the ACAS Code of Practice as it had not provided him with the CCTV stills of the urination incident before the disciplinary hearing (only showing them to him during that hearing) and fifthly the Respondent had not held an appeal against his dismissal.

4 At the beginning of the hearing I clarified the Respondent's case with Mr Stebbing

because the response was very brief. He said he had taken some advice about the claim from the Respondent's insurers when the claim had been received. He confirmed that the Respondent would argue that the dismissal was procedurally fair notwithstanding the lack of an appeal because it was the Respondent's case that the Claimant had never asked for one. He confirmed that the Respondent would in any event be arguing even if the Claimant won his unfair dismissal claim that he contributed to his dismissal and that even if a fair procedure had been followed he still would have been dismissed (a Polkey deduction). Although Mr Stebbing appeared familiar with these arguments I explained how they worked as the Respondent was not represented and explained the different tests for the unfair dismissal claim and the wrongful dismissal claim.

5 I also clarified with Mr Stebbings who took the decision to dismiss the Claimant as it was not particularly clear from the documents leading up to his dismissal. Mr Stebbing said at the beginning of the hearing that the decision to dismiss was taken by Mr Dollard (Contracts Manager), the Claimant's line manager (who has subsequently left the Respondent so did not attend as a witness) who had also conducted the investigation meeting. However following Ms Agombar's evidence Mr Stebbing said that the Respondent's case was that the decision to dismiss was made by Ms Agombar, although she had consulted HR about it before making that decision and had asked Mr Stebbing to 'ratify' the decision, meaning, as explained by Mr Stebbing, a procedural check before dismissal to check that the right meetings had been held and the right letters and documents produced. Mr Stebbing said he had mistakenly said at the beginning of the hearing that it was Mr Dollard who took the decision to dismiss.

6 Two meetings were held with the Claimant before he was dismissed, an investigation meeting on 14th September 2020 and a disciplinary meeting on 17th September 2020. Due to an error when the notes of these meetings were scanned and saved after the meetings (the paper copies not then being kept) the second page of each of these sets of notes was missing.

7 Part of the evidence included CCTV stills provided by EGL, said by the Respondent to be the evidence of the Claimant urinating against a lorry. The Claimant's case was that whilst he accepted that he had urinated outside, the CCTV stills were of him walking to a lorry on another occasion in order to get into the shade as it was a hot day and were not of the urination incident.

8 There was an absence of evidence from EGL in relation to (a) an account from the person said to have seen the Claimant urinating (referred to by Mr Dearlove WS para 3) and (b) express confirmation that the CCTV stills provided for 16.37 were the urination incident said to be witnessed by an EGL member of staff. Whilst the Claimant admitted outside urination by a lorry, tying the stills to that incident was important due to the other allegation of leaving the site unsecured because the two incidents were different.

9 I was provided with an electronic bundle (80 pages) and witness statements for the Claimant, Ms Agombar, Mr Stebbing, Ms Carless (who explained the issue with the meeting minutes) and Mr Dearlove of EGL (the latter four in the form of letters plus one extra email from Mr Dearlove dated 26th July 2021 regarding retention of CCTV footage). Mr Stebbing also provided the Respondent's disciplinary procedure during the hearing. On the first day of the hearing I heard oral evidence from Ms Agombar and Mr Stebbing and as he was unwell and unable to attend the hearing was asked to take into account the witness

statement of Mr Dearlove at EGL. I heard a small part of the Claimant's evidence but unfortunately due to technical issues meaning the sound quality was poor the hearing had to be stopped and relisted for a second day, 11th November 2021, to complete the hearing with arrangements being made for the Claimant to attend the Tribunal if necessary, though in the event he had the help of his step son on day 2 and there were no further technical issues. When relisting the second day I identified with the parties that the hearing would cover evidence and submissions on remedy too on the second day so that if the Claimant won one or both of his claims there would be no need for a second remedy (compensation) hearing.

10 By the second day of the hearing the Respondent was represented. Because some questions had been asked in chief of the Claimant and his cross examination had started for a few minutes, I recapped this part of the evidence for the Respondent's representative at the beginning of the second day so that he would know what questions the Claimant had already been asked and the answers he had already given. I asked if Mr Dearlove of EGL was going attend to give evidence as he had been unable to on the first day due to illness, but was told he was not.

11 Mr Stebbing reviewed the Claimant's schedule of loss and confirmed on the first day of the hearing that the figures were agreed as to net weekly loss and gross weekly pay, although it was not accepted that the Claimant was due any compensation. He also confirmed that the Respondent was not going to argue a failure to mitigate by the Claimant. By the second day the schedule of loss had been updated to correct an error in the calculation of the basic award and it was confirmed again on behalf of the Respondent that the figures were agreed and that mitigation was not in issue. It was also accepted on behalf of the Respondent prior to submissions that the Respondent was not going to argue in relation to the unfair dismissal claim that the dismissal was within the range of reasonable responses for the urination and not wearing high-vis allegations, but would argue that that it was within that range for the security breach allegation.

Findings of fact

Dismissal procedure followed by the Respondent

12 The Claimant's oral evidence was that he had not received the letter inviting him to the investigation meeting (page 46) though Ms Agombar's oral evidence was that she had put it through his letter box. The Claimant said he had been made aware of the investigation meeting by a phone call from Mr Dollard. Even if the Claimant did receive the letter, the letter did not squarely put the then allegation to him as to what exactly he was being accused of. It refers to the issue being his removal from the EGL site but does not say what he was said to have done wrong at the site. Given the way the allegations then shifted over time (see findings of fact below) it was important that this letter was clear as to what the Claimant was said to have done wrong and so he could prepare for the meeting. The Respondent's case was also that the Claimant had been sent another letter confirming his suspension but none was produced from which I find that it was not sent.

13 At this stage there was one allegation, namely the report by EGL that the Claimant had been seen urinating outside. Based on Mr Stebbing's witness statement (who visited EGL) and in the absence of any evidence from Mr Dollard about the phone call he had with the Claimant I find that the only allegation the Claimant was therefore made aware of prior

to the investigation meeting was the urination allegation.

14 The Claimant attended the investigation meeting on 14th September 2020. There were now two allegations (see heading, namely leaving the gate (ie the up and down barrier) open and urinating on property), only one of which the Claimant had been notified in advance by phone. Mr Dollard conducted the investigation and Ms Agombar was there as notetaker. I find that the CCTV stills (pages 69-75) were not shown to the Claimant at this meeting because firstly there is no mention in the notes that he is shown them (and by contrast in the disciplinary hearing there is a reference to them being shown to him, page 54). Secondly he is noted (page 49) as saying he left the barrier down (ie closed) when he went outside to urinate, when the stills show it was up so if he had them in front of him he would be unlikely to have said this. Thirdly Mr Dollard is noted as saying he had asked for evidence from the client suggesting he had not yet received the CCTV stills. Fourthly Ms Agombar said (WS para 3) that after the investigation meeting further investigations were carried out which identified also that the Claimant had not been wearing a high vis jacket and had left the barrier up but these two additional matters was already evident from the stills and so that would not have required further investigation as had the stills been produced at that meeting it would have been obvious that the barrier was up and that that he was not wearing a high vis jacket. Fifthly although the second page of the meeting notes was not available, the end of page one records that Mr Dollard notes the Claimant as accepting he urinated outside and asks if there is anything the Claimant wishes to say which is more in line with the meeting coming to a close, taking into account the Claimant had admitted to urination outside.

15 I therefore find the Claimant was not shown the CCTV stills (or provided with the footage in another way) at the investigation meeting and was not shown the stills until during the disciplinary hearing on 17th September 2020. Although he accepted he had urinated outside, the non-provision of the stills either before or during the investigation meeting meant he was operating slightly in the dark about the by now new second allegation introduced at the meeting about leaving the barrier up.

16 The disciplinary hearing was held on 17th September 2020 by Ms Agombar with Mr Dollard now as notetaker. The notes (page 52) were wrongly headed Investigation and it was accepted at the hearing that that was an error and that the heading should have been Disciplinary. The allegations now included a new third allegation regarding not wearing high–vis, not an allegation the Claimant had been told in advance was being made (page 51) or discussed at the investigation meeting. The CCTV stills were shown to the Claimant and the Claimant accepted at this meeting (WS para 8-9) that he had left the barrier up (but denied he should have closed it, saying it was left open till 10pm in line with procedures) and that he had urinated outside. He accepted he had not been wearing high-vis but disagreed that he had been required to wear in in the particular area he was in. He did not raise the issue he later raised (attachment to email from Mr Dearlove dated 26th July 2021)) about urgency being a problem due to the medication he was on.

17 The upshot at the end of this meeting was that the Claimant admitted that he had urinated outside and had apologised. He accepted that he had left the barrier up. In his witness statement he said in mitigation that he had always kept the barrier in his line of vision but that was at odds with his account of first going to the toilet block and finding it occupied/partly sealed off due to COVID restrictions as he could not have kept in in sight. The Respondent was therefore reasonably entitled to conclude that he had left the barrier

up (which he accepted he had done), reject his claim that he had kept the barrier in sight and conclude that this was in any event a serious matter, his primary responsibility (based on Ms Agombar's oral evidence) at the site being to keep the site secure and to close down the barrier if having to leave the security cabin/office next to the barrier and go elsewhere on site (and on his own account he had been to the toilet block first so had not just briefly stepped outside to urinate). The core of what he admitted was that he had urinated outside and had left the barrier up for a period including a trip to the toilet block first, even if the CCTV stills were of him at another point in the day and were confusing matters somewhat.

18 The Claimant was then dismissed (page 56) with immediate effect. I find the decision was taken by Ms Agombar. The letter did not say he was being dismissed for gross misconduct but instead for 'unsatisfactory conduct', unsatisfactory conduct not being a ground for dismissal without notice. The letter referred to two allegations being found, namely the urination incident and the security issue about the barrier being left up (referred to as the 'gate'). Although Ms Agombar said at the hearing that he had been dismissed for all three matters and missing out the third had been an error ie also including the failure to wear high-vis (see also WS para 4) I find, taking into account the Respondent's response which also only refers to the other two reasons (page 56) that when the Claimant was dismissed what was in Ms Agombar's mind was the urination incident and the security breach and that in effect the high vis allegation was in practice not being included or pursued, likely to be because in context the other two allegations were already sufficiently serious in her mind, taking into account her oral evidence that for her the more serious issue was the security issue, that being the Claimant's primary responsibility. The Claimant had referred to his very long service at the disciplinary hearing (page 55) and I find she considered it but rejected it in the light of what she considered a serious security breach. The dismissal letter did not advise the Claimant of his right of appeal.

19 The Claimant then wrote to Ms Agombar to say he had not been told about his right of appeal as he should have been and asking for any new disciplinary policy if there was one and asking that before his appeal he would like an explanation of the severity of the punishment. Whilst the Claimant also raised other issues (such as regards the meeting minutes) I find it is clear from this letter that the Claimant wanted an appeal and that at least one of the grounds was to be the severity of his punishment. At this stage he had not been told how to appeal in any other way in the dismissal letter. Mr Dollard replied to this (page 58) advising the Claimant that he did have the right to appeal and to send his appeal to Mr Stebbing within 7 days. The Claimant duly emailed Mr Stebbing in that timeframe (page 59) and although he did not expressly say this was his appeal or ask for an appeal hearing he was contacting Mr Stebbing as advised to do (although raising other matters ,such as the provision of the minutes and the return of property). I find based on Mr Stebbing's oral evidence that when he received this email he had seen the letter the Claimant had sent to Ms Agombar from which I find that in context it was unreasonable of Mr Stebbing to conclude that the Claimant was not appealing his dismissal. He had already in effect done so to another manager (Ms Agombar) and Mr Stebbing was aware of that letter and the Claimant had contacted him as advised to do.

20 The procedural failings by the Respondent were therefore firstly the failure to provide the CCTV stills to the Claimant until during the disciplinary hearing (ie not before it so that he could consider them in advance), secondly the shifting nature of the allegations throughout the process without each allegation being put clearly to the Claimant in writing in advance so that he could prepare his case and thirdly the lack of an appeal.

21 I also find therefore that the Respondent breached the following provisions of the ACAS Code of Practice: para 9 (provision of sufficient information to enable employee to answer case at disciplinary meeting) and para 26 (provide for appeal). I find these to be unreasonable failures because although not having a large management structure the failings were not due to not having a sufficiently large management team and Mr Stebbing would have been the appeals officer.

The Claimant's conduct on 9th September 2020

22 Taking into account the absence of evidence from the manager at EGL who witnessed the urination incident (which would be likely to have identified the approximate time of the incident) and the fact that the stills do not show the Claimant first going to the toilet block and returning, I find that the CCTV stills are not of the urination incident, but of another time that day when the Claimant stepped outside. On the Claimant's account he had been absent for at least a few minutes because he had gone to the toilets first on another part of the site and this required walking through another building to get there and this footage only covers 16.37.40 to 16.37.52. I find that he did go to the toilet block first because he was consistent in that part of his account from the investigation meeting onwards.

23 The Claimant accepted he had urinated outside and in his oral evidence that Mr Dearlove had informally spoken to him about a previous incident of outside urination. Whilst he had not been formally warned by the Respondent, he was aware it was not considered acceptable by EGL and this was the context of this further incident.

24 In relation to leaving the barrier up and therefore the site unsecured, the Claimant has given a conflicting account as set out below, even taking into account the confusion created because the CCTV stills he was shown at the disciplinary meeting were not the correct ones.

25 The Claimant's account of whether he had closed and secured the barrier in line with procedures he identified himself (lock the office, put up sign and secure barrier shut ie down), when he went to the toilet block was as follows:

- He said at the investigation meeting (page 49) he would leave the barrier closed if on a toilet break but did not say, as he did at the hearing, that he on that particular occasion followed the correct procedure of locking the security office, putting up a sign and securing the barrier down

- He said at the disciplinary hearing (albeit when shown the wrong CCTV stills with the barrier up) that the barrier had been left up (WS para 8) and justified it as the barrier being open till 10pm but that was contrary to his oral evidence that the barrier procedures during the pandemic had changed so that the default was that the barrier was always down ie closed (whereas pre-pandemic there had been two set periods of it remaining open/up so staff could arrive and leave); it was as if he sought to argue that even if it had been left up (and he maintained he had not left it up) that did not breach procedure anyway, contrary to his oral evidence of the correct pandemic procedures

- In para 15 of his witness statement he accepted that he had left the barrier open when he went to the toilet; he sought to explain that as acceptable because it was policy to leave the main barrier open but that was contrary to his oral evidence that during the pandemic the procedure had changed and the default setting was that it remained closed between arrivals/departures; again it was as if he sought to argue he had not breached procedure, contrary to his own oral evidence of what that procedure was

- The Claimant said at the hearing that he had closed the barrier when he went to the toilet but was referring at the same time to pre-pandemic barrier procedures as if he needed a back up argument as to why leaving the barrier open was still however acceptable, when he was saying he had closed it

- In para 15 of his witness statement he said the barrier remained anyway in his line of vision but it could not have been if he had first gone to the toilet block which involved going through another building

- If the Claimant was referring to the shade incident to explain the barrier being up (because on his account it remained in his line of vision when stepping out for shade) he was referring to another occasion and not the urination incident

- The Claimant in his oral evidence referred to the barrier close button sometimes not working, as if to justify not closing it (when he said he had closed it)

- When asked why he said in his witness statement that he had not closed the barrier when he went to the toilet if he was now saying he had closed it, he said that sometimes the barrier button did not work and that he did try to close it, which was a different account.

26 I therefore find that the Claimant did not close the barrier and left the entrance unsecured when he was absent for a few minutes going to the toilet and then returning. Given the purpose of the Respondent at the site was to provide security and he was a security officer that was a serious breach of his duties.

27 Taking the above findings of fact into account I conclude that the Claimant would fairly have been dismissed by the Respondent for the security breach, even if a fair procedure had been followed. Whilst the Claimant could have raised his very long service and the absence of any previous disciplinary action by the Respondent and these were points in his favour, that dismissal would nonetheless have fallen within the range of reasonable responses bearing in mind that range encompasses the range from the more lenient employer to the strict employer taking a firm view and the Respondent would have been entitled notwithstanding the long service to take that strict view and not to consider instead moving the Claimant to a different site where the problem could happen again. If the Claimant had had an appeal to iron out the issue with whether the CCTV stills were the right ones, the Respondent would still have acted reasonably in concluding that the Claimant had left the site insecure when he had gone to the toilet block. I find that a fair procedure would have extended his employment by a further 4 weeks taking into account the failures in the investigation and disciplinary process and the absence of an appeal.

28 Taking the above findings of fact into account it is just and equitable to reduce the Claimant's basic award.

29 Taking the above findings of fact into account the Claimant contributed to his own dismissal such that his compensatory award should be reduced.

30 In terms of the wrongful dismissal claim I conclude based on the above findings of fact that the Respondent was entitled to dismiss the Claimant without notice for the serious breach of leaving the entrance unsecured.

Relevant law

Unfair dismissal

31 The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.

32 The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt [2003] IRLR 23*.

33 It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.

34 The compensatory award is calculated under s123 ERA 1996 and is such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal in so far as that loss is attributable to the action of the employer.

35 It is for the employer to adduce evidence that the employee would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction) (*Compass Group v Ayodele [2011] IRLR 802*). *Software 200 Limited v Andrews* [200] ICR 82 identified the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.

36 s207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that an award may be reduced or increased by up to 25% where there has been an unreasonable failure by a party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), if just and equitable in all the circumstances to do so. This can apply to a breach by either party of its obligations under the ACAS Code.

37 The basic award for unfair dismissal can be reduced under s122(2) Employment Rights Act 1996. This is where any conduct of the employee before dismissal was such (whether or not the employer knew about it) that it would be just and equitable to reduce the amount of the basic award in which case the Tribunal shall make that reduction. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*).

38 The compensatory award for unfair dismissal can be reduced under s123(6) Employment Rights Act 1996. This is where the Tribunal finds that the dismissal was caused or contributed to by any action of the employee before the dismissal in which case the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*) but does not have to amount to gross misconduct or a breach of contract (*Jagex Ltd v McCambridge [2020] IRLR 187*).

Wrongful dismissal

39 The relevant law is the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which provides that a breach of contract claim can be brought if it arises or is outstanding on the termination of employment. The amount which can be claimed is capped at £25,000.

40 There is a right to terminate the employment without notice where an employee commits an act amounting to a repudiatory breach of contract or gross misconduct.

41 In terms of the breach, the focus is on the damage to the employment relationship; acts of dishonesty or other acts poisoning the relationship fell within that but it could also include acts of gross negligence (*Adesokan v Sainsbury's [2017] EWCA Civ 22*).

Reasons

42 Taking into account the above findings of fact and all the circumstances the Claimant was unfairly dismissed by the Respondent. He would however have been dismissed in any event after a further four weeks and his compensatory award losses are therefore limited to four weeks' net pay.

43 Taking into account the above findings of fact I increase the Claimant's compensatory award by 25% under s207A Trade Union and Labour Relations (Consolidation) Act 1992 and s124A Employment Rights Act 1996, for unreasonable breaches of the ACAS Code of Practice. It is the maximum because in particular the Respondent did not let the Claimant appeal his dismissal.

44 Taking into account the above findings of fact the Claimant's basic award should be reduced under s122(2) Employment Rights Act as it is just and equitable to reduce the award. I fix that just and equitable reduction at a reduction of 75%.

45 Taking into account the above findings of fact the Claimant's compensatory award should be reduced under s123(6) Employment Rights Act 1996. The just and equitable proportion for that reduction is 75%.

46 I conclude based on the above findings of fact that the Respondent was entitled to dismiss the Claimant without notice for the serious breach of leaving the entrance unsecured

and there was no breach of contract by the Respondent. The Claimant is therefore not entitled to any notice pay.

Employment Judge Reid
Date: 17th November 2021