



EMPLOYMENT TRIBUNALS

Claimant: Mr A Adeniran

Respondent: TC Facilities Management Limited

HELD AT: London South, by CVP

ON: 10 November 2021

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Awotidebe, friend

Respondent: Mr Underwood, consultant

JUDGMENT

1. The claimant was not unfairly dismissed by the respondent. The claimant's unfair dismissal claim fails and is dismissed.
2. The claimant's claim for breach of contract for unpaid notice monies fails and is dismissed.

REASONS

Preliminary Matters and Issues for the Tribunal to Decide

1. The claimant brings claims of unfair dismissal and breach of contract. The claimant was a security officer at the respondent's site in Ashford. The respondent is a facilities management business largely engaged in cleaning and security. The security operation contains approximately 200 employees across sites in south-east England and London. The claimant started working for the respondent by way of a TUPE transfer in 2019 and he transferred to the respondent with his pre-existing terms and conditions, with continuous service having started on 18 October 2013.

2. He was dismissed by reason of gross misconduct by letter, so that his effective date of termination was 3 April 2020. He commenced ACAS early conciliation on 5 May 2020 which lasted until 5 June 2020 and his claim form was lodged on 27 June 2020.
3. The tribunal was greatly assisted by Mr Awotidebe, the claimant's "Mackenzie friend" and also by Mr Underwood, a consultant, for the respondent. We heard evidence from the claimant himself and also from Mr O'Sullivan who was the respondent's investigating officer and Mr Staple who was the respondent's dismissing officer. Mr Tilley was the appeals officer for the respondent but no longer works for the respondent and so did not appear before the Tribunal to give evidence. The Tribunal has read the witness statements. As was discussed with the parties at the start of the hearing less weight is attached to Mr Tilley's statement because he did not appear to be cross-examined on it.
4. Although not scheduled to appear as a witness, Ms Forsey provided the Tribunal with sworn evidence in relation to some procedural issues that were raised during the hearing by the claimant. Ms Forsey is the respondent's senior HR adviser and I was grateful that she was able to provide her assistance at very short notice.
5. The allegation that was made by the claimant for the first time in these proceedings that meant that Ms Forsey appeared in front of us was that Mr Staple conducted both the disciplinary hearing and the appeal hearing and secondly that he also wrote many of the respondent's letters to the claimant as part of the disciplinary process. The claimant's representative offered to send those documents to the Tribunal to demonstrate this but this was not necessary because the relevant pages were confirmed to be already in the bundle.
6. The issues for the Tribunal to decide in relation to unfair dismissal are in section 98 of the Employment Rights Act 1996. The respondent must show that they had a fair reason for dismissal. The tribunal will assess whether the dismissal was reasonable in all circumstances, within the range of reasonable responses and whether the respondent followed a fair procedure.
7. The claimant also complains that he was not paid notice monies on termination of his employment. Where there is a proven act of gross misconduct a claimant is not entitled to his notice monies. Therefore the tribunal has to decide whether the claimant on the balance of probabilities did commit an act of gross misconduct which entitled the respondent to dismiss with no notice.
8. Where an individual has been dismissed for misconduct, the issues for the Tribunal to decide (as per *British Home Stores v Burchell*) are:
 - a. Was misconduct the reason for the claimant's dismissal? The claimant does not dispute that this was the respondent's reason for dismissing him;

- b. Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
 - c. Was the belief in misconduct arrived at having carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
 - d. Was the procedure within the band of reasonable responses, in other words, would a reasonable employer have carried out the procedure the respondent did?
 - e. Was the sanction within the band of reasonable responses, in other words, would a reasonable employer have imposed the sanction that the respondent did?
9. The claimant will say that the respondent did not follow a fair procedure in relation to his disciplinary and in particular, he was not provided with the disciplinary and grievance procedure nor his terms and conditions of employment. He will say that the sanction was unfair and that no-one told him that asking clients for money was gross misconduct. He now also says that Mr Staple committed the acts of procedural impropriety set out above.
10. The parties put forward evidence which the Tribunal has considered. However, if the following findings of fact are silent in relation to some of that evidence, it is not that it has not been considered, but that it was insufficiently relevant to the issues that the Tribunal had to decide.

Findings of Fact

11. There was no real dispute about the incident that led to the disciplinary procedure being started by the respondent. The claimant was working in Ashford at Avison Young International House as a security officer.
12. The premises is a mixed-use office block comprising government bodies police agencies and private businesses. The claimant was working there as a daytime security officer and had been for some time.
13. On 19 March 2020 the landlord of Avison Young International House contacted Patrick O'Sullivan, the respondent's security operations manager, to tell him that the claimant had given letters to two tenants of the building asking for money, to cover personal debts, and had provided his bank account details in the letter.
14. At first the respondent and Avison Young were concerned due to the generic way in which the letter was written that it may have been distributed not just to two tenants, but throughout the building or wider. It was addressed "*To Whom It May Concern*" and began "*Dear sir/ma*".
15. The respondent, having investigated, subsequently accepted the claimant's explanation that in fact the letters were only given to these two tenants.

16. Mr O'Sullivan had a meeting with the claimant on 19 March which lasted for approximately twenty minutes, with Mr Harrison of Avison Young also present. Subsequently the claimant was suspended pending further investigations.
17. Mr O'Sullivan gave evidence to the Tribunal that he was shocked to discover that the claimant had sent these letters. He told the Tribunal that the claimant didn't tell him in the investigatory meeting that the two tenants he approached were friends, as he now tells the Tribunal. When he was asked why he approached them in particular he is reported in the minutes to have said that there were "*no criteria*" for him choosing them.
18. Mr O'Sullivan told the Tribunal that the claimant was crying and remorseful at the investigation meeting, but the respondent's concern was reputational risk given the level of trust needed in an organisation where security is provided especially as some sensitive agencies such as government bodies were in the building.
19. Mr O'Sullivan passed the notes of the investigation to Mr Staple and who was also an operations manager of the respondent, albeit in a different location to Mr O'Sullivan. Mr Staple convened a disciplinary hearing on 2 April 2020, the contemporaneous notes of which were extensive and were before me in the bundle in evidence. This hearing was done by telephone because by April 2020 the Covid pandemic had led to a face-to-face meetings not taking place.
20. In that telephone meeting the claimant was asked by Mr Staple how he gave the two tenants the letters. He said they were friendly to him. In the notes of the meeting the claimant is recorded as having said

"I gave it to them as they were very friendly to me and I was misled by their friendliness relationship to me. They were fellow Nigerians and had lived in Nigeria therefore I felt I had a good relationship with them and so I asked them for personal assistance"

21. From this, Mr Staple concluded that this did not mean that they were personal friends outside of a good security officer/tenant relationship. At this hearing the claimant seeks to tell the Tribunal that, in fact, they were good friends of his. He said he had been to the pub with one of them and that one of them offered employment to his son. However, this was not information that was before Mr Staple at the time he made his decision as part of the disciplinary process. It also wasn't in the claimant's witness statement or the claim form. On the balance of probabilities I find that it was reasonable for Mr Staple to conclude that this wasn't, in fact, a personal friendship between the claimant and the two tenants particularly because the letter itself is very impersonal in its style. The letter states:

*"Dear sir/ma,
It is with great concern and condition that I have just decided to take this step for the first time after 7 years of making different efforts to resolve my financial difficulties and problems.*

I am a hard working and very dedicated man, who has been working tirelessly for the upliftment and development of my family. I am married with three children.

With utmost respect and humanity, I strongly wish to appeal to you personally for your financial assistance towards repayments of my huge credit card debts and loans, which has become a very big stress and problem for me to repay back, due to the fact that I was on zero hours contracts for years and couldn't find a permanent job..... I am presently a low income earner..."

22. Mr Staple also noted that the claimant was in his place of work, in uniform at the time he gave the letters to the two individuals. This, plus the tone of the letter, led Mr Staple to conclude that the communication to the two individuals was not that of personal friends.
23. Mr Staple considered that this was a very serious breach of trust to try to solicit money from clients in this way. He accepted that the claimant had financial difficulties but did not accept that this was sufficient mitigation to justify the claimant's actions. He considered alternatives to dismissing the claimant but considered his actions to be gross misconduct and that this was too serious a breach of trust to justify a sanction short of dismissal, even taking the claimant's clean disciplinary record and good work record into account.
24. Mr Staple told the Tribunal that the claimant was an SIA licensed professional and had lots of experience and so had no reason to not appreciate that this was inappropriate behaviour. Mr Staple dismissed the claimant by a letter which was read by the claimant on 3 April 2020, so the date of dismissal was 3 April 2020.
25. The claimant appealed on 6 April 2020. His grounds of appeal were that he did not receive the disciplinary and grievance procedure with the disciplinary invitation letter, he had never been given his terms and conditions of employment and so did not know that his actions were considered gross misconduct and said that the two tenants were "personal friends". In the appeal hearing itself, he repeated these points and said that he considered that dismissal was too harsh a penalty in the circumstances. The facts were not disputed in the appeal hearing, although it is reported by the respondent that the claimant is said to have acknowledged in the appeal hearing that his behaviour may have "crossed a line".
26. The appeals officer Mr Tilley notes in his witness statement that he considered the role of a security officer is to protect client assets and that this needs trust and integrity. The claimant's actions were in breach of this. He also said that he did not consider the claimant's financial difficulties to be serious enough to be mitigation. The claimant's appeal was dismissed in a letter dated 27 April 2020.

27. During this hearing (and for the first time in these proceedings) the claimant raised two issues of procedural irregularities in the respondent's disciplinary procedure, which were:

- a. That Mr Staple carried out both the disciplinary hearing and the appeal hearing; and
- b. That Mr Staple wrote and signed most of the letters in the disciplinary process, dated 30 March 2020 (the invitation to the disciplinary hearing), 15 April 2020 (the invitation to the appeal hearing) and 27 April 2020 (the appeal outcome) as well as the dismissal letter of 3 April 2020.

28. In relation to the first issue, Mr Tilley is not before the Tribunal to give his evidence as to what happened at the appeal hearing. Mr Tilley's witness statement and the notes of the appeal hearing are in the bundle. Mr Staple's notes of the disciplinary hearing are also in the bundle. Mr Staple's evidence, which was clear and straightforward, was that he had had nothing to do with the appeal process and did not know anything about it. I have also taken into account that Mr Staple's verbatim notes of the disciplinary hearing are very different in style and handwriting that those in the bundle said to be Mr Tilley's. Mr Tilley's are very brief and Mr Staple's are extensive and detailed.

29. I have considered the claimant's evidence which was that, at the start of the appeal hearing, which was held by telephone, that Mr Staple said that Mr Tilly wasn't available to conduct the appeal hearing and he said Mr Staple introduced himself and said that he would do it. I considered this conflicting evidence and I find I prefer the respondent's version of events. This is the first time the claimant has mentioned this issue and had Mr Staple done both hearings, this is such a clear failing of natural justice that this would have been mentioned by the claimant in his claim form, or in his witness statement. It has not been. I find that on the balance of probabilities the claimant has misremembered what happened and he is now conflating the two events

30. In relation to the second procedural complaint, the evidence of Ms Forsey was accepted by the Tribunal, that the HR officer Ms Long "pp" signed the three letters on behalf of the two operations managers. This is standard office practice and it is possible to discern Ms Long's name on the three letters. Two of them are signed with "pp" above the author's name in any event.

The Law

31. It is well established law that determination of an unfair dismissal complaint is to be done, in the first instance, in accordance with section 98 of the Employment Rights Act 1996.

32. A respondent employer must show on the balance of probabilities that it had a fair reason for dismissal. In this the respondent's reason is that of misconduct.

33. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of ***British Home Stores v Burchell [1978] IRLR 379*** which is:
- a. Did the respondent have an honest belief that the claimant had committed an act of misconduct?
 - b. Did the respondent have reasonable grounds for holding that belief?
 - c. At the time that that belief was formed on those grounds, had the respondent carried out as much of an investigation as was reasonable in the circumstances?
34. Although the ACAS Code of Practice on Disciplinary and Grievance Procedures is not legally binding, the Tribunal must have regard to it when assessing both the substantive and procedural fairness of an employer's decision to dismiss. However, it is a well-established feature of the law of unfair dismissal that the investigation and procedure need only be within a range of reasonable actions (the case of *J Sainsbury v Hitt*). For example, the investigation need only be a reasonable one and need not be a forensic examination of all possible evidence.
35. The respondent must show that the reason to dismiss was within a range of reasonable responses that a respondent could have taken in that situation. There must be a fair investigation in all the circumstances, and the decision to dismiss must take into account equity and the substantive merits of the case
36. Furthermore, the Tribunal is expressly cautioned against substituting its view for that of the respondent in reaching the decision to dismiss. The Tribunal must not decide the case on the basis of what it considers to be the correct action in the circumstances, but instead must decide whether the respondent's actions were the actions of a reasonable employer in the circumstances.
37. The claimant's representative referred me to *Game Retail Ltd v Laws*, an Employment Appeal Tribunal case.
38. An employee is entitled to notice on termination of employment in accordance with s86 Employment Rights Act 1996, or the contract of employment, whichever is the longer period of notice, unless the claimant has committed a fundamental breach of contract, in which case the employer may dismiss without notice being given and paid.

Application of the Law to the Facts Found

39. The case of *Burchell* sets out three tests that the Tribunal must consider in determining whether the respondent's actions are reasonable in misconduct dismissals. The first is whether the respondent had a genuine belief in the claimant's misconduct, the second is was that belief held on reasonable grounds and the third is at the time that belief was formed on those grounds

had there been an investigation carried out by the respondent that was reasonable in all the circumstances.

40. The question for the Tribunal, in essence, is was the decision one that no reasonable employer would have taken and was the procedure one no reasonable employer would have followed. If the answer to both of those questions or either of those questions is yes, the dismissal is unfair.
41. Did the respondent have a genuine belief in the misconduct of the claimant? I find they did. Mr Staple had a genuine belief that the claimant had committed the acts that he did. The claimant admitted to having handed over the letters.
42. Did he have reasonable grounds for that belief? The claimant admitted to having written and handed over the letter at the time of the disciplinary hearing, so yes, he did. The claimant did not say that he was good friends with the two individuals during the disciplinary hearing. He has given much more evidence to the Tribunal about his relationship with them than he did to Mr Staple during the disciplinary hearing, and Mr Staple was entitled to conclude that this was just a good professional relationship and not a close friendship between the claimant and the two individuals.
43. The letter itself is written in a very impersonal way. It is not a personal letter at all. Mr Staple took into account (and was entitled to do so) that when the letters were handed over by the claimant, the two individuals complained about it rather than responding back to the claimant. Mr Staple took that this suggested this was not a close personal relationship. This was a reasonable conclusion to draw. Mr Staple also concluded, as was reasonable, that the claimant did not need to be given his terms and conditions of employment, nor a copy of the disciplinary procedures, in order to know that soliciting money from clients while at work would be gross misconduct.
44. Was there a reasonable investigation? I find there was. The facts were not largely in dispute. As part of the investigation, the claimant was given an opportunity to speak and put his case forward and his submissions were taken into account by Mr O'Sullivan.
45. Was the decision to dismiss within the range of reasonable responses? The Tribunal must not substitute a view of what is reasonable for that of the respondent. Instead a tribunal must look at whether the respondent's reasons and their reasoning is within the range of reasonable responses, and would a reasonable employer reach the same conclusion.
46. I find that a reasonable employer would have reached the same conclusion that the respondent did. It was within the range of reasonable responses for them to dismiss the claimant. It cannot be said that no reasonable employer would have dismissed in the circumstances. Finally was a fair procedure carried out? It was. The respondent's procedure was reasonable. I did not accept that Mr Staple carried out both hearings and I found that it was irrelevant on balance that the disciplinary procedures and the terms and conditions were not given to the claimant, because it should have been

obvious to the claimant, particularly given his experience and his training that this was something he shouldn't have done.

47. Finally was this a fundamental breach of contract such that the claimant is not entitled to his notice monies? On the balance of probabilities, yes it was. He did commit the act of gross misconduct for which he was dismissed and so therefore he has no right to payment of his notice monies.

Request for Written Reasons

48. This judgment having been given extempore at the conclusion of the hearing, the claimant requested that written reasons be provided.

Employment Judge Barker

Date: 16 November 2021