



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Lee Strutt

**Respondent:** Phoenix Healthcare Distribution Limited

**Heard at:** Bury St Edmunds

**On:** 14 January 2022

**Before:** Employment Judge Hutchings (sitting alone)

## Representation

Claimant: no representation

Respondent: Mr Tom Hasson, solicitor

# RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded. The claimant was not unfairly dismissed.

# REASONS

## Introduction

1. The claimant, Mr Lee Strutt, was employed by the respondent, Phoenix Healthcare Distribution Limited, as a transport supervisor until his dismissal on 31 December 2020.
2. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct in the form of deliberately falsifying company documentation, breaching trust and confidence and failing to follow company policy.

## Issues for the Tribunal to decide - Unfair dismissal

3. The Tribunal was hearing issues as to liability only in relation to the claim for unfair dismissal. The issues on liability have 2 core elements:
  - (i) 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; and
  - (ii) If so, was the dismissal fair or unfair within section 98(4). 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 respondent followed an unfair process and failed to obtain CCTV footage. In oral evidence to the Tribunal the claimant said that the respondent failed to consider his length of service in mitigation.

4. For the claimant's claim of unfair dismissal, the focus under section 98(4) is on the reasonableness of management's decisions. In reaching my decision it is immaterial what decision I would have made about the claimant's conduct.

### **Procedure, documents and evidence**

5. The claimant was not represented; he gave sworn evidence. The respondent was represented by Mr Hasson, solicitor, who called sworn evidence from Mr Richard Flower, the respondent's general manager, and Mr Carl Murray, depot manager at the respondent's Birmingham depot.
6. I considered the documents from an agreed 209-page Bundle of Documents which the parties introduced in evidence. The claimant and Mr Hasoon on behalf of the respondent made oral closing submissions.
7. As Mr Strutt was not represented I explained to him the role of the Tribunal: that the burden of proof was on the respondent to show the reason Mr Strutt was dismissed was a potentially fair reason under the law (section 98(2) of the Employment Rights Act 1996). If the respondent discharges this burden, the question for the Tribunal is did the respondent, as employer, act reasonably or unreasonably. I made it clear that the Tribunal cannot substitute itself as decision maker; the question for the Tribunal is did the employer act in a reasonable way given the reason for the dismissal.

### **Findings of fact**

8. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.
9. The claimant, Mr Strutt, was employed by the respondent, Phoenix Healthcare Distribution Limited, as a transport supervisor from 22 June 1992 until his dismissal on 31 December 2020. The respondent operates a distribution business, distributing pharmaceutical products to pharmacists and dispensing doctors. It has about 1,631 employees, across several sites. Mr Strutt was employed at the Norwich distribution centre.
10. Part of Mr Strutt's job was to carry out the respondent's policy of random searches of delivery vehicles [48-51] to ensure no stock was missing. The policy also acts as a deterrent to the unauthorised removal of stock. The policy requires searches to be conducted in the presence of the driver. After completing a search, to comply with policy Mr Strutt was required to enter time, date, vehicle registration details into a log. Mr Strutt was also responsible for overseeing driver manual training and health and safety training.
11. On 29 October 2020 Mr Strutt was offered a Performance Improvement Plan ('PIP') [69-74] as it had been identified he was falling behind with tasks

he had been assigned to complete. As part of the PIP the claimant was required to carry out 2 vehicle checks a day and to check health and safety and driver training of 3 drivers a week (6 drivers total). Mr Strutt accepted in oral evidence that stop and search of company vehicles was an important part of his job, given that the respondent distributed controlled substances.

12. On 6 November 2020 Mr Strutt attended a PIP review meeting with Mr Andy Gaskell, the respondent's depot manager, to check his progress against the expectations set out in his PIP. During this review Mr Gaskell noted discrepancies in the vehicle search log: a photocopy for 5 November 2020 (as at 4pm) [91] did not record searches for that day, but the searches for 5 November were recorded on a copy of the log printed on 6 November 2020 [92] as having taken place on 5 November. At this meeting Mr Strutt confirmed that he had carried out the searches on 5 November and completed the log the same day. Mr Strutt was then shown the photocopies of the logs and invited to explain the discrepancies. Mr Gaskell made contemporaneous notes of the PIP review meeting [71-74].
13. The claimant says that he carried out the searches on 5 November but did not enter them into the log as he could not find the book. The respondent submits that the searches were not carried out on 5 November at all but entered onto the log on 6 November and back dated for the purposes of the review meeting. I prefer the respondent's evidence on this point as there is a contemporaneous record of what was said at the meeting [74] in which Mr Strutt confirms he filled in the log on the 5 November. He gave this explanation before he was shown the photocopies.
14. In line with company policy [36] Mr Gaskell decided to suspend the claimant on full pay pending further investigations. During the week commencing 9 November 2020 Mr Gaskell reported the claimant's suspension to Mr Flower, general manager at the respondent's Portsmouth site, and provided a summary of the situation. Suzanne Baker, an operations manager, was appointed to review the search discrepancies and examine other records for which Mr Strutt was responsible: records for manual driver and health and safety training overseen by the claimant. As part of her investigation Ms Baker reviewed external CCTV footage from the loading bays, concluding that it was not possible to identify the claimant in the recordings. There was no CCTV footage available for inside the transport office. She collated NET2 records logging the claimant's entry to the transport office, iTrent task completion records and a witness statement from one of the drivers whose vehicles was logged for search on 5 November and from drivers whose training was overseen by Mr Strutt.
15. Ms Baker confirmed Mr Strutt's suspension in a letter to him dated 24 November 2020 [79-81], informing him of the respondent's decision to invite him to an investigation meeting. The letter particularised the allegations against the Mr Strutt as: breach of trust and confidence; deliberate fabrication of documents or records; and failure to adhere to company procedures. The letter enclosed documentary evidence to support the allegations [listed at 81, copies 82-125].
16. An investigation meeting took place on 27 November 2020. Ms Baker and Lynne Ramm, a senior administrator at the respondent, attended the meeting with Mr Strutt, who was accompanied by Mr Graham Yallop, the

site trade union representative. Ms Baker acted as investigating officer and Ms Ramm as notetaker. At this meeting the conflicting evidence on the logs (written records, building entry times and driver evidence) was put to Mr Strutt, who gave a different explanation for the log entries than was recorded at the PIP meeting. Ms Baker told Mr Strutt there was a case to answer and invoked the respondent's formal disciplinary procedure. The respondent made a contemporaneous record of the investigation meeting [126-134]. Following this meeting Mr Flower was asked to chair a formal disciplinary hearing. He received copies of an evidence bundle by email on 9 December 2020.

17. On 9 December 2020 Ms Baker wrote to Mr Strutt inviting him to a disciplinary hearing on 16 December 2020 [152-154]. The letter attached a copy of the investigation meeting notes of 27 November and informed Mr Strutt that he could bring someone to the meeting to accompany him. The letter also notified him that, should the conclusion of the investigation determine that he was guilty of gross misconduct, as defined by the respondent's disciplinary policy, the sanction could be dismissal without notice.
18. After reviewing the bundle of evidence Mr Flower agreed with Mr Strutt that the hearing would be postponed allowing further evidence to be collated, including additional witness evidence [155-157]. Mr Strutt was informed of the new hearing date in a letter from Mr Flower dated 17 December 2020 [167-168]. The letter enclosed the additional witness evidence [155-157].
19. The disciplinary hearing took place on 23 December 2020 in person at the respondent's Norwich depot. Mr Flower chaired the hearing. Also present were Deborah Chamberlain, an internal human resources representative who acted as note taker, and Mr Strutt, who was not accompanied. Mr Flower examined evidence relating to vehicle searches, driver training and health and safety records, training records for drivers. This included, in summary: (i) PIP report [69-74] compared to (ii) a driver witness statement relating to vehicle search [155-157]. Only one driver statement relating to the search was obtained; the respondent tried to obtain a statement from the driver of the second vehicle, but he refused. (iii) NET2 (a system which records time entry to the respondent's buildings) access records for entry to the transport office [93-97]. (iv) The claimant's own training record [61-68]. (v) Mr Strutt's daily task sheets [84-88], noting incomplete tasks for 10 November 2020 [89-90]. (vi) Driver witness evidence for driver training and health and safety training [98-102]. (vii) Driver training records completed by Mr Strutt and discrepancies with the driver statement [131-133].
20. Mr Strutt was interviewed by Mr Flower about his recollections of the searches and his explanation of the log entries. He was also asked how he conducted the vehicle searches and why he did so contrary to company policy. Mr Strutt was invited to explain discrepancies between his completion of the safety matters training log on the PIP form in the name of 2 drivers [72], their completed questionnaires [106-108, 103] and the witness statement of the drivers [157-158, 77]. The respondent did not accept Mr Strutt's explanation and concluded the training record had been falsified. Ms Chamberlain made a contemporaneous note of the disciplinary hearing [169-182].

21. The disciplinary hearing took the decision to dismiss Mr Strutt for gross misconduct. In a letter dated 31 December 2020 Mr Flowers informed the claimant of this decision [183-186]. The letter set out Mr Strutt's right of appeal, which the claimant exercised [187]. Mr Carl Murray, the depot manager for the respondent's Birmingham site, was asked by the respondent's HR department to conduct the appeal hearing. In a letter dated 19 January 2021 Mr Murray invited Mr Strutt to an appeal hearing [191-192]. Mr Strutt was informed of his right to be accompanied and to submit evidence in advance of the hearing.
22. An appeal hearing took place on 27 January 2021 via Skype. Mr Murray was chair and Aftan Sultan attended on behalf of the respondent as note taker. Mr Strutt was not accompanied and did not present any new facts to the Appeal Hearing. The hearing identified 5 grounds of appeal. Each ground was examined. The respondent made a contemporaneous note of the hearing [193-201].
23. The appeal hearing identified contradictions in Mr Strutt's explanation on 6 November with his evidence at investigation meeting and disciplinary hearing. Mr Strutt had changed his explanation from entering the details in the log on 5 November (his explanation to Mr Gaskill at the PIP hearing) to a statement that he was not able to locate the log book on 5 November so made the entries on 6 November (his explanation at the investigation and disciplinary hearing). At the end of the hearing, it was noted by Mr Murray that the claimant felt he was struggling with his workload and that his length of service should be taken into account in any decision.
24. Mr Strutt raised additional points relating to holiday and training records, to which he had not referred at the investigation meeting or disciplinary hearing. Mr Murray agreed these points would be investigated, including Mr Strutt's concerns about CCTV footage of the vehicle searches, before a decision was made. He conducted an additional interview with Suzanne Baker on 4 February 2021 [200-201]. It was not possible for Mr Murray to review the CCTV footage as the respondent's security officer confirmed footage is only saved for 35 days and had been deleted by this time. For CCTV evidence the respondent relied on the evidence of Suzanne Baker [200].
25. In a letter dated 4 February 2021 Mr Murray wrote to Mr Strutt informing him that the decision of the appeal hearing was to uphold the decision made at the disciplinary hearing to dismiss Mr Strutt without notice for gross misconduct [202- 206]. The letter sets out the allegations of misconduct, grounds for appeal and decision of the chair by reference to each appeal ground, together with the reason for that decision.

### **Law – unfair dismissal**

26. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95. This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

27. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
28. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on 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; and shall be determined in accordance with equity and the substantial merits of the case.
29. In misconduct dismissals, there is well established guidance for Tribunals on fairness within section 98(4) in the decision in *Burchell 1978 IRLR 379*. 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 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. 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*).

### **Conclusions – unfair dismissal**

30. The respondent has satisfied the requirements of section 95 of the 1996 Act, admitting that it dismissed Mr Strutt (within section 95(1)(a)) on 31 December 2020.
31. The first issue is what was the reason for the dismissal? In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct against company policy in concluding the claimant had falsified company documents (vehicle search logs and training records) and failing to follow company procedure in conducting van searches resulting in a breach of trust and confidence. The conduct of the employee is a potentially fair reason for dismissal under section 98(2)(b). The respondent has satisfied the requirements of section 98(2)(b).
32. The next consideration for the Tribunal is the three stages in the Burchell case. In oral submissions Mr Hasoon reminded me in considering this question and the fairness of the process I must not substitute my own view.

33. First, did the employer reasonably believe that the claimant committed the misconduct in that the respondent had a genuine belief in the employee's guilt. I find that the respondent's management, Mr Flower and Mr Murray, held genuine beliefs that the claimant was guilty of misconduct. Mr Flower believed that Mr Strutt had not conducted the vehicle searches on 5 November. He genuinely believed Mr Strutt was not conducting vehicle searches in line with company policy. I find that Mr Flower also held a genuine belief that the claimant had falsified the vehicle search log and training records for driver training and health and safety matters. His evidence was clear about why he dismissed Mr Strutt and his dismissal letter clearly and comprehensively set out the reason for his decision. Mr Murray's appeal letter was unequivocal. Mr Strutt has not challenged Mr Flower's or Mr Murray's genuine belief in his guilt.
34. Second, the Tribunal must decide whether the employer held these genuine beliefs on reasonable grounds. I find that Mr Flower's belief Mr Strutt was guilty of misconduct was held on reasonable grounds. Mr Flower, as the dismissing officer, collated and reviewed a range of evidence. He compared written records with contemporaneous evidence of Mr Strutt's explanation of events on 5 November given at the PIP meeting on 6 November with evidence from Mr Strutt at the investigation meeting. I find that Mr Flower had reasonable ground to conclude it had changed. Mr Flower considered the evidence of an independent witness whose vehicle was identified as one of two recorded for search on 5 November. Mr Flower had no reason to doubt the evidence of the driver. However, he did have grounds to doubt Mr Strutt's explanation recorded at the PIP meeting on 6 November as this changed at the investigation meeting once Mr Strutt had seen the log photocopies. The evidence before Mr Flower at the disciplinary hearing conflicted with earlier evidence from Mr Strutt, which meant that Mr Flower reasonably questioned the claimant's explanations for his conduct. Mr Flower identified several sources which led to his conclusion the searches were not undertaken.
35. Mr Strutt only presented his versions of events, which changed over time. The claimant argued that he had conducted the searches but did not have the logbook with him, then that he entered the searches on 5 November, then that he could not locate the book on 5 November so entered the searches on 6 November. I find that the dismissing officer was entitled to disregard that evidence considering the inconsistencies and considering clear evidence from paperwork, electronic records, and an independent witness.
36. In addition to witness evidence Mr Flower reviewed evidence from the Net2 entry system from which he concluded that the entry and exit times recorded for Mr Strutt on 5 November meant Mr Strutt was not in the transport yard at the time he states the search was conducted. Review of NET2 records Mr Strutt entering transport office at 7.09 and leaving at 7.19 [93] from which it was reasonable for Mr Flower to conclude there was a very small window of time to conduct the search and so it was not undertaken. Mr Flower had no reason to doubt these automated systems.
37. I find Mr Flower's conclusion that the claimant falsified records of van searches, not entering details for 2 searches he said were conducted on 5 November until 6 November and backdating them was based on reasonable

grounds given the evidence he reviewed. I find Mr Flower's conclusion that the searches were not conducted at all was also held on reasonable grounds, given the discrepancies of Mr Strutt's evidence outlined above and Mr Flower's review of the photocopies, PIP meeting notes, investigation meeting notes, independent witness evidence and electronic systems;

38. Mr Flower's belief that Mr Strutt did not follow company procedure generally in conducting searches, failing to conduct them in the presence of the driver was based on reasonable grounds. Mr Strutt told Mr Flower that he gave the driver the option of being present and witness evidence confirmed this.
39. In relation to Mr Flower's belief that the claimant was guilty of misconduct for falsifying records for driver and safety matters training, I find that this belief that Mr Strutt had not completed training for 6 drivers a week as required by his PIP, but had instead falsified records, was also held on reasonable grounds. Mr Flower compared written training records completed by Mr Strutt to confirm drivers had completed training with statements from a couple of drivers who stated that they had no recollection of completing the training and could not recall having seen the questionnaire Mr Strutt said he had completed on their behalf. Mr Flower's had no reason to doubt evidence from independent driver witnesses but had grounds to doubt Mr Strutt's explanations given that they were inconsistent between the investigation and disciplinary hearing.
40. The claimant argued that he had completed a log for one of the drivers as that driver did not have a pen. He then stated that the questionnaire had been completed with the driver's name and date in anticipation that the driver would complete the training on a Saturday. Later he said the named questionnaire was a model answer, and it was not his intention to submit it in the name of the driver.
41. I find that Mr Flower was reasonably entitled to disregard this evidence considering the independent witness statements of the drivers named on the forms completed by Mr Strutt that they did not recall the training or seeing the questionnaire. Mr Flower's reached his conclusion on the basis that it had a training card completed and dated by Mr Strutt for Kelly Benson which conflicted with the statement Mr Benson in which he told the respondent that he had no recollection of the safety matters training, does not remember the forms, questions or completing the form. I find that the inconsistency of the claimant's story itself and when compared to the statements of two independent witnesses gave Mr Flower's reasonable grounds for his belief that Mr Strutt had fabricated training records. The evidence of the documents and witnesses that claimant had completed the training record in someone else's name without that person's consent gave Mr Flower's reasonable grounds to conclude breach of trust and confidence.
42. Third, the Tribunal must determine if the respondent conducted a fair and reasonable investigation in all the circumstances? I find that the respondent conducted a reasonable investigation in all the circumstances. The investigation adhered to the ACAS code and followed a written company procedure of which Mr Strutt was aware. It had 3 parts: investigation meeting, disciplinary hearing, and appeal hearing. At each stage evidence was sought from a range of sources, including independent witnesses who were directly linked to allegation being investigated. First, Ms Baker was



instructed to carry out an investigation to establish the facts of the situation. This investigation was rigorous; she reviewed CCTV footage, NET2 entry records, photocopies of the vehicle search logs, witness statements from drivers and promptly informed Mr Strutt that she had decided his conduct should be the subject of a disciplinary hearing.

43. Having reviewed the evidence and minutes of the investigation meeting Mr Flower delayed the disciplinary hearing to obtain further independent witness evidence. A large range of written (photocopies of vehicle search records, training questionnaires) and electronic evidence (NET2 entry systems, ITrent daily task logs) were obtained. The respondent also checked Mr Strutt's own training records to ensure he was fully trained in the tasks that had been identified in his PIP review. Collation and review of the evidence by Mr Flower was in-depth and rigorous. Mr Strutt was given the opportunity to explain the discrepancies at this disciplinary hearing
44. For each meeting/hearing the process was clearly communicated to Mr Strutt in writing, and he was sent copies of the evidence to be considered. He was informed that he had the right to be accompanied and invited to submit evidence beforehand. The investigating officer (Ms Baker), dismissing officer (Mr Flower) and chair on appeal (Mr Murray) were all independent in their roles, having had little if any previous contact with Mr Strutt. The respondent made contemporaneous notes of each meeting / hearing, which were shared with the claimant for the next stage of the proceedings. When Mr Strutt identified points of issue at the appeal hearing which he had not previously mentioned, the respondent investigated these, conducting further interviews before reaching a decision. Mr Murray dealt comprehensively with the issues raised by Mr Strutt.
45. In his evidence to the Tribunal and his final oral submissions Mr Strutt addressed his concern that Mr Flower did not review the CCTV footage of the transport yard and vehicle bays for 5 November 2020. Mr Flower confirmed this was correct as he relied on the evidence of Ms Baker that she had reviewed it and was not able to identify Mr Strutt in the yard. While it is unfortunate that Mr Flower did not review this footage personally, and by the time Mr Murray requested it on appeal it had been deleted under the respondent's 35 day retention policy, I find that this does not take away from my finding that overall the respondent followed a reasonably fair procedure.
46. I have considered the size of the respondent's undertaking in reviewing the procedure for fairness. The respondent is an organization with substantial resources. These resources were properly exercised. Independent managers carried out the investigation and hearings. The decision makers were independent and collated evidence in depth and range. For the reasons set out above I find that I find that the procedure followed was comprehensive as would be expected for an employer of the respondent's size.
47. The final consideration for the Tribunal is whether in all aspects of the case, including the investigation and the grounds for belief, the decision of Mr Flower to dismiss without notice was a fair sanction. The Tribunal must decide whether a reasonable employer would have decided to dismiss Mr Strutt for misconduct in the circumstances. I have the band of reasonable

responses clearly in my mind in reaching my decision. It is immaterial what decision I would have made.

48. I find that dismissal without notice was within the band of reasonable responses: Mr Flowers held a genuine belief that Mr Strutt was guilty of misconduct; his belief was based on reasonable grounds; the respondent conducted a reasonable investigation in all the circumstances, it exercised considerable resources to ensure the procedure was structured, logical and comprehensive. Given the nature of the conduct and the regulated operation of the respondent, the decision to dismiss was fair, notwithstanding Mr Strutt's long service, which was considered at the appeal hearing. Although the claimant had a long record the respondent had a genuine belief that Mr Strutt was guilty of a series of serious offences, all of which could be classified in the company's disciplinary procedure as gross misconduct. Mr Strutt was aware of the Disciplinary Policy; it states that breach of trust and confidence and falsification of company records are issues of gross misconduct for which the sanction is dismissal of the employee. As the respondent operates in a regulated industry and is subject to audit by the Medicines and Healthcare Products Regulatory Agency vehicle checking is an important part of the respondent's operation; the respondent is required to keep records of checks and training for audit and is required to report to the Agency and Home Office in the event any products are missing from its supply chain.

49. Therefore, I find that the claimant [was/was not] unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

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Employment Judge **Hutchings**

18 January 2022

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

2 February 2022

FOR EMPLOYMENT TRIBUNALS