



THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Lynas

Respondent: Lloyds Register GMT Limited

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at: Newcastle upon Tyne Hearing Centre **On:** 28th February and 1st March 2022

Before: Employment Judge Martin

Appearances

For the Claimant: Mr L Mann (Solicitor) **For the Respondent:** Mr H Menon (Counsel)

REASONS

1. Mr Paul Livingston, Operations Director, and Mr Andrew McEwan, also Operations Director, Mr John Sturgeon, Laboratory Manager all gave evidence on behalf of the respondent. The claimant gave evidence on his own behalf. Mr Martin Kilburn, a former colleague of the claimant, gave evidence on behalf of the claimant. The tribunal was provided with a bundle of documents marked Appendix 1.

The Law

2. The law which the tribunal considered was as follows:

Section 98 (1) of the Employment Rights Act 1996 .. "In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal,

Section 98 (2) - A reason falls within this subsection if it-

- (b) relates to the conduct of the employee.
3. Section 98 (4) ERA 1996 – “The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends 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”.
 4. Section 122 (2) of the Employment Rights Act 1996 - “where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal should reduce or further reduce that amount accordingly”.
 5. Section 123(1) ERA 1996 “The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”
 6. Section 123 (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
 7. The tribunal also noted the well-known case of **British Home Stores Limited v Burchell 1980 ICR** page 302 which sets out the three-fold test which has to be considered in cases of conduct dismissals namely:- whether the respondent had a reasonable belief the employee had committed an act of misconduct; whether that belief was based on reasonable grounds; and whether the employer had undertaken a reasonable investigation.
 8. The tribunal also considered the case of **Polkey v AE Dayton Services Limited 1987 IRLR 503** where the House of Lords held that a tribunal can consider whether an employee would still have been dismissed even if a fair procedure had been followed. It indicated that the tribunal can consider whether there was a chance of that happening as well as whether there was little or no chance of that happening.
 9. The tribunal also considered the case of **Nelson v BBC 2 1979 IRLR 346** where the Court of Appeal set out three factors to consider in terms of any question of contributory fault. Firstly there has to be a finding of conduct. Secondly that the

conduct was culpable or blameworthy and thirdly that that conduct contributed or caused the dismissal.

10. The case v **Hollier v Plysu Limited 1983 IRLR 200** where it was held in any apportioning the tribunal has to look at the responsibility of both the employer and the employee.

The Issues

11. The issues which the tribunal had to consider was the reason for dismissal which, in this case, was pleaded as conduct.
12. The tribunal therefore had to consider whether the respondent had a reasonable belief based on reasonable grounds that the claimant had committed that act of misconduct. It had to also consider whether the respondent had undertaken a reasonable investigation.
13. The tribunal also had to consider whether a fair procedure had been followed and whether dismissal was a reasonable response in the circumstances taking account of whether the respondent had treated other employees in other circumstances differently.
14. In terms of any remedy the tribunal had to consider any loss, the period of any loss, whether the claimant had acted reasonably in mitigating any loss, whether the claimant would have been dismissed in any event if a fair procedure had been followed and whether the claimant had contributed in any way to his dismissal.

Findings of Fact

15. The respondent is a global risk management and safety assurance organisation. It provides fuel analysis to the marine industry.
16. The claimant was employed as part of that group. He was employed as a laboratory technician based in Cleveland. He was employed since August 2009.
17. The respondent's disciplinary policy is set out at page 73 to 77 of the bundle. The disciplinary procedure deals with gross misconduct at page 76 - 77. At page 77 it sets out examples of offences of gross misconduct which include, theft, fraud, dishonesty or deliberate falsification of records and serious breach of the company's rules, policies and procedures
18. The respondent put procedures in place to deal with testing of samples. One of the tests which the claimant was required to undertake was the sulphur analysis test. He was provided with training on these procedures on a number of occasions, including in relation to the sulphur analysis training. The last training which he attended in relation to that was in early May 2020.

19. The respondent says, and it is not disputed, that another employee was dismissed in July 2020 for not doing tests for SQC and for falsification of results.
20. On 15th October 2020 the claimant's supervisor raised an issue with the laboratory manager and the operations director. He indicated concerns about the claimant. His concerns are set out in an e-mail at page 169. He raises concerns about a sulphur batch being received rather quickly from the claimant which led to questions about rechecks. He went on to indicate that he asked the claimant about this and that the claimant had indicated that he had prepared the rechecks and done the second batch. The claimant's manager then refers to being concerned about this and arranging for Mr Sturgeon, the laboratory manager, to undertake some further investigation.
21. The claimant said in his evidence that, although he was never provided with or had sight of the e-mail at page 169, he agreed that he had initially effectively denied that he had done the conduct which he subsequently admits.
22. Somewhere between 15th and 16th October 2020, it appears that Mr Sturgeon, the laboratory manager, undertook some further investigation. This consisted of viewing the CCTV footage which he says that he reviewed. He was concerned that the claimant had not actually left his station to undertake the rechecks. He also reviewed a number of recheck forms for the claimant and looked at the data behind those recheck forms, which is at pages 110 and 114 of the bundle. The further data behind those forms is at pages 111 to 113 and pages 115 to 117. The documentation relating to the rechecks is also pages 118
– 127.
23. Mr Sturgeon said in his evidence that he then met the claimant to confront him with this information. He said that the claimant admitted that he had not done the rechecks and had effectively falsified the documents. The claimant in his evidence said that no such meeting took place with Mr Sturgeon.
24. Mr Sturgeon discussed the outcome of his investigations with Mr Livingston.
25. Mr Livingston then wrote to the claimant to invite him to a disciplinary meeting and suspended him. That letter is at page 171 of the bundle. Prior to that hearing or as part of that suspension meeting, the claimant said in evidence that he met with Mr Livingston when he was shown the forms - pages 110 - 114, plus the other documentation as well as the data back up information. The claimant said in his evidence that he did admit to not doing the rechecks and effectively falsifying the documentation at that suspension meeting with Mr Livingston. Mr Livingston himself did not refer to any such meeting in his evidence.

26. The invite to the disciplinary meeting indicates at page 171 that the claimant is being investigated in relation to a number of matters namely:- that he failed to correctly perform sulphur analysis, failed to correctly recheck spec results according to established procedure process, that he wilfully neglected a very important quality assurance process to save himself work and/or time and failed to communicate his failure to his line manager. He was then informed he was being suspended and he was to attend a disciplinary meeting. It was explained to him in that letter that, if the allegations were upheld, then he could be liable to disciplinary action which might include dismissal under the terms of the company disciplinary policy and procedure. He was informed that he was entitled to be accompanied to that meeting by a work colleague or trade union representative. The claimant was not provided with any documentation with that invite letter or in advance of the disciplinary or investigatory meeting. He was not given a copy of page 169, being the email, nor was he provided with any of the investigations undertaken by Mr Sturgeon either the forms or the back-up data. He was also not given the opportunity to view the CCTV footage.
27. In his evidence to the tribunal, Mr Livingston that he had the forms and data at the disciplinary hearing. He said that they were on the table, but he did not refer to them because he did not think they were necessary as the claimant had admitted to misconduct. The claimant in his evidence, indicated that, although the forms were shown to him at the suspension meeting, they were not made available to him at the disciplinary hearing.
28. In his witness statement, Mr Livingston did not refer to those forms being made available at the disciplinary and nor is there any indication that they were made available to the claimant in the notes of the disciplinary hearing.
29. The disciplinary hearing took place on 21st October. The claimant attended alone. The hearing was conducted by Mr Livingston. The notes of the disciplinary hearing are at pages 173 to 175 of the bundle.
30. At the disciplinary hearing the claimant admitted that he had not followed the correct process and had not done the rechecks. He said that the reason that he had not done so was because he did not have enough time to do so. He confirmed at the disciplinary hearing that he realised it was wrong and said that he would not do it again. He did not raise at the disciplinary meeting any issues about other colleagues not doing those rechecks or suggest it was common practice or that supervisors were condoning it.
31. Mr Livingston in his evidence, said that, as part of the investigations, he had asked Mr Sturgeon after the claimant's suspension to undertake checks into other colleagues namely to do some random auditing and checking to check if other people were not doing the checks properly. He said that investigation continued after the claimant's dismissal. He said it was done effectively as

an audit trail to review the practice of others. There are documents relating to that investigation into six other members of staff being four batches of thirty tests at pages 87 to 109 of the bundle. That was intended to be a random sample. None of those documents were provided to the claimant at any stage. The respondent says that the investigation was not completed until after the claimant was dismissed.

32. The claimant was subsequently dismissed by way of a letter of 22nd October 2020, which is at pages 178 to 179 of the bundle. It states that he is being dismissed for gross misconduct. The reason being that he acknowledged and accepted that he failed to correctly perform the sulphur analysis rechecks according to the process and wilfully neglected this quality assurance process to save himself time and work and failed to communicate his failure to his laboratory manager. The letter notes that the claimant admitted during the meeting that he simply repeated the analysis on the initial sample and did not follow the recheck procedure with the reason given being was that he was saving himself time.
33. The claimant appealed against that decision. His letter of appeal is at page 180 of the bundle. In his appeal letter he says that not completing the recheck analysis is common practice. He says that none of the staff do it, including supervisors. He reiterates this by saying that he accepts that he did not follow the full procedure, but says that others do not do so either and have not been dismissed. He said that it was unfair to strictly enforce a rule that had not been strictly enforced previously.
34. Prior to the appeal hearing Mr McEwan, who was to conduct the appeal, spoke to Mr Livingston. He was told of the investigation that was being undertaken into other colleagues and noted that it appeared that there was no evidence to support the claimant's contentions. The appeal hearing took place before Mr McEwan on 3rd November 2020. The claimant again attended alone. The notes of that hearing are at pages 183 to 188 of the bundle.
35. At the appeal hearing, the claimant went through his grounds of appeal and said that other colleagues were doing exactly the same. He referred to text messages which he said he had received from others confirming that they were doing it, but he did not produce copies of those text messages either at the appeal hearing or in these proceedings. He refused to give the names of the others whom he said were doing the same thing. He said it was everyone. In his appeal hearing he also said that the practice was condoned by the supervisors, but again gave no names. In his evidence to the tribunal, Mr McEwan said on cross examination that he had not done any investigation into the issue about whether the practice was allegedly being condoned. After the appeal hearing, Mr McEwan spoke again to Mr Livingston. He reviewed the evidence produced by Mr Livingston/Mr Sturgeon, which was

the investigation into other colleagues which is at pages 87 to 109 of the bundle. That documentation was not provided to the claimant either during or after the appeal hearing, so that he could make any comments on that documentation. In his evidence to the tribunal, the claimant said that he would not have been able to comment on that documentation.

36. The respondent wrote to the claimant following the appeal hearing to uphold the decision to dismiss the claimant. The letter is at page 189 of the bundle.
37. Mr Kilburn, who gave evidence to this tribunal, was himself dismissed by the respondent in February 2021, but was not dismissed for any issues relating to tests or falsifying documentation. He said in his evidence that other people were doing the same thing, but gave no details of exactly what was being done, but did give some details of names of people, particularly supervisors, who he said condoned the practice.
38. In preparation for the tribunal hearing, the respondent prepared a document which was described in the index to the bundle as a summary of the data for disciplinary October 2020. The document is at pages 176 to 177 of the bundle. In their evidence to the tribunal, both Mr Sturgeon and Mr Livingston confirmed that document was actually produced after the ET1 was submitted and not, as suggested, as part of the disciplinary. Indeed in his witness statement, Mr Livingston corrected paragraph 17 at the outset of his evidence, after Mr Sturgeon had given earlier evidence. His witness statement at paragraph 17 initially indicated the document was produced after dismissal, but all the results were established prior to dismissal but he then amended it to suggest that it was after dismissal. The document was not provided to the claimant. In his evidence the claimant admitted on cross examination, that, although he was not given any of the documentation, it would not have made any difference to him.
39. The tribunal found the claimant to be an honest and consistent witness.
40. The respondent's witnesses were less consistent. For example, Mr Livingston referred to forms being produced and documentation available during the disciplinary hearing but makes no reference at all to that in his witness statement nor is there any reference in the notes of the meeting. He equally does not refer to the meeting with the claimant when the claimant was suspended, which the claimant says was when the claimant made his apparent admission. Mr Sturgeon referred to a meeting with the claimant when he said the claimant admitted his actions, but was not able to provide any details of when that meeting took place.
41. On balance, the tribunal prefer the claimant's evidence in relation to what happened in respect of these proceedings to that of the respondent. However the tribunal does not accept the claimant's evidence about others doing the

same thing or the practice being condoned as he has failed to provide any documentary evidence to that effect. The respondent denies it happened. The claimant said Mr Kilburn suggested that it did happen but has provided little in the way of details. The respondent, on the other hand, have produced documentary evidence which shows that, from random tests this was not happening as a matter of practice. The claimant has not himself contradicted any of that evidence, nor has he provided details of the text which he says show that others indicate that this was happening.

42. The claimant's gross weekly wage was £570.02; his net weekly wage was £439.38. His pension loss, as agreed between the parties, for his employer and employee contributions was £177.85.
43. After the claimant's employment terminated, he sought employment elsewhere and signed on with a number of agencies. He successfully obtained alternative employment with a construction company in March 2020. However, the course he needed to attend to commence that employment did not start until September 2021. He was unable to actually start the job, because he then broke his thumb in November 2021. The job is still open to him. He is claiming up to November 2021, when he could have started the job.

Submissions

44. In submissions, the claimant's representative submitted that the dismissal was unfair. He says that the investigation was not reasonable. He says that there was no investigation into the practice or the condoning of the practice by supervisors. His representative also says that the procedure was unfair. He referred to the discussion between the appeal officer and the dismissing officer prior to the appeal. He says that no documentation was provided to the claimant. He suggested that, if any reduction in compensation is to be made it should be limited to 25%.
45. The respondent's representative submitted that the dismissal was fair. He said that if others were doing the same thing practice, it was irrelevant to the claimant's defence and irrelevant to the claimant being dismissed. Alternatively, he said that, if it was found a fair procedure had not been followed, it would have been a 100% likely that the claimant would have been dismissed in any event and that he contributed a 100% to his own dismissal. He submitted that the claimant had admitted the conduct. He said the conduct amounted to gross misconduct.

Conclusions

46. The claimant was dismissed for the following:- failing to correctly follow procedures and do the required recheck on the sulphur analysis; and for falsifying documentation indicating that he had done so.

47. Conduct is a fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996.
48. The tribunal accepts that the respondent reasonably believed, and had reasonable grounds to believe that the claimant had committed an act of gross misconduct. The claimant had admitted his misconduct. Further the respondent had documentary evidence to support that misconduct both in terms of the CCTV footage and investigations into the recheck forms and the data.
49. However, on balance, the tribunal does not consider that there was a reasonable investigation into these matters. The tribunal accepts that the respondent did investigate the allegations against the claimant and that the investigation included an investigation with the claimant which consisted of a discussion with him and his supervisor. The tribunal further notes that the claimant admitted the misconduct at the suspension meeting. However, although the respondent undertook investigations into what others were doing and whether they were engaged in the same practice, there was no opportunity given to the claimant to comment on those investigations, which is of particular concern since he raised allegations that the practice was being condoned. The tribunal accepts that any investigations into that contention namely whether there was condoning of the practice by the supervisor might have been limited, because it was in fact a supervisor who initially brought the matter to the respondent's attention but, nevertheless, there was no attempt, after the appeal hearing when the claimant specifically raised the matter, to investigate whether there was any substance to those allegations. The appeal officer simply relied upon the evidence produced by the dismissing officer in relation to the investigations into the others. That was all the investigation which he undertook, namely the audit that had initially been commissioned.
50. The tribunal considers that dismissal was a reasonable response in the circumstances of this case. The claimant himself admitted the misconduct which included falsifying test results, which could have very serious consequences for the respondent's business and reputation.
51. The tribunal accepts that dismissal in this case was the only alternative available to them bearing in mind the seriousness of that claimant's actions which was effectively falsifying test results. The tribunal also notes that the respondent, itself, had only a few months earlier dismissed another employee for falsifying test results.
52. In that regard the tribunal accepts that the misconduct did amount to gross misconduct, as it is clearly defined under the respondent's policy as falsification of documents and serious breach of their policies and procedures.

53. The tribunal does not consider that the respondent followed a fair procedure. The claimant was not given any documents as part of the investigatory or disciplinary process either before he was interviewed or as part of the disciplinary hearing. He was not provided with any of the documents relating to the investigation; being either the forms, the data, or the CCTV nor was he provided with the documentation relating to the other employees. A fair procedure would have ensured that the claimant was given a proper opportunity to comment on the allegations and consider his response but that was not afforded to him in this case.
54. Further the tribunal has serious concerns about the discussions that appear to have taken place between the dismissing officer and the appeal officer, both before and after the appeal hearing which raises questions about the independence of the appeal officer.
55. For those reasons this tribunal considers the dismissal to be unfair.
56. However the tribunal considers that, although the procedure was unfair, it does not consider that it would have made any difference. The tribunal finds that the respondent would have dismissed the claimant fairly if they had followed a fair procedure. The claimant had admitted his misconduct. He had effectively admitted to failing to do the recheck according to the appropriate procedures and most significantly to falsifying documents. These are very serious matters and could have a serious impact on the respondent's business and reputation.
57. The tribunal considers that it would have made no difference if the claimant had been given that documentation and there had been no discussion between the dismissing and appeal officers, because the tribunal considers that the claimant would still have been fairly dismissed not least because of his admission. Indeed, the claimant himself in his own evidence accepted that being provide with the documentation would have made no difference.
58. Accordingly, this tribunal finds that the Polkey reduction in this case on the basis that the claimant would have been fairly dismissed in any event, would be a 100%.
59. The tribunal went on to consider whether the claimant had contributed to his own dismissal. The tribunal considers that the claimant's actions in not doing the rechecks and falsifying the documents is clearly blameworthy conduct which did effectively cause his own dismissal. He therefore he contributed 100% to his own dismissal.
60. Accordingly the claimant's complaint of unfair dismissal is well-founded, but he is not awarded any compensation either in terms of the basic or compensatory award.

61. As indicated earlier, the tribunal considers that the claimant's actions did amount to a breach of contract which entitled the respondent to dismiss him. Therefore his complaint of breach of contract for notice pay is not well-founded and is hereby dismissed.

EMPLOYMENT JUDGE MARTIN

REASONS SIGNED BY EMPLOYMENT

JUDGE ON

16 May 2022