



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Z Gibbs

v

Babcock Critical Services
Limited

Heard at: Watford by CVP

On: 31 May 2022 and 1 June 2022

Before: Employment Judge Anderson

Appearances

For the Claimant: In Person

For the Respondent: P Nainthy (solicitor)

JUDGMENT

1. The claimant's claims for notice pay and holiday pay are dismissed on withdrawal.
2. The claimant's claim of unfair dismissal is dismissed.

REASONS

Claim

1. By way of a claim form presented on 16 February 2021 the claimant, Zakaree Gibbs, claims that he was unfairly dismissed. The respondent filed a response on 16 March 2021 resisting the claim and stating that the claimant was dismissed fairly for conduct reasons.

List of issues

2. No list of issues having been agreed before the hearing, the following list was agreed at the beginning of the hearing:
 - a. Unfair Dismissal
 - i. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
 - ii. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

1. there were reasonable grounds for that belief;
 2. at the time the belief was formed the respondent had carried out a reasonable investigation;
 3. the respondent otherwise acted in a procedurally fair manner;
 4. dismissal was within the range of reasonable responses.
- b. Remedy for unfair dismissal
- i. Does the claimant wish to be reinstated to their previous employment or be re-engaged to comparable employment or other suitable employment?
 - ii. What financial losses has the dismissal caused the claimant?
 - iii. Has the claimant taken reasonable steps to replace their lost earnings?
 - iv. If not, for what period of loss should the claimant be compensated?
 - v. Did the Respondent follow a fair procedure?
 - vi. If the Tribunal finds that a fair procedure was not followed, would the Claimant still have been dismissed if a fair procedure had been followed?
 - vii. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal?
 - viii. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
 - ix. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

The hearing

3. The claimant was in person. Mr Nainthy of Make UK represented the respondent. I was provided with a bundle of 566 documents. I also received a witness statement from the claimant, along with a statement on whistleblowing, and a witness statement from Martin Audis, witness for the respondent. The claimant and Mr Audis gave evidence at the hearing.
4. At the outset of the hearing the claimant said that he was no longer pursuing a claim for unpaid holiday. Before the end of the first day Mr Nainthy confirmed that the claimant was also withdrawing his claim for notice pay.
5. The claimant said that he felt the respondent had unreasonably delayed in providing documents for disclosure and the completed bundle. He confirmed that he had received the bundle on 26 May 2022. I noted his comments.

Findings of Fact

6. The claimant was employed by the respondent, a company which has a contract to repair and maintain London Fire Brigade vehicles and equipment. The claimant was employed as a mechanic and was responsible for repairing and maintaining London Fire Brigade vehicles.

7. The claimant raised a grievance on 28 March 2018. In a decision letter dated 21 May 2018 his grievance was partially upheld.
8. The claimant raised a grievance on 7 November 2019. The grievance was upheld.
9. On 26 May 2020 the claimant tied the arms of his overalls around his waist as the workshop in which he was working was hot. The claimant refused instructions to put the overalls on properly and was sent home by the workshop supervisor Mr Lindsey. He returned to work on 28 May 2020 by which point fans had been installed in the workshop.
10. An investigation into this incident concluded that there was evidence that the claimant unreasonably refused to follow an instruction issued by a manager or supervisor and that formal action should be taken.
11. A disciplinary hearing took place on 19 August 2020 chaired by Peter Shaw. In a letter dated 28 August 2020 Mr Shaw found the charge against the claimant proven and the claimant was issued with a first written warning. The claimant appealed the decision, but it was upheld at appeal by the appeal manager Martin Audis in a decision letter dated 9 October 2020.
12. The claimant raised a wide-ranging grievance on 10 July 2020. He was asked to provide further information and was notified on 29 July 2020 that as he had not done so, the grievance was closed.
13. On 24 August 2020 the claimant raised a grievance against Stephen Knight, Contract Manager. The claimant requested that an external manager be appointed to hear the grievance. After an investigation, and a hearing chaired by Terry Howard, Senior Quality manager, Mr Howard set out in a letter dated 18 September 2020 that the grievance was not upheld. The claimant appealed the decision, but the decision was upheld in a letter dated 14 October 2020 from Timothy Claringbull, Head of Transformation, following a hearing on 6 October 2020.
14. On 1 September 2020 the claimant drove into the respondent's car park at a time when due to a fire alarm there were a number of employees standing in the car park area. The speed limit in the car park was 5 mph. Dave Elliott, Finance Manager, challenged the claimant as he thought he had been driving over the speed limit. Mr Elliott subsequently reported the incident.
15. Andrew Smith investigated the incident and concluded on 25 September 2020 that there was a case to answer of a breach of site rules and breach of a number of the respondent's policies. Formal action was recommended.
16. On 22 September 2020 when the claimant reported for work he was told that he would have to have his temperature taken before he could enter the site. The claimant protested, and that protest included him swearing at his colleagues. He was subsequently sent home. An investigation by Mark

Hynes concluded on 8 October 2020 and formal action was recommended on the basis that the claimant had shown unsatisfactory behaviour at work.

17. On 8 October 2020 the claimant was asked to do a job by the workshop supervisor Troy Lindsey. Mr Lindsey was unable to provide the correct paperwork for the claimant to complete in relation to the job as, he said, the administration office was not yet open. He asked the claimant to write down the checks and transfer them to the correct paperwork later. The claimant said that he would not do this as he had dyslexia. Mr Lindsay challenged this and according to Mr Lindsey the claimant said *'I can but I won't, why should I? If the company wants me to do the job, they should sort out the packs'*. The claimant admitted that he had made such a statement in oral evidence. The claimant said he was going home but after discussion with his trade union representative Steve Mason he remained. He started work on the job when the official paperwork was provided. Before it was completed, he was handed a letter telling him that he was suspended with immediate effect.

18. On 4 November 2020 the respondent wrote to the claimant inviting him to a disciplinary hearing on 11 November 2020, to be conducted by Martin Audis, a contract manager from another part of the respondent's business. The charges against the claimant were set out as follow:

"On 8 October 2020, you were suspended pending an investigation following an incident that occurred on the morning of this date whereby you allegedly refused to obey a reasonable instruction of completing paperwork related to work you were completing, that was instructed by a manager/supervisor. In addition to this, there were other instances in the process of being investigation regarding conduct, behaviour and insubordination including; on 22 September, you were asked by the Workshop Controller to take your temperature check however you allegedly refused to comply with a reasonable instruction and reacted in an inappropriate manner. On 1 September, you allegedly drove above the speed limit within the company car park, placing yourself and other employees at risk. The purpose of the meeting is to establish these allegations.

The above allegations may constitute, but are not exclusive to:

1. Serious and or breach of the company's Disciplinary policy, in particular:

- a. Unsatisfactory behaviour at work;*

- b. Serious or repeated failure to follow reasonable requests or instructions;*

- c. Unreasonable refusal to obey reasonable instructions from a manager/supervisor or other serious insubordination;"*

19. The claimant was advised in the letter that he could bring a colleague and that one result of the hearing could be that the claimant was dismissed.

Neither the claimant nor the claimant's representative raised before or during the disciplinary hearing that they were unhappy with the appointment of Mr Audis as the disciplinary manager.

20. On 10 November 2020 the claimant requested to have all questions in writing in advance of the hearing due to suffering from dyslexia and said that he would not carry out any meetings verbally unless they were recorded for accuracy.
21. The respondent's Natasha Gupta said that it was not possible to provide questions in advance as the questions followed the evidence, and that meetings were not recorded. She said that sufficient time would be provided for the claimant to answer questions and he would be given an opportunity to review the notes.
22. The disciplinary meeting on 11 November 2020 was held by conference call due to issues with a video link. The claimant attended with his trade union representative, Steve Mason. The claimant said at the outset *'I'm going to be non-verbal. I don't trust the notes and have no faith in HR. I'm going to write the answers and Steve Mason or Natasha can read and write them out.'* The hearing commenced in this way but as it progressed the claimant began answering questions verbally. In oral evidence he said that this was because his writing was poor and Steve Mason was unable to read it, which I accept.
23. The claimant said that he did not trust the minute taking process of the respondent and this was why he wanted to record meetings. Mr Audis confirmed that minutes were provided to those who attended meetings for review and comment. There is evidence from the bundle that the claimant was given the opportunity to review (and did in fact amend) minutes for an earlier meeting and that he was provided with minutes of the appeal hearing on 3 December 2020 to review. I find there is no evidence that the respondent did not follow a proper process in respect of minute taking.
24. Following the investigation meeting Mr Audis carried out some further investigations by interviewing Steve Knight and Troy Lindsey. On 20 November 2020 Mr Audis wrote to the claimant setting out as follows: in relation to incident 1, the alleged speeding on 1 September 2020, this was unproven and therefore there was no case to answer, in relation to incident 2, refusing to be temperature checked on 22 September 2020, the allegation was upheld and the claimant's behaviour *'was not in line with that which [he] would expect from a reasonable request'*, and in relation to incident 3, the allegation was upheld as the claimant's words to Troy Lindsey were *'a direct challenge to a manager/supervisor who had made a reasonable request.'*
25. Mr Audis went on to state:
Given the fact that you already have a live First Written Warning sanction on file for a similar occurrence, I firmly believe that these situations would

continue to occur repeatedly and could be detrimental to the running of the business, as well as potentially the functionality and safety of other staff, whilst engaging unaffordable time in investigating individual issues that could and should be addressed through the correct process and collective representation.

To that end and weighing all the facts, the continued questioning of both decisions and style, I find points 2 & 3 (refer to hearing findings) to be proven. These demonstrate a breach of Disciplinary Policy with following:

a. Unsatisfactory behaviour at work;

b. Serious or repeated failure to follow reasonable requests or instructions;

c. Unreasonable refusal to obey reasonable instructions from a manager/supervisor

or other serious insubordination;

As such, I have made the decision dismiss you with immediate effect. Your notice period will be paid in lieu and you will not be required to work your notice. [295]

26. The claimant appealed the decision. The appeal was heard by Tony Marton, a contract director from another part of the respondent's business, on 3 December 2020. In a decision dated 11 December Mr Marton upheld the decision to dismiss the claimant.[327] In that decision he dealt with the claimant's complaint that Mr Audis was biased. He found that t Mr Audis had no other involvement in any of the incidents or investigations and there was no evidence of bias in his decisions.

Submissions

27. Both parties provided full submissions which I have summarised below.

28. For the respondent Mr Nainthy said that on the evidence there was no other reason for the dismissal than conduct. He said that the respondent had a genuine belief that the claimant was guilty of misconduct. The claimant accepts that he refused to have his temperature taken and the evidence showed that he reacted inappropriately. On the vehicle inspection, the request from Mr Lindsey was not unreasonable and the claimant's reaction arose out of conflict between Mr Lindsey and the claimant. Mr Nainthy referred to comments from the claimant in oral evidence that Mr Lindsey was not qualified for the role he had been given. He said there had been a full investigation into all matters and Martin Audis had carried out further investigation after the hearing. He said investigation meetings were held, notes were taken, the claimant had the right to be and was accompanied by his trade union representative, the allegations were set out, he was warned of the possible outcomes, and he had a right of appeal. On bias neither the claimant nor the representative had raised at the disciplinary hearing that Mr Audis was an unsuitable disciplinary manager and the claimant had

previously voiced concerns in a grievance process about the suitability of someone appointed to hear a grievance. On the range of reasonable responses, Mr Nainthy said the decision was within that range. He said that the tribunal should not look behind the extant warning and that it should take it into account when looking at the claimant's conduct in total. Mr Nainthy pointed to the claimant's behaviour in relation to the two allegations upheld by Mr Audis. He said it was not just the incidents but the way he acted after, such as swearing and ripping up paperwork. Mr Nainthy said that if it was found that the respondent's process was unfair, it was clear that the claimant would have been dismissed in any event and said that if the dismissal was found to be unfair then the claimant's conduct had contributed to the dismissal.

29. The claimant said that his conduct was in line with the position, training and qualifications he held and the tone was set by those around him such as Steve Knight and Troy Lindsey. He referred to his 25 years serving in the armed forces and said that his exemplary record showed that he was able to take orders. The claimant said that the policies applied in relation to the overalls incident and temperature testing were targeted at small areas of the work force and were not properly published policies. The claimant said that he questioned the thoroughness of the disciplinary investigation and grievance investigations as he said that key witnesses were not interviewed. He said that he did not think the procedures were fair. He said procedures were used against him but when he questioned the use of any procedures his questions were ignored. He said that the allegations against him always led straight to formal action without consideration of informal action as set out in the disciplinary policy. The claimant said that Martin Audis had said in the hearing that he and Stephen Knight were friends, and this brought into question any decision by Martin Audis. On the Burchill test he said that his behaviour was not misconduct. He said he told the respondent he would take the temperature test if others did and he did what he was asked to do by Troy Lindsey. The claimant said there was no reasonable grounds to believe in his misconduct as the temperature test was not enforced across the board and he did do the work he was asked to do by the supervisor. He did not think the investigation was fair as not all witnesses were spoken to, and he did not have all the relevant evidence.

Law, Decision and Reasons

30. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.
31. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. I am satisfied on the evidence that the Claimant was dismissed for conduct.
32. The claimant put forward the alternative view that he was dismissed as a result of supporting two colleagues who had brought employment tribunal

claims against the respondent. He said in effect that he was targeted for this action. In support of this claim the claimant provided two undated witness statements written by him in support of his two colleagues. The claimant said this happened in 2020 and attitudes to him changed thereafter. The claimant did not provide evidence that anyone involved in the events that led to his dismissal was aware of the statements, and Mr Audis said in oral evidence that he did not know the two individuals or of the claimant's statements in support of them. I find therefore that this alternative view is unproven and there was no reason for the claimant's dismissal other than the respondent's belief in his misconduct.

33. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
34. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439*, *Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*, and *London Ambulance Service NHS Trust v Small 2009 IRLR 563*).
35. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant on his own admission refused to have his temperature taken on 22 September 2020, he swore when arguing about the matter with the colleagues who had been instructed to take his temperature and was subsequently sent home. On 8 October 2020 the claimant refused to write down inspection notes to be transferred to official documentation at a later stage, because the official documentation was not available at that time. Again, the claimant admits this. In addition, there was a live first written warning for insubordination relating to the incident about overalls on 26 May 2020. The warning was issued after an investigation and disciplinary process and had been reviewed at appeal.

36. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.
37. The incident on 22 September was investigated by Mark Hynes who spoke to those present at the time and others involved in the implementation of the temperature testing policy. He produced an investigation report which was provided to the disciplinary manager Martin Audis. The claimant was invited to a disciplinary meeting, and he attended with a trade union representative. He was provided with the documentation that Mr Audis had seen before the meeting. After the meeting Mr Audis carried out further investigations before reaching his decision which included an interview with Troy Lindsey about the incident on 8 October 2020. The Claimant had the opportunity to appeal the decision, which he did. He was invited to an appeal hearing which he attended with a trade union representative.
38. The claimant put forward throughout his witness statement and in the hearing that the investigation and disciplinary process was not reasonable as there was a failure by the respondent to show that there was a considered policy in place about temperature taking and in relation to 8 October 2020 that he had carried out the vehicle inspection he had been asked to do. In my view this is a misreading of the charges and findings. The allegations set out in the disciplinary meeting invitation are very clearly said to be a breach of the disciplinary policy by unsatisfactory behaviour, and refusal to accept instructions, both of which are examples of misconduct in the respondent's policy. Mr Audis took the view that notwithstanding the claimant's evidence that there were questions to be asked about the implementation of the temperature testing policy (a matter raised by him in a list of recommendations to the business he drew up after his part in the process had concluded) the request had been reasonable and the claimant's behaviour in response was not such as he would have expected. He also took the view that in relation to the incident on 8 October 2020 the claimant had directly challenged a supervisor who had made a reasonable request.
39. The claimant said that it was unreasonable that Mr Audis be the disciplinary manager when he had heard an appeal by the claimant against a first written warning. The claimant did not raise this as a complaint until he appealed against his dismissal. The claimant did not point to any evidence of bias other than that Mr Audis upheld the allegations against him. He referred to the fact that in cross examination Mr Audis said he knew Steve Knight. Mr Audis said he knew Steve Knight from a previous job. Steve Knight was not directly involved in either of the incidents that led to the claimant's dismissal. Whilst it would have been preferable to have different people hearing the appeal in the first disciplinary matter and chairing the second disciplinary hearing, I do not find that there is any evidence of bias or that this rendered the investigatory process unreasonable.
40. The claimant said that he was surprised that Troy Lindsay, Steve Bober and Nick Walker were not witnesses at this hearing as he had wanted to cross

examine them on the evidence they gave in the disciplinary hearing. It is not the place of the tribunal to re-run a disciplinary process. Its task is to consider whether the investigation and disciplinary process carried out was reasonable and whether the decision reached was reasonable on the basis of the findings.

41. I find on the evidence provided that the investigation and disciplinary process was reasonable. Relevant witnesses were interviewed, the claimant had the opportunity to make his case at a hearing and to appeal a decision he did not agree with. Where the decision manager did not find a charge proven he did not uphold it.
42. I must then consider whether the decision to dismiss was within the range of reasonable responses. As set out above it is immaterial how the tribunal would have handled events, the test is simply whether a reasonable employer could have reached the decision to dismiss on the particular facts. The claimant says that the sanction was overly harsh and said in oral evidence that he had expected that the outcome would be a final written warning. Mr Audis had a range of options open to him under the disciplinary policy. The claimant had received a first written warning on 28 August 2020. The warning was for insubordination in that the claimant failed to follow an instruction to put on his overalls properly. Mr Audis set out in his decision letter that taking this first warning into account, his two further findings in relation to the incidents on 22 September and 8 October, as well as the claimant's negative comments about the respondent and its processes during the hearing, he believed further similar incidents would arise, which would be detrimental to the running of the business, and went on to conclude that dismissal was the appropriate sanction. I find that this was a decision that Mr Audis was entitled to make based on the investigations carried out, the evidence before him, and the guidance in the respondent's disciplinary policy. I find that it was within the range of reasonable responses.
43. I therefore conclude that the dismissal of the claimant by the respondent on 20 November 2020 was fair, and the claimant's claim is dismissed.

Employment Judge Anderson

Date: 1 June 2022

Sent to the parties on: 21 June 2022

For the Tribunal Office