EMPLOYMENT TRIBUNALS

Claimant: Mr Javier Sanchez Ortiz

Respondent: Mitie Limited

Heard at: London South Employment Tribunal (by CVP)
On: 24-27 January 2022

Before: Employment Judge Abbott, Mrs G Mitchell and Mr J Bendall

Representation
Claimant: Mr Finnian Clarke of United Voices of the World
Respondent: Mr Steven Gittins, barrister, instructed by Dentons UK and Middle East LLP

JUDGMENT having been sent to the parties on 22 February 2022 (reasons having been delivered orally on 27 January 2022) and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Mr Javier Sanchez Ortiz, was employed by the Respondent, Mitie Limited, as a cleaner at the site of the Respondent's client, Daily Mail and General Trust, in London from May 2010. His employment ended with him being summarily dismissed on 4 December 2018.

2. The Claimant brought claims for 'ordinary' unfair dismissal, automatic unfair dismissal, trade union detriment, breach of the right to be accompanied and wrongful dismissal. The Respondent denied the Claimant's claims.

3. The case came before the Tribunal for Final Hearing on 24-27 January 2022. The hearing was held fully remote through the Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

4. Oral judgments were delivered on liability and remedy on 27 January 2022, in each case being unanimous decisions of the Tribunal. Written reasons

were subsequently requested by the Claimant. The Tribunal apologises for the delay in promulgating these reasons, which resulted from an initial delay of several weeks in the request being communicated to the Employment Judge, and workload pressures thereafter.

5. The Respondent relied upon witness statements from Mr Matthew Warwick (the investigation manager), Mr Dwayne Royall (who took the decision to dismiss the Claimant) and Ms Linda McKenna (who heard and dismissed the Claimant's appeal). Mr Warwick and Ms McKenna attended the hearing and gave oral evidence. Mr Royall, however, failed to attend the hearing and, in the circumstances further described below, the Tribunal concluded it was unable to place any weight on his written evidence.

6. The Claimant provided a witness statement and gave oral evidence. He called three other witnesses who each provided witness statements and gave oral evidence, namely Mr Elia (his union representative), Ms de Dios Fisher (a union caseworker who assisted with translation during the disciplinary appeal) and Ms Baek Espinosa (a former employee of the Respondent).

7. The Tribunal was provided with a bundle of documents and, notably, a CCTV video of the Claimant's fall on 15 October 2018 that led ultimately to his dismissal.

8. The issues to be determined were set out in an Order of EJ Fowell dated 12 May 2020. One additional detriment was relied upon by the Claimant in his skeleton argument, relating to the conduct of the appeal hearing. This was pleaded by the Claimant in his ET1 and the conduct of the appeal hearing was squarely at issue in the evidence. Both parties addressed the Tribunal on the issue in closing. The Tribunal therefore considered it appropriate to address the issue in its decision.

Findings of fact

9. The relevant facts are, we found, as follows. Where it was necessary for us to resolve any conflict of evidence, we indicate how we have done so at the relevant point. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in these reasons. We have not referred to every document read by the Tribunal in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.

10. Prior to the events leading to his dismissal, the Claimant had an impeccable record as an employee.

11. The Claimant was a member of the United Voices of the World (***UVW***) union, in which he played a role which was active at a level comparable to other colleagues who were union members. The evidence on this was not entirely consistent, but the Tribunal felt that the Claimant slightly underplayed, and Mr Elia slightly overplayed, the extent of the Claimant's active involvement.

12. There was a general awareness within the Respondent about the UVW union, in particular in view of the campaign for London Living Wage to be paid to staff at the Daily Mail site, which culminated in a petition that attracted in

the region of 100,000 signatures in 2018. More specifically, each of the managers involved in the Claimant's investigation, disciplinary and appeal process (Mr Warwick, Mr Royall and Ms McKenna) were aware of the UVW union and, in particular, of its co-founder Mr Elia.

13. An incident took place on 15 October 2018 involving the Claimant falling at work. It was captured on CCTV. The CCTV footage can be interpreted in different ways, but does not in itself give sufficient grounds for a reasonable viewer to conclude that the fall was staged.

14. After a period of 10 days off work due to a back injury, during which time the Claimant was paid Statutory Sick Pay and therefore earned less than he would have done had he been working, the Claimant returned to work.

15. The Claimant was made the subject of an investigation into the incident of 15 October 2018. The investigation was led by Mr Warwick, who held an investigation meeting on 1 November 2018 that the Claimant attended without being accompanied. At that meeting the CCTV footage was played.

16. At some point shortly after that meeting, the Claimant called the UVW union for assistance. Ms de Dios Fisher of the union in turn called Mr Warwick to seek further information about the Claimant's case. This call took place prior to the Claimant being invited to a disciplinary hearing.

17. By a letter of 6 November 2018 the Claimant was invited to a disciplinary meeting. There was then a series of postponements and rearrangements, the chronology of which is not in dispute, resulting from issues on both sides. Throughout this time, the UVW union's (more specifically, Mr Elia's) involvement as the Claimant's representative was clear to all relevant individuals at the Respondent.

18. On 30 November 2018 Mr Royall, who was by that point the disciplinary manager handling the case, issued an invite to a disciplinary hearing on 4 December 2018. This was a date determined by Mr Royall and not by, or in consultation with, the Claimant or his representative.

19. By email at 17:19 on 3 December 2018, Mr Elia emailed Ms Steiner (who had previously been handling C's case as disciplinary manager) requesting a postponement of the next day's hearing due to his unavailability, and proposing an alternative time and date, that being 11am on Tuesday 11 December 2018. This email was passed, via Mr Warwick, to Mr Royall.

20. At the appointed time for the hearing on 4 December 2018, Mr Royall was aware that a postponement request had been made. He decided to proceed in the Claimant's absence and took the decision to dismiss. The asserted reason for the dismissal was on the grounds of conduct, in that the Claimant had falsely claimed to have had an accident at work on 15 October 2018. However, the Claimant advanced no oral evidence at the Final Hearing to support the dismissal being for that reason. The Tribunal's findings as to the true reason are set out in the Conclusions section below.

21. The Claimant appealed the decision to dismiss, and his grounds of appeal were set out in a letter at page 95 of the Bundle.

22. The appeal hearing took place on 18 December 2018, chaired by Ms McKenna. We made the following findings as to what happened at the appeal, primarily based on the evidence of the Claimant's witnesses (in particular Ms de Dios Fisher) which we considered to be consistent and credible. We placed little weight on the email of Ms Horn (HR Business Partner for the Respondent, who was not called as a witness) dated 24 December 2018 regarding the meeting and the notes of the meeting itself (pages 101-104 of the bundle, which emphasise on their face that they are not verbatim), which was clearly outweighed by the oral evidence. We did not on the balance of probabilities accept Ms McKenna's account, which was outweighed by the other oral evidence.

    (1) First there were formal introductions of the attendees and basic formalities.

    (2) Ms McKenna then handed over to Mr Elia to present the appeal

    (3) When Mr Elia started to try to make his points about breaches of section 10 of the Employment Relations Act 1999 (***ERA 1999***) (right to be accompanied), Ms McKenna reacted defensively and sought to close him down. From there, no real progress was made in the hearing at all.

    (4) We find that Ms McKenna went into the appeal hearing not having an open mind about the appeal or about how to deal with Mr Elia. She was well aware of the wider issues with the union.

    (5) In particular, Ms McKenna did not invite Mr Elia to make submissions on mitigation or sanction.

23. The appeal outcome letter was sent on 4 January 2019, upholding the dismissal.

Relevant law

'Ordinary' unfair dismissal

24. Section 94(1) of the Employment Rights Act 1996 (***ERA 1996***) provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that the Claimant was a qualifying employee and was dismissed by the Respondent.

25. Section 98 ERA 1996 deals with the fairness of dismissals. There are two stages within this section.

    (1) First, the employer must show that it had a potentially fair reason for the dismissal, *i.e.* one of the reasons listed in section 98(2) or "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" (section 98(1)(b)). Conduct is one of the potentially fair reasons.

    (2) Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the employer acted

> fair or unfairly in dismissing for that reason. Section 98(4) provides that the determination of the question whether the dismissal is 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. The burden of proof at this stage is neutral.

26. In cases relating to conduct (as this case is), the Tribunal should apply the test set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379. In summary, the employer must demonstrate that:

    (1) it genuinely believed that the employee was guilty of misconduct;

    (2) it had reasonable grounds for that belief; and

    (3) it had carried out an investigation into the matter that was reasonable in the circumstances of the case.

27. It is not for the Tribunal to substitute its own view of what it would have done in the position of the employer, but to determine whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the substantive decision and the procedure followed (*J Sainsbury plc v Hitt* [2003] IRLR 23; *Whitbread plc v Hall* [2001] ICR 699).

Automatic unfair dismissal

28. Section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (***TULRCA***) provides that the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee (a) was, or proposed to become, a member of an independent trade union, [...] [or] (ba) had made use, or proposed to make use, of trade union services at an appropriate time […].

29. Where (as here) an employee who alleges that he or she was dismissed for an 'automatically unfair' reason has sufficient qualifying service to claim unfair dismissal in the normal way, then the burden of proving the reason for dismissal is on the employer, as it is in an ordinary unfair dismissal claim under s.98 ERA 1996.

30. In *Kuzel v Roche Products Ltd* [2008] ICR 799, the Court of Appeal held that, if an employer does not show to the satisfaction of a tribunal that the reason for dismissal was the one put forward by it, it is open to the tribunal to find that the real reason was that asserted by the employee. But it does not follow, as a matter of either law or logic, that the tribunal must find that, if the reason was not that put forward by the employer, then it must have been that asserted by the employee. It is open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not advanced by either side. However, once a claimant has produced some evidence in support of his or her case (i.e. meets the evidential burden to show, without having to prove, that there is an issue

which warrants investigation and which is capable of establishing the automatically unfair reason he is advancing), the burden shifts to the employer to establish that the reason for the dismissal was not the automatically unfair reason.

Trade union detriment

31. Section 146(1) of TULRCA provides that a worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of […] (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so […].

32. In the case of an employee, a dismissal cannot amount to a detriment (s.146(5A) TULRCA). Applying the logic of the Court of Appeal's decision in *Woodward v Abbey National plc (No 1)* [2006] ICR 1436, post-termination detriments are actionable.

33. The rules on burden of proof are rather similar to those for automatic unfair dismissal. There is an initial burden on the Claimant to show a *prima facie* case that the purpose of the acts relied upon as detriments were for the purpose of preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so. The burden then shifts to the employer to show the true purpose (as per s.148(1) TULRCA).

Right to be accompanied

34. Section 10(4) of the ERA 1999 provides that if — (a) a worker has a right under this section to be accompanied at a hearing, (b) his chosen companion will not be available at the time proposed for the hearing by the employer, and (c) the worker proposes an alternative time which satisfies subsection (5), the employer must postpone the hearing to the time proposed by the worker.

35. Section 10(5) of the ERA 1999 provides that an alternative time must — (a) be reasonable, and (b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

36. There was a dispute between the parties over the effect of section 10(5)(a): it was argued by the Claimant that it simply requires that the proposed alternative time must be reasonable, whereas the Respondent argued that it requires the postponement request more generally to be reasonable in all the circumstances. Neither party identified any previous case law considering this point. The Tribunal considered that the Claimant's approach was the correct one. On its plain wording, section 10(5) is concerned with the alternative time and not with the postponement request more generally, and no purpose is served by interpreting the provision otherwise.

37. Even if an employer is not technically in breach of section 10, a refusal to allow a hearing to be postponed so that the employee can be accompanied

may still result in an unfair dismissal if it was unreasonable not to postpone the hearing (*Talon Engineering Ltd v Smith* [2018] IRLR 1104, EAT).

Wrongful dismissal

38. An employee is not entitled to notice of termination if they have fundamentally breached the employment contract, *e.g.* if the contract is terminated because the employee is guilty of gross misconduct. It is not enough for the employer to show (as for unfair dismissal) that it reasonably believed that the employee committed gross misconduct, but that the misconduct was actually committed (*British Heart Foundation v Roy* UKEAT/0049/15).

Conclusions on liability

'Ordinary' unfair dismissal

39. The first issue to resolve is whether the Respondent has shown that it had a potentially fair reason for the dismissal.

40. The Tribunal gave judgment in favour of the Claimant at the close of the Respondent's evidence on the basis that the Respondent had failed to meet its burden. The dismissing officer, Mr Royall, failed to attend to give evidence. The Tribunal was not satisfied that the reasons given contemporaneously, which were based on an assertion that the Claimant had faked his fall, were genuine. As we have found, the CCTV evidence in itself was insufficient to make such a finding. Moreover, there was no obvious logical reason for the Claimant to fake a fall leading to injury – as found above, in fact the Claimant suffered financial loss as a consequence of being off work in the immediate aftermath. There was therefore a lacuna in the Respondent's justification for the dismissal.

41. Accordingly, the Tribunal found that the Respondent had failed to show that it had a potentially fair reason for the dismissal and, therefore, the claim succeeded.

Automatically unfair dismissal

42. The issues under this head were summarised in the Order of EJ Fowell as follows:

> 5.1 Was the principal reason for Mr Sanchez-Ortiz's dismissal that he was a trade union member or had made use of the services of one of their representatives?
>
> 5.2 In addressing that question the Tribunal will consider:
>
> (a) whether he has produced enough evidence to raise this question?
>
> (b) if so, whether the company can then satisfy it of its reason for the dismissal, namely conduct?
>
> (c) if not, whether they accept that it was the union membership or activities or some other reason?

43. Regarding (a), the Tribunal was satisfied that the Claimant produced

sufficient evidence to raise the question. There are sufficient primary facts from which it could fairly be inferred that the prohibited reason was the true reason. These are: (1) the relevant managers' knowledge of the Claimant's union membership, (2) the reputation of the UVW union within R, in particular in light of the recent London Living Wage campaign, (3) the reputation of Mr Elia within the Respondent, (4) the evidence of the Claimant regarding previous suggestion of anti-union sentiment among managers at the Respondent.

44. Per point (b), it then falls to the Respondent to satisfy the Tribunal of its reason for the dismissal. As already noted under 'ordinary' unfair dismissal, the Tribunal found that the Respondent failed to meet its burden to prove its own reason for dismissal.

45. Moving to point (c), the Tribunal must also consider whether there is any other reason that the evidence suggests was the true reason. We did not consider there to be any evidential basis to find there was any other reason at play.

46. We therefore concluded that, on the balance of probabilities, the principal reason for the Claimant's dismissal that he was a trade union member or had made use of the services of one of their representatives. The claim for automatically unfair dismissal therefore succeeded.

Right to be accompanied

47. The question to be resolved here is whether the Respondent complied with section 10(4) ERA 1999 when refusing to reschedule the disciplinary hearing so as to take place on 11 December 2018, as requested. (The Claimant did advance an alternative basis for the right to be accompanied claim, relating to the conduct of the appeal hearing, though this was not recorded in the Order of EJ Fowell and we considered it better addressed as part of the detriment claim in any event.)

48. There was no dispute that section 10(4)(a) was satisfied, i.e. the Claimant had the right to be accompanied. Nor was it disputed that the Claimant's chosen representative, Mr Elia, was not available at the scheduled time (section 10(4)(b)). An alternative time was proposed that fell on a day (11 December 2018) before the end of the period of five working days beginning with the first working day after the day proposed by the employer (5 December 2018, as the hearing was scheduled for 4 December 2018), so section 10(5)(b) was satisfied.

49. On the Tribunal's interpretation of section 10(5)(a), the alternative time proposed was an objectively reasonable one: there is nothing obviously unreasonable about proposing that a hearing take place at 11am on a normal working Tuesday.

50. Accordingly, all of the requirements of section 10(4) were met and, therefore, the Respondent was obliged to postpone the hearing to the time proposed by the Claimant. It did not do so, and was therefore in breach of section 10.

51. For completeness, even if the Tribunal had accepted the Respondent's interpretation of section 10(5)(a), we would nonetheless have found for the

Claimant. The Tribunal saw nothing objectively unreasonable about the Claimant's postponement request. Whilst it was made late in the day, Mr Royall was aware of it in advance of the scheduled hearing. As found above, the history of postponements and rearrangements was not all one-way: there were rearrangements due to issues on both sides. It was unreasonable on the part of Mr Royall to insist on proceeding in the Claimant's absence in all the circumstances.

Trade union detriment

52. The Claimant relied upon the following as detriments:

(1) The Respondent's failure or refusal to rearrange the disciplinary hearing to 11 December 2018 as requested;

(2) Ms McKenna's conduct of the appeal hearing, specifically (i) seeking to utilise Mr Elia's reputation as a way to discredit him, (ii) seeking to prevent the Claimant from utilising his representation during the hearing, and (iii) seeking to remove Mr Elia and ask Ms de Dios Fisher to conduct the proceedings instead.

53. As already noted, the rules on burden of proof are similar to those for the automatic unfair dismissal claim. For the same reasons set out in relation to automatic unfair dismissal, we found that the Claimant had shown sufficient primary evidence that it could plausibly be concluded that the Respondent's purpose was the prohibited one. The burden then shifts to the Respondent to show the true purpose.

54. Regarding the failure to postpone the disciplinary hearing, for the same reasons given in relation to automatic unfair dismissal, the Respondent failed to meet its burden. There is no reliable evidence of Mr Royall's reason for not postponing the hearing, and no evidential basis to find that the reason was other than that advanced by the Claimant.

55. Regarding the conduct of the appeal hearing, we have made factual findings about how the hearing was conducted. Ms McKenna's actions at the meeting were such that, in practice, the outcome was to penalise the Claimant for using the union services. There is insufficient reliable evidence (having rejected Ms McKenna's own account) to make a finding that Ms McKenna's purpose was other than the prohibited purpose. The Respondent therefore fails to discharge its burden on this aspect also.

56. Accordingly, the Claimant's trade union detriment claim succeeded.

Wrongful dismissal

57. The Tribunal gave judgment in favour of the Claimant at the close of the Respondent's evidence on the basis that the Respondent had failed to meet its burden to show a reason for summary dismissal. The reasons are those already given in relation to the ordinary unfair dismissal claim.

<u>Remedy</u>

58. Having delivered its oral judgment on liability, the parties agreed several aspects of the remedy, specifically:

    (1) The award for unfair dismissal, being a basic award of £6,203.00 and a compensatory award of £11,314.61;

    (2) The award for breach of section 10 ERA 1999, being £734.40; and

    (3) The award for wrongful dismissal, being £2,227.12.

59. The Tribunal was left to determine two issues, being:

    (1) The award for injury to feelings under the Claimant's detriment claim; and

    (2) Whether an uplift should be awarded for failure by the Respondent to comply with the ACAS Code pursuant to s.207A of TULRCA. If ordered, that uplift would apply to all of the awards other than the s.10 award.

Injury to feelings

60. The Tribunal heard evidence from the Claimant as regards the effect of the detriments on his feelings. We found that the detriments have had a lasting effect on the Claimant, beyond the inevitable emotional impact of a dismissal. In particular, we accepted the Claimant's evidence of his emotions in the immediate aftermath of the appeal hearing. It was also evident to the Tribunal when the Claimant gave his evidence in the liability part of the Final Hearing, and we found, that there has been a continuing impact that the events of late 2018 on the Claimant.

61. We also found, based on the evidence, that the Claimant has continued to work since his dismissal from the Respondent. The Respondent submitted that this means he cannot truly have clinical depression. We reject that submission: it is possible for those with depression to continue to work.

62. The Respondent's position was that an appropriate award would be around £7,500, i.e. at the upper end of the lower Vento band. Mr Gittins pointed, by reference, to guidance for awards in relation to PTSD in the 15th edition of the Judicial College Guidelines, in particular to the upper end of the "less severe" range, being at £7,680. Having considered those guidelines, the Tribunal was of the view that the impact on the Claimant is more comparable to "moderate" than "less severe", for which the guidance is for awards in the range £7,680 to £21,730.

63. The Claimant's position was that the middle Vento band was appropriate, and an award of £15,000 was sought.

64. The Tribunal agreed with the Claimant that the middle Vento band is appropriate. However, we were of the view that the Claimant's injury falls toward the lower end of this range. As noted above, the Claimant has continued to work, which provides some indication of the degree of impact. We must also take care not to compensate for the emotional effect of the dismissal itself, but only for the detriments found.

65. In the Tribunal's view, a just and equitable award for injury to feelings in this case is the sum of £10,000.

ACAS uplift

66. The Claimant argued for the maximum 25% uplift, submitting that both the disciplinary hearing and appeal involved callous and deliberate disregard for basic rules of fairness. The Respondent argued that no uplift was appropriate, on the basis that any procedural failings are covered by the award for unfair dismissal; alternatively, that there was no complete failure to comply and therefore an uplift of no more than 10% should be awarded.

67. The Tribunal did not accept the Respondent's submission that no uplift would be appropriate. There were clear breaches of the ACAS Code, including at least paragraphs 12 (The employee should be allowed to set out their case and answer any allegations that have been made) and 16 (which reflects the postponement rights under s.10). The procedure adopted by the Respondent in respect of the Claimant was unjust and unreasonable, for the reasons already given in the liability section above. In effect, the Claimant was denied any genuine opportunity to defend himself.

68. In those circumstances, the Tribunal considered that an uplift of 25% was appropriate.

69. The Tribunal therefore made the following award:

    (1) Unfair dismissal: £17,517.61

    (2) Detriment: £10,000.00

    (3) Breach of contract: £2,227.12

        SUB-TOTAL (1)+(2)+(3): £29,744.73

    (4) 25% uplift on (1)+(2)+(3): £7,436.18

    (5) s.10: £734.40

        TOTAL (1)+(2)+(3)+(4)+(5): £37,915.31

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Employment Judge Abbott

Date: 20 June 2022