



EMPLOYMENT TRIBUNALS

Claimant: Mr S Merrell

Respondent: Bell Decorating Group

Heard at: Southampton (by VHS)

On: 8 & 9 June 2022

Before: Employment Judge Scott

Representation

Claimant: In Person

Respondent: Hazel Coutts of Brodies Solicitors.

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claim for unfair dismissal is not well founded and is dismissed.
2. The claim for unlawful deductions from wages is not well founded and is dismissed.

REASONS

1. By a claim form presented on 3 November 2020 (case 1405875/2020), the claimant, Mr Merrell, complained of unfair dismissal, unlawful deductions from his wages constituting his travel costs and victimisation.
2. A further claim form was presented on 15 February 2021 (case 1401252/2021). By order dated 21 October 2021 Judge Midgely ordered that the claims be heard together.
3. By a response form dated 27 May 2021, the respondent (The Bell Decorating Group) responded to the claim form dated 15 February 2021 and resisted the claim. Their case was that the claim was time barred, that the claimant's dismissal was fair, and that the claimant was not owed any

payments for travel. A further response form dated 20 September 2021 was filed by the respondent in response to the 3 November 2020 ET1.

4. Following the Claimant's dismissal on 07 July 2020, the Claimant lodged a claim for early conciliation with ACAS on 3 September 2020 and a certificate was issued on 1 October 2020, the first Tribunal claim was lodged on 03 November 2020. It was therefore brought within time. The second tribunal claim, filed on 15 February 2021 was brought out of time.
5. In his claim form, Mr Merrell had alleged victimisation, however, at the outset of the hearing Mr Merrell confirmed that he did not pursue a claim under the Equality Act 2010.
6. The claimant stated that the claims within his two claim forms were identical. The claimant therefore did not seek an extension of time for the 15 February 2021 claim form and confirmed he wished to withdraw claim 1401252/2021.
7. I identified the following issues for determination:
 - a. Was the Claimant unfairly dismissed?
 - i. What was the reason or principal reason for dismissal? The respondent says the reason was related to the claimant's 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?
 - iii. 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. Unauthorised deductions
 - i. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?
 - ii. Was any deduction required or authorised by statute?
 1. I.e. was the C entitled to payments for national mileage or
 2. Was the C entitled to payments for repairs of his van.
 - iii. Was any deduction required or authorised by a written term of the contract?

1. i.e., was the C entitled to payments for national mileage or
2. Was the C entitled to payments for repairs of his van.
- iv. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- v. Did the claimant agree in writing to the deduction before it was made?
- vi. How much is the claimant owed?

Evidence

8. I was provided with a bundle of evidence consisting of 126 pages, together with the witness statements for the two Respondent witnesses. I was further provided with an email from Mr Merrell to stand as his statement and a series of photographs.
9. I heard evidence from Mr Merrell in person. Bell decorating Group called two witnesses, Nick Owen (decision maker) and Andrew Blackmoor (chair of the disciplinary appeal).

Findings of fact.

10. Mr Merrell started employment with Bell Decorating Group on 20.03.17.
11. On 01.03.2020 Mr Merrell filed a grievance regarding the failure to pay a fair amount of petrol money for travel to work, given that Mr Merrell used his own van.
12. On the 19.05.20 a grievance meeting was held with Mr Nigel Loxton where Mr Merrell had the opportunity to discuss the issues he had raised regarding his travel expenses.
13. On 2 June 2020 Mr Merrell returned to work, having previously been on furlough during the Covid 19 pandemic. On the 02 June 2020, it is not disputed that Mr Merrell attended an induction at the Westfield Road lock up where he was informed of the location of the welfare facilities (P97). Those facilities were 7 miles from the site.
14. Mr Merrell was not happy to use the facilities at that distance, and in his witness statement confirms that he both urinated and cleaned himself in the back of his van. He states that his van has no windows.
15. In the week commencing 1 June 2020 Mr Merrell is said to have urinated behind a customer's shed. Mr Merrell denies doing so, and has provided photographs of the site explaining that he stored his tools behind the shed. Bell Decorating Group rely on the witness evidence of an anonymous

colleague of Mr Merrell, who states that he admitted to them he had urinated behind the shed.

16. Mr Merrell has admitted to not using the welfare facilities provided and urinating in the back of his van. He gave detailed evidence about the location of the shed where he was supposed to have urinated, and of the areas subject to the HSE complaint. Mr Merrell was able to provide a character reference from the customer the address where the incident was purported to have taken place.
17. I found Mr Merrell's evidence to be frank, detailed and believable. In contrast, the evidence from the witness colleague is vague and indirect. For those reasons I find that Mr Merrell did not urinate on a customer's property. However, for the reasons set out below, whether Mr Merrell in fact urinated behind the shed is not determinative of whether his dismissal was fair.
18. On 4 June 2020 an anonymous complaint was made to the Health and Safety Executive (HSE) regarding the lack of welfare facilities on site at Anchor Road and Anchor Close. That report stated that Employees were urinating on grassed areas of the road.
19. On 8 June 2020 the HSE contacted Bell Decorating Group regarding this complaint.
20. Also on 8 June 2020, Mr Merrell received a response to his grievance regarding travel expenses, which was not upheld, and was given 24 hours to appeal. He appealed the same day.
21. Sometime between the 8 and 12 June 2020, Mr Merrell is said to have had a conversation with a colleague (Witness A) and admitted to them that he urinated behind a shed (see paragraph 32 below). Mr Merrell in oral evidence denied having such a conversation. I have found Mr Merrell to be a reliable witness and I accept he did not have this conversation.
22. On 10 June 2020 welfare facilities were installed at the site where the work was taking place.
23. On 11 June 2020 Bell Decorating Group responded to the HSE complaint stating that all operatives had been informed of the welfare facilities, and that the operative in question is being disciplined regarding the incident. At this time, Mr Merrell was not subject to disciplinary proceedings.
24. Also on 11 June 2020, Mr Merrell was interviewed regarding the HSE complaint (P81). In that interview, Mr Merrell confirms he was not the person who urinated in the garden as per the HSE report he had been given to read. He states he washed himself down in the back of his van but was not seen doing so. He also confirms he was aware of the location of the welfare facilities.

25. On 12 June 2020 Witness A was interviewed (P83). Witness A states that Mr Merrell denied being on the road where the HSE incident took place, but stated that he 'had a wee behind a shed'. Further, that Mr Merrell has been caught cleaning himself down at the end of the day in his van in his underpants.
26. On 15 June 2020 Witness A was contacted again to confirm when Mr Merrell supposedly said he had urinated behind the shed at 31 Anchor Road, and the record states 'last week' (P86).
27. On 15 June 2020 Jon Wiltshire emailed Mr Merrell asking for clarification of some matters in his grievance appeal and arranging a grievance meeting to take place on 22 June 2020. On 19 June 2020 Mr Wiltshire delayed that meeting as he had not received a response to his requests for clarification. A further date of 30 June 2020 was proposed by Mr Wiltshire, to which there was no response from the Claimant.
28. The Claimant alleges that the grievance appeal hearing was never resolved because the disciplinary process was started. However, the emails provided in the bundle demonstrate that Mr Wiltshire was taking active steps to try to arrange the grievance appeal, and that he did not receive any response from the Claimant. I accept that the Bell Decorating Group and Mr Wiltshire were actively seeking to resolve the grievance notwithstanding the disciplinary proceedings.
29. On 19 June 2020 Mr Merrell provided Bell Decorating Group with a fit note, stating that he was unfit to work due to stress at work.
30. On 2 July 2020 Mr Merrell attended an appeal meeting conducted by Nick Owens. Mr Owens confirmed the company is large and he was appointed because he had no connection with Mr Merrell or his immediate supervisors.
31. Mr Owens confirmed in oral evidence that he was unaware of Mr Merrell's grievance and that grievance had no bearing on his decision. I find Mr Owen's to be a reliable witness. I accept both that Mr Owens was unaware of the grievance and that he was independent of the disciplinary investigation.
32. By letter dated 7 July 2020 Mr Owens found that Mr Merrell had urinated in the garden on the basis of the evidence before him and dismissed Mr Merrell for gross misconduct.
33. On 10 July 2020 Mr Merrell appealed on the basis that:
 - a. There was no direct evidence that Mr Merrell urinated in any public place.
 - b. The HSE report and the allegation against Mr Merrell were different.

- c. The HSE report was not available to the hearing manager or given to Mr Merrell in advance of the hearing.
 - d. The company had a preconceived view of the event
 - e. The company did not look for any evidence in support of Mr Merrell.
 - f. That Mr Merrell's timesheet dated 05/06/2020 was forged indicating that there was a lack of welfare facility.
34. Andrew Blackmoor, the second witness, was appointed to hear his appeal. The appeal hearing was scheduled for 7th August 2020 and Mr Merrell was accompanied by his trade union representative.
35. On 27 August 2020 Mr Blackmoor wrote to Mr Merrell confirming he upheld the decision to dismiss him for gross misconduct.

Relevant Law

36. Section 94 of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed. The employer must show that the reason for dismissal is a potentially fair one. There are five potentially fair reasons for dismissal as set out in s98 (1) (b) and (2) of the ERA 1996. The Respondent here relies on a reason related to the Claimant's conduct.
37. At this stage the burden on the Respondent is not a heavy one. A 'reason for dismissal' has been described as a 'set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee' (Abernathy v Mott Hay and Anderson [10974] ICR 323).
38. In considering whether the Employer had reasonable grounds to conclude the Employee was guilty of misconduct, I note that it is sufficient that the Employer honestly believed that the employee was guilty of misconduct, and that the Employer is not required to prove the offence *Alidair Ltd v Taylor 1978 ICR 445, CA*.
39. In considering whether the dismissal was fair or unfair, the Tribunal must be satisfied that in all the circumstances, the employer has acted fairly in dismissing for that reason (section 98(4) of ERA). There is no burden of proof on either party.

S98

- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
- (a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

40. I must not substitute my own decision for that of the employer in this respect. Rather it must be decided whether the Respondent's response fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439).

41. In a case concerned with conduct, regard should be had to the test set out by the EAT in *British Home Stores v Burchell* [1978] IRLR 379 in considering section 98 (4) of ERA. The essential enquiry for the Employment Tribunals in such cases is whether, in all the circumstances, the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee is guilty of misconduct. If satisfied in those respects, the Tribunal then must decide whether dismissal lay in the range of reasonable responses.

42. Both the ACAS Code of Practice on Disciplinary and Grievance procedures (the ACAS Code) as well as an employer's own internal policies and procedures should be considered in assessing the reasonableness of dismissal.

Submissions

43. At the conclusion of the evidence, each party made an oral submission which I have considered when reaching my decision.

44. Ms Coutts maintained that the decision to dismiss was taken on the basis of all the evidence before the decision maker, that the decision maker did not know about Mr Merrell's grievance and the process was independent and fair. Mr Merrell had the opportunity to present his evidence at the disciplinary hearing and the appeal hearing, and was accompanied by his trade union representative. The dismissal was reached in a full and fair way.

45. In relation to the deductions from wages, Mr Coutts submitted that there had never been written or oral agreement to pay vehicle maintenance or mileage at government rates. Mr Merrell's grievance in relation to these matters was dealt with fairly, and the grievance appeal did not proceed due to the Claimant failing to respond.

Discussion and Conclusions

Unfair Dismissal.

46. The first issue to be determined is the reason for dismissal. The burden of proof is on the Employer to show the reason for dismissal and that it is a potentially fair one.

Did the respondent dismiss the claimant for the alleged misconduct?

47. It is Bell Decorating Group's case that Mr Merrell was dismissed for gross misconduct because he was believed to have urinated behind the shed of a customer. This was based on the evidence of a colleague, (Witness A) who was interviewed in the course of an investigation into a complaint to the HSE regarding operatives urinating on Anchor Road and Anchor Close.

48. Mr Merrell has maintained that the real reason he was dismissed was for raising a grievance regarding payments for travel time and mileage. As set out at paragraph 31, I accept that Mr Owen's was unaware of the grievance. Furthermore, Mr Merrell's evidence in this regard was confused. He did not dispute the contents of Mr Owen's witness statement, and accepted that Mr Owen's did not know about the grievance. Instead, Mr Merrell stated that Mr Owen should have been informed about it.

49. Mr Merrell has also stated that he was dismissed for complaining about the welfare facilities. This complaint was not clear from either ET1 or Mr Merrell's emailed witness statement. The ET1 refers to a complaint about welfare facilities being included in Mr Merrell's grievance, however, the grievance letter (P66) does not contain any complaint regarding welfare facilities.

50. On a timesheet dated 5 June 2020 (P69), in a section entitled 'Are there any Health & Safety Concerns' Mr Merrell recorded 'there are no welfare facilities to clean and change and no toilet'. This timesheet was forwarded to Mr Merrell's manager, Mr J Hartnell, who was also the investigating officer of the complaint.

51. However, this timesheet was not submitted, and instead, Mr Hartnell submitted a different timesheet (P71). Mr Merrell says he was told that the timesheet was not clear so could not be submitted.

52. Bell Decorating Group had not called Mr Hartnell as a witness. However, as stated above, this complaint was not clearly particularised in the case, accordingly I would not expect Bell Decorating Group to have responded to it.

53. Furthermore, Mr Merrell has confirmed both in his interview dated 11 June 2020 (P81), his disciplinary hearing (P103) and in oral evidence that he had been told about the location of the welfare facilities and that he felt they were too far away.

54. Mr Merrell's complaint regarding the location of welfare facilities was considered in the course of the grievance. Mr Merrell did not argue that Mr Owen was aware of the complaint on the timesheet. The timesheet with the HSE complaint was not before Mr Owen at the time of his decision. I see no evidence that Mr Merrell's HSE complaint on his unsubmitted timesheet was known to the Mr Owen at the time he made his decision.
55. On the evidence before me, on the balance of probabilities, I find that the Respondent has discharged the burden of proof, the reason for dismissal was Mr Owen's belief that Mr Merrell had urinated on a customer's property.
56. This is a potentially fair reason for dismissal under s98 (1)(b) and (2) of the ERA 1996.

Were there reasonable grounds for the respondent's belief?

57. I therefore consider whether the Respondent acted reasonably in dismissing Mr Merrell for conduct in accordance with s98 (4) of the Employment Rights Act 1996.
58. Mr Merrell argued that there was no direct evidence against him that he had committed misconduct. He argued that the statement from his colleague should not be believed because she was not a reliable witness and he had never had such a conversation with her. Mr Merrell also relied on the discrepancy between the accusation against him of urinating behind the shed, and that of the HSE report where it claimed operatives were urinating on the grass verge.
59. Ms Coutts submitted that the witness evidence contained corroborative information, such as that Mr Merrell would clean himself in the van after his shift, which aligned with his own evidence. This suggested that the account was accurate and it was reasonable for Mr Owen to prefer the evidence of the witness to the evidence of Mr Merrell. Mr Merrell had acknowledged he received training on the location of the welfare facilities.
60. I considered the evidence before Mr Owen at the time he formed the belief that Mr Merrell had culpable. Mr Owen had evidence taken from Witness A who claimed that Mr Merrell had admitted he had urinated behind the shed. That witness statement was consistent in parts with Mr Merrell's own evidence, regarding using his van to wash himself. He had a complaint from the HSE claiming that operatives had been urinating on the grass verges. There was no other evidence that any other operatives had urinated in public. As set out in Mr Owen's witness statement, this was during the Covid 19 pandemic where there were heightened concerns regarding hygiene issues. The question for the Tribunal is not whether it would have preferred the witness' evidence to that of the claimant's or vice versa. Instead, what must be determined is whether there were objectively reasonable grounds for the belief that Mr Owen's formed in Mr Merrell's

guild. The evidence gathered in the investigation offered reasonable grounds for the belief he formed.

Had the respondent conducted a reasonable investigation at the time the belief was formed?

61. Mr Merrell submitted that the investigation was not sufficiently thorough. He was able to get a letter of support from the resident of the property where he was purported to have urinated. In cross examination, he questioned Mr Owen's as to why that hadn't been obtained by Bell Decorating Group. Mr Owen's view was that such a statement could not have been evidence that Mr Merrell had not committed the act, because it would not be possible for the resident to have watched Mr Merrell constantly, and indeed, the nature of the act would suggest he would do so when not observed.
62. Mr Merrell submitted that there was an inappropriate relationship between Witness A and the investigating officer. However, he did not provide any reason why this would have led to an investigation against him, nor was any evidence provided beyond the bald assertion. Instead, Mr Merrell maintained that he had a reasonable working relationship with both and the reason for bias against him was his grievance related to travel time. He submitted no cogent reason that would have led to either Witness A or the investigating officer taking action against him.
63. Ms Coutts argued that the investigation was reasonable. The investigation was prompted by the HSE report, and in the course of that investigation, the allegation against Mr Merrell came to light. The evidence shows a number of operatives were interviewed but declined to provide a statement as to what had happened. The investigation was carried out within a reasonably short period of time and the investigating officer spoke to Witness A, Mr Merrell and other operatives in order to gather evidence.
64. I am satisfied that the approach to the investigation fell within the range of reasonable responses. The decision not to seek supporting letters from customers where their evidence was unlikely to be determinative is understandable given the nature of the allegation and the concern about reputational damage.

Did the respondent act in a procedurally fair manner?

65. Mr Merrell complained that Mr Owen did not have the HSE report before him at the time of the disciplinary hearing, and that a copy had not been made available to him. His evidence was unclear about when he received the HSE report for the first time. Mr Merrell acknowledged that Mr Owen had the report at the time he took his decision and that he had been given the opportunity to make representations on the HSE report before a decision was taken. Mr Merrell made no other complaint at the hearing regarding the disciplinary procedure.

66. Ms Coutts submitted that the procedure followed by the Respondent was in accordance with its disciplinary procedure. The Claimant had the opportunity to present all his evidence to the decision maker. Mr Merrell had signed his original interview confirming that the HSE report had been provided to him. Further, Mr Owen records he gave the claimant an opportunity to provide any comments or information in relation to the HSE report following the hearing. The procedure was in line with the company disciplinary policy (P55) and the ACAS code of practice and the decision maker was independent of the Claimant and his line management chain.

67. I had regard to the Respondent's Disciplinary Procedure and the ACAS code of practice on disciplinary and grievance procedures. On the evidence before me, I find the process followed by the Respondent complied with the internal procedure and with the principles of the Code. In so far as the Claimant and the decision maker did not have the HSE report at the time of the hearing, a reasonable approach was taken post hearing to ensure Mr Merrell had the opportunity to respond in full.

Did the dismissal fall within the range of reasonable responses?

68. Mr Merrell submitted that he should not have been dismissed as he was innocent and his account should have been believed. Mr Merrell stated that had he, in fact, done the act then the Respondent would have been right to dismiss him for gross misconduct. However, the evidence before the decision maker was not a witness who claimed to have seen him doing the act of gross misconduct, but one claiming he had admitted it himself. There was no direct evidence of misconduct.

69. Mr Merrell is correct that there is no direct evidence of misconduct. There is no evidence of any previous misconduct and no suggestion his record of work is anything other than good. Mr Merrell complied with the investigation throughout.

70. The Respondent's action, in dismissing Mr Merrell for gross misconduct on the evidence of a witness to a conversation where Mr Merrell allegedly admitted the act is unquestionably at the severe end of a response. However, the Respondent had to initiate an investigation following the HSE complaint, and in the course of that investigation uncovered the allegation against Mr Merrell. It was certainly open to the Respondent to find in Mr Merrell's favour, or to impose a lesser sanction and as set out in paragraph 17 I have found that Mr Merrell did not, in fact, do the act.

71. However, I remind myself that it is not relevant whether I would or would not have dismissed the Claimant in the same circumstances and I must avoid a substitution mindset. The question to be determined is whether the decision to dismiss was within the range of reasonable responses open to the employer of the Respondent's type and scale. In the circumstances of a global pandemic, where a HSE complaint about public urination had

been raised, and that there was evidence that Mr Merrell had urinated on customer premises which was consistent with Mr Merrell's own account in parts (though it is not suggested that this incident was the source of the HSE complaint), I am satisfied that it did, having regard to all the circumstances.

Unlawful deduction from wages.

72. It is Mr Merrell's case that he should be paid petrol and upkeep for his vehicle as he uses his personal van for work. He argues that he is in a less favourable position because other operatives are provided a work van with a fuel card and are paid the same wage, so have more favourable conditions.
73. Mr Merrell confirmed there was no term in his contract providing for such payments. Instead, he submitted he should be paid the published government rates for mileage and fuel rates and allowances as found on the government website [Travel — mileage and fuel rates and allowances - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/travel-mileage-and-fuel-rates-and-allowances).
74. Ms Coutts submitted that Mr Merrell was not entitled to payment for petrol or upkeep for his vehicle. The company had a policy for payment for travel costs in exceptional circumstances, but everyday commuting did not fall within that. Mr Merrell admitted there was no term within his contract that provided for this payment, nor was there any implied term. In evidence, Mr Blackmoor confirmed that some competitors had signed up for a working rule agreement where payment would be made for mileage, but that this did not form part of Bell Decorating Groups terms and conditions.
75. Mr Merrell was unable to provide any authority to substantiate his claim for such a payment. There is no provision for such a payment as an express or implied term. Accordingly, no deduction has been made and I find this claim to be without merit.

Employment Judge Scott
Date: 07/07/2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
12 July 2022 by Miss J Hopes

FOR EMPLOYMENT TRIBUNALS