Case No: 2301897/2021

EMPLOYMENT TRIBUNALS

Claimant: Dawid Durant Schabort

Respondent: H.S. (Water Hygiene) Ltd

Heard at: London South (by CVP) **On:** 15 June 2022

Before: Employment Judge Kumar

Representation
Claimant: In person
Respondent: Zain Malik (solicitor)

RESERVED JUDGMENT

1. The correct respondent is H.S. (Water Hygiene Limited).
2. The claimant was unfairly dismissed by the respondent.
3. No basic or compensatory award is made because:
   (a) A 100% reduction in the compensatory award for unfair dismissal is made under the principles in **Polkey v A E Dayton Services Ltd 1988 ICR 142 HL**; and
   (b) the claimant contributed to his dismissal through his culpable conduct; this is reflected in a reduction to both the basic and any compensatory award of 75%.

REASONS

1. The claimant, Mr Schabort, was employed by HSL Group Limited as a Static Buildings Services Engineer from July 2016. The claimant resigned from his position on 10 July 2019 and started employment as a Technical Director at H.S. (Water Hygiene) Ltd on the same date. It is agreed by the parties that H.S (Water Hygiene) Ltd was an associated employer for the purposes of section 231 of the Employment Rights Act 1996. HSL Group Limited supplies maintenance, buildings, plant, equipment and electrical services at 160 customer sites in the South East of England. It employs 38 staff.

2. The claimant was dismissed from H.S. (Water Hygiene) Ltd on 15 March 2021. The claimant claims his dismissal was unfair within section 98 of the Employment Rights Act 1996. He also claims that the respondent breached

his employment contract by failing to give him the required notice of termination of his employment.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct. In the alternative it says the claimant was fairly dismissed for some other substantial reason, namely either breach of trust and confidence or third-party pressure.

4. I heard oral evidence from the claimant and from Mr N. Barsby who was essentially a character witness. I read further witness statements in support of the claimant from Mr S. Kayani, Mr C. Labutte and Mr S. Wilton. The claimant accepted that these were character witnesses rather than witnesses of fact and it was agreed it was unnecessary to hear from them. On behalf the respondent I heard oral evidence from Mr J. Harrison, the compliance manager for H.S. (Water Hygiene) Ltd, Mr P. Solomi, the managing director of HSL Group Limited and director of H.S. (Water Hygiene) Ltd, and Mr J. Solomi, the chairman of HSL Group Limited and director of H.S. (Water Hygiene) Ltd. I considered documents contained within a 415 page bundle.

Preliminary matter

5. At the beginning of the hearing, before I heard evidence, I dealt with a preliminary matter in relation to emails contained within the bundle and also partially reproduced in the claimant's witness statement. The respondent considered the emails should be redacted as they referenced settlement discussions and fell within the ambit of the without prejudice rule. The claimant did not consider the emails to be without prejudice as they were not marked as such. The parties both confirmed that the relevant emails contained offers to settle following the claimant's dismissal with a view to avoiding a tribunal claim. The claimant raised no basis why the emails should be excepted from the without prejudice rule other than that they were not marked 'without prejudice'. To fall under the rule, there is no requirement for the words 'without prejudice' to be used (**Chocoladefabriken Lindt and Sprungli AG v Nestle Co Ltd 1978 RPC 287, ChD**.) I accordingly ruled that the relevant parts of the emails which fell under the without prejudice rule should be excluded and would not be considered by the tribunal.

Issues

6. Prior to hearing the evidence I agreed with the parties the issues for me to decide as follows:-

    1) Who was the employer?
    2) What was the reason or principal reason for the dismissal?
    3) Was it a potentially fair reason?

    The respondent says the reason was conduct or some other substantial reason.

    4) If the reason was misconduct,
        a. Did the respondent genuinely believe the claimant had committed misconduct?

b. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
c. Were there reasonable grounds for that belief?
d. At the time the belief was formed had the respondent carried out a reasonable investigation?
e. Was the dismissal within the range of reasonable responses?

5) If the reason was some other substantial reason capable of justifying dismissal, namely i) loss of trust and confidence or ii) third party pressure, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

6) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

7) Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice?

8) If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

Findings of Fact

7. The claimant was initially employed by HSL Group Limited from July 2016. By agreement he resigned and immediately commenced a new role with H.S. (Water Hygiene) Ltd, a company whose directors, like HSL Group Limited, were Mr J Solomi and Mr P Solomi. That company carried out contracts for HSL Group. Within the bundle was an offer letter, dated 10 July 2019 addressed to the claimant from Mr J Solomi offering the claimant employment as technical director at H.S. (Water Hygiene) Ltd and setting out the terms of his employment. The letter was on the letterhead of H.S. (Water Hygiene) Ltd.

8. The claimant had a clean disciplinary record. In June 2019 a client of HSL Group Limited, McKay Securities dispensed with the claimant's services stating they had '*lost all faith and trust'* in the claimant. No disciplinary process was initiated and the claimant's employment subsequently moved from HSL Group Limited to H.S. (Water Hygiene) Ltd.

9. On 12 February 2021, the claimant attended a client site, namely the Imperium building, operated by Savills. Whilst on site, the claimant ran the showers at full heat and left them unattended with the doors to a changing area left open. The resultant steam set off the fire alarms in the building. This was not the first time the fire alarms had been set off whilst the showers were undergoing maintenance and the Savills buildings manager had previously drawn the claimant's attention to the issue and asked him to 'be careful'.

10. During the site visit the claimant also carried out a 6-monthly inspection of the roof water storage tank.

11. The buildings manager sent an email to HSL Group on the same day as the site visit complaining about the claimant's activation of the fire alarm. He asked that HSL Group to remind all engineers that when running the showers the doors should be shut and that they should not be left unattended. When the email was forwarded to the claimant and he was asked to ensure that it did not happen again the claimant responded, "*Well exaggerated, bless him. But yes, I'll make sure no one gets lost in "my steam*"."

12. On 13 February 2021, the day after the site visit, the roof tank ball valve in the water tank at the site failed, causing extensive flooding and damage to the building. The buildings manager sent a further email to HSL Group expressing concerns about the claimant's general conduct on site, describing him as '*erratic/sporadic'* and indicating that Savills was no longer willing for the claimant to attend their sites. The email further identified that the claimant had overwritten the date on an existing water tank inspection report sheet, rather than completing a new report sheet.

13. The claimant was informed of the concerns raised by the site manager by telephone by Mr P. Solome on 17 February 2021.

14. The claimant was then suspended from his role on 24 February 2021 on full pay. The letter informing the claimant of his suspension stated the following

    "Further to our telephone conversation on 17th February 2021 and in line with the Company's disciplinary procedure, we are suspending you on full pay to allow an investigation to take place following the allegations of the incident that occurred at Imperium on the 12th February 2021 . At first sight these matters would appear to fall within the category of Gross Misconduct, for which you may be liable to be summarily dismissed, unless you are either exonerated, or the outcome is found to be less serious.

    Suspension from duty, on full pay, is not regarded as disciplinary action, but merely a holding measure, pending further investigations.

    The duration of the suspension will only be for as long as it takes me to complete the investigation. During this period, we must remind you that you remain an employee of the company and it may be necessary for us to contact you during your normal working hours, and should this be the case, then you are required to make yourself available. Should you not be available if we try to contact you, then it is likely that you will not be paid for that day.

    During the course of your suspension, you are instructed not to contact or to attempt to contact, or influence, anyone connected with the investigation in any way, or to discuss this matter with any other employee or client of the Company. However, should you wish to contact any employee who you feel could assist you in preparing an explanation for the allegations made against you, then please contact me in order that arrangements can be made for them to be available for interview."

15. On 11 March 2021, the respondent wrote to the claimant inviting him to an investigation hearing. The letter identified the following concerns which would be subject to investigation:

    - Setting off the fire alarm system with steam in circumstances where the building manager had previously warned the claimant about the risk
    - Re-using an existing water tank inspection report sheet from the onsite logbook on several occasions (which would have led to an audit failure)
    - Inadequately carrying out the 6-monthly inspection of the roof water storage tank (which then flooded the next day causing tens of thousands of pounds of damage)
    - Initially denying that he had undertaken the 6-monthly water tank inspection at all

16. An investigation meeting took place on 12 March 2021. It was attended by the claimant and Mr P. Solomi. Notes from the meeting, taken by Mr P. Solomi, and not approved by the claimant, appeared within the bundle. The respondent did not permit the claimant to be accompanied by a colleague to that meeting.

17. Following the investigation meeting, Mr J. Solomi, by email sent on 15 March 2021, wrote to the claimant informing him of his dismissal with immediate effect. The letter stated "*We consider your actions to be a serious breach of trust and confidence*'.

18. The letter identified that in addition to the concerns investigated, the claimant during suspension had contacted colleagues at H.S. (Water Hygiene) Ltd, contrary to the instructions contained within his suspension letter. It also identified that after the investigation meeting the claimant had removed items from the offices without permission.

19. The letter confirmed that the claimant would receive a week's pay '*in lieu of notice*'.

20. The respondent subsequently acknowledged that it had incorrectly overlooked the claimant's continuous employment with an associated employer since June 2016. It then provided pay in lieu of 4 weeks' notice (and a further sum in lieu of unused holiday entitlement).

21. The respondent significantly failed to comply with the with the Acas Code of Conduct on Disciplinary and Grievance Procedures. In particular the claimant was summarily dismissed without a disciplinary hearing or a right of appeal.

22. In respect of the specific incidents which the respondent says led to the dismissal I find that the respondent was entitled to reach the conclusions that it did bearing in mind the following:-

    i) The claimant accepted he had previously been advised by the buildings manager about the issue with steam causing the fire alarm to activate. The claimant failed to follow that advice and was careless

when descaling and cleaning the showers in that he failed to shut the door and left the hot showers running unattended. The resulting build-up of steam caused the fire alarm to be activated. The claimant was dismissive in his response when alerted to Savills' complaint when he stated "*Well exaggerated, bless him. But yes, I'll make sure no one gets lost in "my steam*". Subsequent to his dismissal the claimant continued to minimise the incident and deflect blame stating in an email sent to the respondent on 10 March 2021 "*Setting of the fire alarm shouldn't happen when showers are turned on. It was also not as steamy as first elaborated. I have apologized and believe this is happening rather often that these showers is setting off the fire alarm."* The claimant sought to blame the equipment rather than his own actions.

ii) On the day of the site visit the claimant overwrote a used inspection log sheet for the water tank, adding the date of the inspection. The log sheet appeared in the bundle from which it was apparent that it had initially been completed on 3 February 2020. It has then been reused and overwritten by the claimant on 13 August 2020 and reused and overwritten for a second time at the inspection on 12 February 2021. The claimant's case was that he had not had time to provide a fresh log sheet and his intention was to go back to the site and rectify the issue by filing out a new log sheet after the event. I am not convinced by the claimant's evidence on this. The fact that this log sheet had already been overwritten on 13 August 2020 and that the claimant had not rectified it by the inspection on 12 February 2012 (6 months later) leads me to the conclusion that this would not have occurred. The claimant was careless in his adherence to the procedure for completing log sheets following inspection of the water tank.

iii) The claimant was careless when carrying out the water tank inspection in that he did not adequately inspect the ball valve. The following day the tank flooded. The claimant's evidence was that it would not have been possible to see the split on the ball float and that the flooding was therefore down to mechanical failure. Given the generally careless approach the claimant took during this particular site visit, it was not unreasonable for the respondent to conclude that the claimant's inspection of the water tank was inadequate and a thorough inspection may have identified that there was a fault.

iv) The claimant initially denied to Mr P.Solomi during a telephone call which took place on 17 February 2021 that he had carried out the 6-monthly inspection during his site visit stating only that he had taken a water sample from the tank. When Mr Solomi told the claimant that he had the log sheet confirming the inspection, the claimant then accepted he had carried out the inspection. The claimant's evidence was that he had informed Mr Solomi that he "*went to the roof tank for a sample, which included a tank inspection which was carried out*." I prefer Mr Solomi's evidence in respect of this conversation. I note that the shift in the claimant's accounts was raised promptly and recorded by Mr Solomi in his letter dated 11 March 2021 inviting the claimant to an investigation hearing. I find that the claimant initially asserted that he had only taken a water sample. In all likelihood he said this because he anticipated he would be blamed for not identifying a fault with the ball valve and the subsequent flood.

v) The claimant ignored the respondent's instruction set out in his suspension letter not to contact or attempt to contact anyone connected with the investigation. The claimant accepted he contacted Mr J. Harrison, the other engineer he worked with, who has given oral evidence to the tribunal. I find that the claimant would or should have known that Mr Harrison would be connected to the investigation and that he should not have contacted him against his employer's instruction.

vi) The claimant removed items from the office after the investigatory hearing without permission. The claimant accepts he removed the items.

23. I further find that Savills were one of the respondent's largest clients (this was not challenged by the claimant). Savills was the second of the respondent's major client who had dispensed with the claimant's services on account of concerns about his performance on their sites.

The Law

24. Section 98 of the Employment Rights Act 1996 contains the applicable law as follows:

" (1)In determining for the purposes of this Part 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, and (b)that it is either a reason falling within subsection (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.

(2)A reason falls within this subsection if it— … (b)relates to the conduct of the employee, …

(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."

25. In a misconduct dismissal guidance is set out 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. The Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt 2003 IRLR 23 CA** confirmed that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

26. 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**).

27. Following **Polkey v AE Dayton Services Ltd [1987] UKHL 8**, in a procedurally unfair dismissal, a tribunal must consider whether the respondent could and would have dismissed the claimant fairly if it had followed a fair procedure. A tribunal should not be reluctant to undertake an examination of a Polkey issue simply because it involves some degree of speculation (**Software 2000 Ltd v Andrews [2007] ICR 825**).

28. Section 122(2) Employment Rights Act 1996 applies if 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.

29. Section 123(6) Employment Rights Act 1996 states that: '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.

30. The tribunal must make a reduction to the compensatory award where there is a finding of contributory fault (**Optikinetics Limited v Whooley [1999] ICR 984**). The reduction may be as much as 100% (**W Devis & Sons Ltd v Atkins [1977] ICR 662**).

31. In approaching the question of contributory fault, the principles laid down by the Court of Appeal in **Nelson v BBC (No.2) 1979 IRLR 346 CA** are that

    i) there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy;
    ii) there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy; and
    iii) there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

32. This applies to the compensatory award but a similar approach is to be taken in respect of the basic award as outlined by the EAT in **Steen v ASP Packaging Ltd 2014 ICR 56**.

33. In **Hollier v Plysu Limited [1983] IRLR 260**, the EAT suggested that the level of contribution should be assessed broadly and generally fall within the following categories:

    • Wholly to blame for misconduct: 100%
    • Largely to blame: 75%
    • Employer and employee equally to blame: 50%
    • Slightly to blame: 25%

Conclusions

The employer

34. The employer was H.S. (Water Hygiene) Ltd. The claimant entered into an employment contract with H.S. (Water Hygiene) Ltd when he resigned from HSL Group Ltd. H.S. (Water Hygiene) Ltd is therefore the correct respondent.

Unfair dismissal

35. The reason or principal reason for the claimant's dismissal was misconduct, specifically the conduct on which I make findings at paragraph 16. The directors were clear on behalf of the respondent in their letter inviting the claimant to the investigatory hearing, and then expanded on in the dismissal email and subsequent correspondence, which incidents gave rise to the decision to dismiss the claimant. The email dismissing the claimant sent on 15 March 2021 stated **"***We consider your actions to be a serious breach of trust and confidence*" but I conclude that it was the claimant's misconduct that led the respondent to that conclusion.

36. The reason for dismissal was therefore potentially fair. Moreover the respondent genuinely believed the claimant to have committed misconduct.

37. The response of Savills to the incidents would have highlighted to the respondent the seriousness of the claimant's conduct for the business. I consider that dismissal was a reasonable response to the circumstances in the case, in light of my analysis at paragraph 22 in relation to the reasonableness of the respondent's conclusions. However, when considering the range of reasonable responses and the investigation and dismissal process I conclude that the claimant was unfairly dismissed. The respondent accepted that the dismissal was procedurally unfair but argued that if the dismissal had been procedurally fair the claimant would have been dismissed in any event. Again, in light of my findings at paragraph 22 I agree with the respondent. The dismissal was procedurally unfair as the claimant was dismissed without a disciplinary meeting taking place and without a right of appeal. However I find that it was inevitable that the claimant would have been dismissed in all the circumstances. I therefore consider that there should be a 100% reduction to the claimant's compensatory award following the principles set out in **Polkey**.

38. In terms of contributory fault, I have considered the claimant's conduct before his dismissal. I conclude that the claimant's conduct was culpable or blameworthy. I find the claimant contributed significantly to his dismissal

through his conduct as set out in my findings at paragraph 22 and I conclude that it is just and equitable to reduce the claimant's basic and compensatory award by 75%.

39. A separate hearing to consider remedy has been listed on **8 September 2022**. The claimant has already provided documents relating to mitigation.

40. By **4pm on 2 September 2022** the claimant is to send to the respondent a schedule of loss and/or witness statement and/or further documents for the hearing to determine remedy.

41. By **4pm on 6 September 2022** the respondent is to send to the claimant any counter schedule and/or documents for the hearing to determine remedy.

Employment Judge Kumar

Date: 08 August 2022