EMPLOYMENT TRIBUNALS

Claimant: Mr. Anthony Macedo

Respondent: Corps Security (UK) Limited

Heard at: **London South ET** **On:** **14th April 2023**

Before: Employment Judge Bromige

Representation
Claimant: In Person
Respondent: Mr Winspear (Counsel)

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well-founded and is dismissed

REASONS

2. This is the written judgment in Case Number 2303559/2022, heard at London South ET on 14th April 2023. The Claimant brings a claim for unfair dismissal under s.94 and s.98 Employment Rights Act 1996 ("ERA 1996"). An oral judgment was delivered on 14th April 2023. A request for written reasons was received by the Claimant on 28th April 2023.

Procedure

3. I was provided with an agreed bundle, totalling 171 pages, as well as a witness statement from the Claimant and three witness statements for the Respondent. The Respondent's witnesses were Andrew Crowhurst (Contract Manager), Paul Cloke (Regional Manager) and John Ford (Regional Director).

4. As well as the agreed bundle, the Claimant had provided some supplemental documents, namely minutes of a grievance hearing and grievance outcome, and some emails, relating to an earlier issue around the allocation of work shifts. These documents had been sent to the Respondent, but the Respondent witnesses had not had sight of these before being asked questions. I adjourned the hearing during Mr Cloke's evidence so that he could be provided with the documents. This did not

occur, but I took steps for Mr Cloke to understand the evidence, and I was satisfied he was able to answer questions about them.

5. The parties also submitted CCTV footage (without audio) of an incident which occurred on 22nd May 2022 and involving the Claimant, which I viewed, and an audio recording of the minutes of the disciplinary meeting on 2nd June 2022. I did not listen to this recording, as neither party raised an issue about the accuracy of the minutes of the meeting contained in the bundle.

6. The case had not previously been case managed, and there was no list of issues. In particular because the Claimant was representing himself, I identified the issues the Tribunal would be determining at the start of the hearing. These were:

    a. What was the reason or principal reason for dismissal? The parties agree that the reason for dismissal was misconduct.
    b. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:
        i. there were reasonable grounds for that belief;
        ii. at the time the belief was formed the Respondent had carried out a reasonable investigation;
        iii. the Respondent otherwise acted in a procedurally fair manner;
        iv. dismissal was within the range of reasonable responses.

7. At §8.1 of the ET1, the Claimant had also said he wished to pursue a claim of "class discrimination". I explored with the Claimant what he meant by this, and having received his answer, determined that he was not bringing a complaint of discrimination relating to one of the protected acts under Equality Act 2010. Therefore the only claim before the Tribunal was one of unfair dismissal.

The Claimant's application for third party disclosure

8. At the outset of the hearing the Claimant made an application for a disclosure order concerning a police report about an incident which occurred on 15th January 2021 at the Respondent's premises. The Claimant's application was dated 12th April 2023 and was received by the Employment Tribunal at 08:07hrs.

9. The Claimant sought disclosure of the Police Report for police reference 028315/01/2021, concerning an incident involving a colleague of the Claimant's (hereafter referred to as "PW") on 15th January 2021. The police were involved, and the Respondent's incident log (bundle, pg. 74), gives the police reference number. The Claimant submitted that the police report was highly significant, since the main thrust of his case was that PW had been involved in a near identical incident in 2021 as to the one for which the Claimant was dismissed for, and no action had been taken against PW.

10. The Respondent confirmed that it did not, and had never been, in

possession of the Police Report. I therefore treated the Claimant's application as an application for third party disclosure under Rule 31 of the Employment Tribunal Rules of Procedure 2013.

11. Rule 31 states:

The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court…

12. The Respondent resisted the application on two grounds. Firstly, the application was made very late in the day, and if granted, would require the hearing to be adjourned, causing delay and additional expense to the parties. Secondly, this document had not been seen by the relevant decision makers on behalf of the Respondent, and so was not relevant to the issues that I was required to determine. Mr Winspear submitted that the test was whether the decision to distinguish between the Claimant and PW was irrational, and so the Tribunal would need to analyse the documents before the decision makers at the material time, as well as the evidence about why that decision was taken.

13. The Claimant responded that he had previously made an application for the police report in December 2022, however he could not provide a copy of that application and there was no copy of it on the Tribunal File that I could identify. It was noted that the April 2023 application referred to "requests" rather than a previous application.

14. I directed myself as per *Canadian International Bank of Commerce v Beck* [2009] IRLR 740, that the test for a disclosure order is whether or not the documents are *"necessary for fairly disposing of the proceedings"* and that the document sought must be *"of such relevance that disclosure is necessary for the fair disposal of the proceedings"*. I further directed myself as to *Santander UK Limited v Bharaj* UKEAT/0075/20 and *Birmingham City Council v Bagshaw* [2017] ICR 263. At paragraph 24 in *Bagshaw*, the EAT held:

    a. *There can be no order for specific disclosure unless the documents to which the application relates are found to be likely to be disclosable in the sense that, in a standard disclosure case, they are likely to support or adversely affect etc the case of one or other party and are not privileged. Similarly, if disclosure is sought in relation to a category of documents, it must be shown that the category is likely to include disclosable documents;*

    b. *Even if this question is answered in the applicant's favour, specific disclosure will only be ordered to the extent that it is in accordance with the overriding objective to do so. The "necessary for the fair disposal of the issues between the parties" formulation in Beck, and the formulation in paragraphs 24 and 25 of Flood, are shorthand for this second question;*

    c. *Beck also effectively makes the point that the greater the importance of the disclosable documents to the issues in the case, the greater*

the likelihood that they will be ordered to be disclosed, but subject always to any other considerations which are relevant to the application of the overriding objective in the circumstances of the particular case and in particular the principle of proportionality

15. The Tribunal refused the Claimant's application for third party disclosure against the Chief Constable of the West Sussex Police. I did so on two grounds. Whilst I accepted that if the document was in the possession of the Respondent it would likely be disclosable (the first limb in *Bagshaw*), it was not, in my judgment, necessary for the fair disposal of the issues between the parties. It was not a document that either party had seen before, and whilst it was referred to within the bundle, it was not a document that was part of the Respondent's determination by either the disciplinary or appeal officer.

16. When considering this issue, I would need to determine the issue of irrationality (above), as well as the fairness of the dismissal in all of the circumstances. This would include a consideration as to the reasonableness of the investigation. Therefore the fact that the Respondent did not seek to access the police report might be a relevant factor, but that does not mean the actual contents of that document are relevant.

17. Further and in the alternative, I would have refused the application in any event due to the lateness of it. The consequence of granting the application would be to adjourn today's case, for a document that might not have any probative value. That would not be in accordance with the overriding objective.

Findings of Fact

18. The Respondent is a Security Company, which provides security services to other companies and locations around the United Kingdom. One of these sites is L3Harris in Crawley, Sussex. The L3Harris premises is managed by CBRE, a facilities management company.

19. The Claimant was employed as a Security Officer from 8th September 2018 until his dismissal on 22nd June 2022. He was assigned to the L3Harris site. The L3Harris site is used by flying Cadets, i.e. people training to be pilots. At the material time, there were a group of Cadets from Kuwait Airways using the site.

20. On 22nd May 2022, the Claimant was on duty as a Security Officer, alongside his son, who was also employed in the same role. They were in the Reception Area at the L3Harris site, behind a desk. One of the Cadets asked the Claimant a question, which he was dealing with, when another Cadet wanted the Claimant to open the door.

21. I accept the Claimant's evidence that in fact the Cadet told the Claimant to *"open the fucking door"*, and did this several times. The Claimant responded by getting up from the desk and walking around to confront the Cadet. The Cadet stood still and the Claimant approached him, gesturing towards him and moving his body towards the Cadet, causing the Cadet to flinch.

22. The Cadet made a complaint the following day on 23rd May 2022 which was communicated via L3Harris. At 0450hrs the same day, the Claimant wrote to Mr Cloke and Mr Crowhurst about an "altercation". The Claimant told the Respondent that *"I started to see red and I stood up and approached* [the Cadet]". He went on to say *"in the heated moment* [I felt] *like he was trying to physically challenge me, so I feinted (motioned my right arm to make him think I was going to swing) so that he would back up. After I feinted he backed up"*.

23. The Claimant was suspended pending an investigation. Mr Crowhurst held an investigation meeting on 2nd June 2022 via Microsoft Teams. Mr Crowhurst had gathered statements, including from the Cadet, Bryce Lambet (the Claimant's son) which was in very similar terms to the Claimant's, and Peter Hodgston, who had seen the aftermath of the incident.

24. In the investigation meeting, the Claimant stated *"I know I should not have reacted that way. With experience with the same cadet baiting me, I should not have acted this way. My age and experience should have stopped me from failing for this"*.

25. Mr Crowhurst found that there was a case to answer, and wrote to the Claimant on 23rd June 2022 (pg. 61), enclosing the minutes of the investigation meeting. The Claimant was warned that his actions could amount to gross misconduct, and that he could be dismissed from his employment. The particular allegations of gross misconduct were:

    a. Use of inappropriate language and/or aggressive behaviour towards or about another person whilst on duty (whether it is to a customer, member of the public or fellow colleague/manager) on 22nd May 2022;
    b. Acts or threats of physical violence against others on 22nd May 2022;
    c. Fundamental breach of trust and confidence between you, the Company and the Client due to the above

26. The matter proceeded to a disciplinary hearing on 27th June 2022, chaired by Mr Cloke. Mr Cloke asked the Claimant if he wanted to watch the CCTV, which the Claimant declined. The Claimant told Mr Cloke that he had been provoked by the Cadet, which Mr Cloke accepted. The Claimant said *"I knew it was wrong. I know, I know. I would have hit him but I knew it was wrong. I thought I would go around there to give him a warning, and I just did that right there and fake him to scare him"*.

27. Mr Cloke adjourned the meeting to consider the outcome, and communicated it orally by telephone to the Claimant on the same day. The Claimant was told that he would be dismissed. At this point, the Claimant told Mr Cloke that his treatment was unfair since another employee, PW, had bene involved in an altercation in January 2021 where PW had actually made physical contact with someone in the reception area. PW was not investigated or disciplined.

28. The Claimant set out further information to Mr Cloke and to Ms El-Aasar (HR Manager) by email on 29th and 30th June 2022. Mr Cloke made further

investigations, and whilst there was no CCTV footage available 18 months after the incident, he did locate the Daily Occurrence Book (pg. 73) completed by PW. Rachel Williams, an HR Officer who was supporting Mr Cloke's investigation also enquired as to whether the Respondent had possession of the police report, and it was confirmed it was not. Mr Crowhurst indicated (pg. 167) that he was not aware the police had been involved at all.

29. Mr Cloke concluded that PW had been confronted by someone from the neighbouring building about a rodent infestation, the person had been aggressive towards PW, and PW had removed him by getting up from the desk, holding his ground and pushing him.

30. Mr Cloke confirmed the disciplinary outcome in light of his further investigation in writing on 11th July 2022 (pg. 76). He concluded that the Claimant's actions amounted to gross misconduct, and whilst there was an element of provocation, he felt that the Claimant had shown no remorse for his actions. The Claimant subsequently appealed (pg. 79), and the appeal was heard by Mr Ford on 9th August 2022. Mr Ford conducted a review of the original decision, in light of the Claimant's grounds of appeal.

31. In the Claimant's appeal email, and expanded in further email on 13th July 2022 (pg. 81), he referred to the inconsistent treatment compared to PW, and that the PW incident had generated a police report. He did not at any stage of the appeal process challenge Mr Cloke's finding that he had committed an act or threat of physical violence (pg. 77). The Claimant accepted to Mr Ford that his conduct was worthy of a final written warning (pg. 103).

32. Prior to making a final decision, Mr Ford emailed both Mr Crowhurst and Mr Cloke, enquiring about the PW incident. Mr Crowhurst directed Mr Ford to the Daily Occurrence Book, and also an email from a Mr Witney from L3Harris (pg. 166) dated 15th January 2022. Mr Ford concluded from this email that Mr Witney was supportive of the actions of PW. He could not find evidence of any complaint made against PW. His decision was to dismiss the appeal.

The Law

33. The burden of establishing the reason for dismissal is upon the Respondent – section 98(1) and (2) ERA 1996. The Respondent has pleaded that the reason for dismissal was the Claimant's conduct, which is a potentially fair reason for dismissal under s.98(2)(b) ERA 1996.

34. If a potentially fair reason is established, I then need to consider whether dismissal for that reason was fair in all of the circumstances – s.98(4) ERA 1996.

35. In a conduct case, that consideration is assessed in accordance with the test in the case of *British Home Stores v Burchell* [1978] ICR 303 which established that the Tribunal must assess:

    a. that the respondent had a genuine belief of the claimant's guilt of the disciplinary offence;

b. that that belief was based on reasonable grounds;
c. that those grounds were formed after conducting a reasonable investigation.

36. If the *Burchell* test is answered in favour of the Respondent, then I must consider whether dismissal was a reasonable sanction within the range of reasonable responses open to a reasonable employer, as set out in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17.

37. In considering all matters under s.98(4) ERA 1996, including the tests in both *Burchell* and *Iceland Frozen Foods*, the Tribunal must make the assessment as what is broadly reasonable, and not substitute their own view as to the appropriateness of the actions taken.

38. The range of reasonable responses test extends to consistency in disciplinary sanctions. In *Post Office v Fennell* [1981] IRLR 221, the 'equity' the Tribunal must consider under s.98(4) includes the concept that employees who *"misbehave in much the same way should have meted out to them much the same punishment"*. However, this assessment must still be made within the range of reasonable responses.

39. In *Securicor Limited v Smith* [1989] IRLR 356, the Court of Appeal held that where two employees are disciplined for the same incident and different sanctions are imposed, in determining the fairness of the Claimant's dismissal, the question is whether the Respondent's reason for differentiating between the two employees was so irrational that no employer would have made that decision. This principle was further expanded upon by HHJ Clark in *London Borough of Harrow v Cunningham* [1996] IRLR 256 which confirmed that the same exercise should be used in any case where a disparity of treatment is alleged. A Tribunal must consider whether the dismissal fell within the range of reasonable responses and ask itself whether the distinction made by the Respondent between two employees was irrational. It should not substitute its own view for that of the employer.

Conclusions

40. Firstly, what was the reason that the Claimant was dismissed? The Claimant initially told the Tribunal he accepted the reason for his dismissal was conduct (i.e. what had happened on 22nd May 2022), however in cross-examination of Mr Cloke, he challenged Mr Cloke over a grievance that he (the Claimant) had submitted against Mr Cloke, and that Mr Cloke was motivated by malice against him. In my judgment the reason for the dismissal was conduct, and that the grievance played no part in Mr Cloke's decision.

41. Turning to the Burchell test, the Tribunal accepts that the Respondent had a genuine belief in the Claimant's guilt. Further, whilst the Claimant in his evidence today has attempted to row back from the very clear concessions he made, both on 23rd May 2022, and then subsequently at the investigation and disciplinary hearing, his statement from 23rd May 2022, alongside the CCTV evidence, provided reasonable grounds for the Respondent's belief.

42. The Tribunal is also satisfied that the investigation was reasonable in all of the circumstances. This is not only Mr Crowhurst's investigation, which gathered statements from the Cadet, people outside of the Respondent company, and the Claimant's son, but also that of Mr Cloke, who paused the disciplinary outcome to undertake further investigation into PW's actions in January 2021.

43. Whilst neither Mr Cloke nor Mr Ford spoke to PW about the January 2021 incident, in my judgment this was not an unreasonable position to take. Neither Mr Crowhurst or Mr Cloke were aware in January 2021 of the alleged incident, and they were not required to conduct a fact finding exercise about what may have happened, but rather, investigate why PW did not face a disciplinary investigation, in contrast to the Claimant.

44. Having answered the three questions posed by *Burchell*, the Tribunal must then consider whether dismissal was within the range of reasonable responses. The principle concern here, indeed, the main focus of the Claimant's case, is whether dismissal was reasonable in light of the Respondent's lack of action to PW.

45. I remind myself that I am not to substitute my own view for that of the Respondent, and that the law does not require me to make a finding as to what happened on 15th January 2021. Rather, I must assess the Respondent's explanation for the different treatment, and ask myself whether that decision was irrational – i.e. that it was a decision that no reasonable employer would have taken in the circumstances.

46. In my judgment, the Respondent's decision to distinguish between the Claimant and PW was a rational decision open to the reasonable employer. Mr Cloke ascertained from his investigation that it had been the visitors who had been aggressive towards PW. This was a reasonable conclusion open to Mr Cloke based upon the entry in the Occurrence Log that PW had been assaulted by one of the visitors using a folder. Mr Ford's subsequent decision was also reasonable and rational, with reference to the position adopted by L3Harris at the material time.

47. Ultimately the Respondent was faced with a situation where the Claimant admitted his guilt, both prior to the investigation, and then again at the disciplinary stage. He further confirmed his culpability in the appeal hearing by confirming that he would accept a final written warning. In the context of this case, where the Claimant was a licensed Security Officer, who had admitted acting aggressively towards a Cadet whilst on duty, dismissal was within the range of reasonable responses open to the reasonable employer.

48. Accordingly the Claimant's claim of unfair dismissal is not well founded and is dismissed.

Employment Judge **J Bromige**

Date: **11th May 2023**