Case No: 2215255/23

EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Sesay**

Respondent: **Openreach Ltd**

London Central by remote technology

Employment Judge Goodman **31 January 2024**

Representation:
Claimant: in person
Respondent: Ms A. Jervis, BT advocate

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
2. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by 20%.
3. The respondent shall pay the claimant the following sums:

    (a) A basic award of £1,778.73

    (b) A compensatory award of £7,296.74.

    Note that these are the actual sums payable to the claimant after reduction for conduct.

    4.The Employment Protection (Recoupment of Benefits) Regulations 1996 apply:

    (a) The total monetary award (i.e. the compensatory award plus basic award) payable to the claimant for unfair dismissal is £9,075.47

    (b) The prescribed element is £6,696.

    (c) The period of the prescribed element is from 20 July 2023 to 20 November 2023

(d) The difference between (a) and (b) is £ 2,379.47.

REASONS

1. The claimant was dismissed for gross misconduct on 19 July 2023 for errors completing timesheets and using an app to show when jobs were started and ended. Following an unsuccessful appeal against dismissal, he presented a claim for unfair dismissal on 3 October 2023.

2. The issues for this hearing were whether the employer dismissed for conduct or because it wished to reduce the workforce, whether it acted fairly, both procedurally and in substance, in dismissing for that reason, whether the claimant contributed to the dismissal, and whether (if the process was held unfair) the claimant would have been dismissed in amy event.

Evidence

3. The tribunal heard evidence from:

Michael McPhee, the claimant's Patch Manager, who investigated misconduct.
Fred Parker, Senior Area Manager, who decided to dismiss the claimant
James Hamilton, Lead Senior Manager, who heard the appeal against dismissal
Abdul Sesay, the claimant

4. There was a 192 page hearing bundle. The claimant submitted an extra 19 pages on mitigation.

5. At the conclusion of the evidence I read a written submission from the respondent who also made some points orally. The unrepresented claimant was asked questions to clarify his case and comment on the respondent's argument. There was not enough time left to complete the case and judgement was reserved in order to save the parties returning for a second day.

Findings of Fact

6. The respondent is a wholly owned subsidiary of BT plc and installs and maintains copper wire and fibre optic cable to connect homes and businesses to telephone and broadband.

7. The claimant was employed from 9 December 2019 as an engineer. Until the end of 2021 he worked in various build teams, laying cables. At the end of 2021 most of his build team was moved to a service delivery team. He understood that it was to be a temporary transfer until April 2023. This involved additional skills, such as climbing poles, and splicing, which the claimant did not have. He says some team members resigned at that point. He says he told his new team leader, Mick Gillon, that he would have difficulty attending training away from home

because his partner was expecting a baby in February, and because she had miscarried in a previous pregnancy, she needed to rest and he had to be at home to take care of her.

8. The child was born the 20 February 2023 following an emergency caesarean section. The claimant was given additional time off after paternity leave to look after her.

9. In the build team the claimant worked his hours in a full day week. This continued until some point towards the end of April or the beginning of May, when he had to move to a five day week. The claimant says this was very difficult. His partner needed a number of checkups, and so did the baby. On a four day week he was able to swap his day off so she could attend appointments.

10. Soon after the hours change, his line management passed from Mick Gillon to Michael MacPhee. They had a getting to know you conversation at Caversham. The claimant explained that he was not getting much sleep with a new baby, but not about the medical complications.

11. The claimant reports that soon after Mr MacPhee took over in May he asked for time off for an appointment and was told to arrange a swap with a colleague. The colleague was unable to accommodate him. The claimant did not go back to Mr MacPhee, and Mr MacPhee did not check whether this had gone ahead.

12. In the build team, the claimant worked on site with others installing infrastructure. In the service team, he had to make calls to customers to reporting difficulty or requiring additional installation. He worked on his own. He had a company van for his equipment and worked on are “park at home” scheme come on by which he would log on at 7:30, was allowed 15 minutes equipment checks, and also allowed unpaid time to drive to the job, which was calculated as an average depending on the time taken to reach specific jobs in the period. He worked to an app on his phone, by which he would record start and finish times, and be given details of his next job. As he finished his job he closed it on the app. If there was no job he would use the WhatsApp group to see if anyone needed help, or call control. At the end of the day he had to log off once he reached home. The app produced a timesheet based on his logged in times for him to submit.

13. Soon after taking over Michael MacPhee reviewed the performance of the engineers he managed and noted that the claimant’s performance was weak: on some days he was not even clearing one job. He then looked at his daily time log, and was able to view the claimant’s location at various times of day from the tracker on his van. He found discrepancies between the claimant’s start and finish times, and saw he had been parked up in various locations for extended periods of time during the working day. Between 17 May and 2 June 2022 (12 working days) there were 12 occasions when he had not left his home address at 7:30 a.m. and had failed to notify Mr MacPhee that he had been late. He also noted 6 periods over the 12 days when the claimant was parked at Blake Cottage (a retail park) for a total of 498 minutes (8 hours 18 minutes). As well as that, on

five days he had gone home earlier than expected, had not signed off at the end of the day, and not asked Mr McPhee about finishing early. There was also a day when he had signed off half an hour before he reached home.

14. The claimant was asked to a meeting to investigate the fact that it had come to Mr MacPhee's attention that on: "multiply dates you have not been in the correct location for significant periods of time, you have allegedly been parked up in various locations away from your place of work". At the meeting he was told it was "allegation of time wasting, fraudulent claiming time, falsely declaring your timesheets". Mr MacPhee first discussed the signing on arrangements to check that the claimant understood the system. He concluded that he did, although the claimant said that he sometimes found it difficult to operate the options on the app when closing off the job and he would then contact the patch leader or control. On one occasion he had been advised to delete the app, but other times no one got back to him about the problem until he was at home and past his finishing time. The claimant remembered having sent a text to Mr MacPhee on the 1st of June about being late. The claimant explained another afternoon, when he was parked at home for two hours, that he had to attend an appointment for the child. He had not told Mr MacPhee because it was two days before he found out that he was the new manager. He had spoken to Mr. Gillon about it. On parking at Blake cottage, he said he would park there to have lunch, or if he had no job. (It was not explained in tribunal what time was allocated for a lunch break). Asked about being parked at home for an hour and 40 minutes on the 19 May, he said it must have been because he had an appointment for his child who needed regular checks. The claimant was asked for evidence of him ringing control, and replied that his calls only went so far on his call list. As for being parked for 39 minutes at a different address he said he was attending a health visitor appointment, he was at that address another day too for the child to have an antibiotic injection. He added that he could not always get a job from control because his skills were limited. Asked why he did not inform Mr MacPhee about the appointments he said: "to be honest I can't give you a reason why - because the last time I asked you, you told me to see if I could get a 1:1 swap. Also I want a four day week so I can attend …appointments, at the moment I have no one to swap with". In his evidence Mr MacPhee also said the claimant had had training opportunities before he took over and he had missed them or cancelled.

15. Mr MacPhee concluded that the claimant was falsifying his timesheet and being paid for time he was not working.He had not told him about his late starts or early finishes. The claimant did not show him any texts or call logs to demonstrate this. He signed off his investigation report on the 25 June 2020 2 recommending that it was progressed as gross misconduct.

16. On 3 July Fred Parker invited the claimant to a disciplinary meeting on the 11 July 2022 on Teams. With the letter he sent the investigation report and three sets of print offs of the time sheets and hours. He was warned that summary dismissal could be an outcome if there was gross misconduct.

17. The claimant attended from his van, as did his trade union representative, Gurjit

Dhillon. At the meeting, when going over the detail of the charges, Mr Parker commented of 22 May, when the claimant had signed off before returning home, that it was “dead serious” as being in breach of the drivers handbook - he would not be insured driving the van home if he was signed off work. The claimant confirmed that Mr MacPhee’s investigation report was accurate, but added: “I don't think Mike knew or understood which I did explain to him last week”, he did not understand “the exact reason what was going on in my life at the time”. His previous managers had understood and had given him flexibility. He proceeded to explain about the previous miscarriage in 2021, the extra checks during the second pregnancy, the burden of domestic duties on the claimant, and that he had been accommodated in attending appointments by Mick Gillon and guven extra time off because of the complicated delivery, but after the birth he had had to take on even more domestic duties. Things have got difficult when his shift pattern moved from four days to five days a week at the end of April. He had been helped to fill in a form, which he submitted twice, applying to get back to four days, but without result. Then he was moved from Mick Gillon to Mike McaPhee. He had not opened up to him as he had to Mick Gillon. He tried to keep his home difficulties home but they were “leaking out” and with working hours and appointments and “because what's going on at home .. as well was a lot. So sometimes I’ll pull up somewhere just trying to like contain myself”. On being late, he thought it was 5 or 10 minutes and did not realise how long it really was until Mike MacPhee had showed him the records. He also described sitting in the van before he got home trying to pull himself together. He had been meaning to see his GP but on a 5 day week he did not have time. He had not told his wife about the stress because she was already anxious about the baby. He had however been to the doctor the previous week and been prescribed medication for stress. Gurjit Dhillon pointed out that he had not been disciplined before, that the jobs he could pick up were limited because of lack of training, and that he had called patch leaders for jobs from time to time. The change in job and hours had adversely affected his work life balance. The claimant was prepared to pay back by working over or refunding money from wages, he had not realised how much time was involved. It was not fraud - he had been horrified when it was added up. He added the claimant had now approached his parents for help; a move back to cabling gang on a temporary basis might help. Fred Parker asked if the claimant had submitted a P&D (personal domestic application for a change in roster patterns, tailored to particular family or social needs). The claimant said that he had asked to switch back to four days, (and learned on 27 June he had not been given 4 days but had an option to do 9 day fortnights). He had however not made a P&D application. In fact he did not know what that was.

18. As the meeting drew to a close Mr. Parker summarised: the claimant agreed the times, he had not realised the time he was taking, and “the mitigation you're explaining is more around the head space that you've been in and the stresses in your personal life and trying to balance the two in part linked by changing your roster pattern and then changing manage is twice. Is that sort of fair?”

19. There was then discussion of whether he could take the antidepressant tablets and continue driving, about preparing a P&D roster, and Gurjit Dhillon asked

getting an occupational health report.

20. Mr Parker decided to dismiss the claimant without notice for gross misconduct, and wrote to say so on the 19 July. His summary of reasons was attached to the letter. There were four charges set out: repeated lateness at start of day, falsification of time sheets by misrepresenting his lunch breaks on the 19, 22, 23, 24, 30 May and 2 June, returning home without closing jobs on the 18, 19, 22, 23 and 30 May, and also signing off early on the 22 May before driving home. The claimant had acknowledged there was little explanation, overall did not dispute the allegations, and was remorseful. His personal difficulty on the change of roster pattern and managers was noted, and that he was now seeking help from Employee Assistance and the GP. Nevertheless: "The mitigation has been considered but the severity of the four breaches of gross misconduct has meant that the outcome has had to be dismissal".

21. The claimant appealed. He said his mitigation have not been fully taken into account. He had been honest and "what has been happening in my personal life which unfortunately affected my work life which was not easy for me to admit and speak about".

22. His appeal was heard by James Hamilton on 17 August 2023. Over 45 minutes the claimant explained his difficulties since being moved to service delivery, and the more so being moved to four days. That was when things went downhill. He explained the burden of domestic duties and getting up at night. He had not realised he was being late. He had given his new manager an overview, but not opened up further. He still had to attend appointments and that was why he was asking for a four day week. His spoken to previous managers to see if he could move back, when a four day week was refused. Gurjit Dhillon commented at the close: "Abdul's laid out his case much better than he did to Fred."

23. Mr Hamilton wrote on 15 September saying that the appeal was not successful. In the written account of his reasons he expressed sympathy for the birth and his wife's immobilisation, but "it does not excuse the scale of your non-compliance and the amount of time you have been paid when you are not where you were supposed to be". There was no evidence that he had asked for a temporary late start because of his difficulties. The scale of his absenteeism during the working day and knowingly submitting timesheets was a significant breach of trust, so significant that he upheld the original decision.

24. In tribunal he noted that there was no evidence of a request for a P&D, or other communication with his manager. This is what made him decide not to issue a final written warning. He also considered that driving home after signing off, so uninsured, was the worst of all the four offences.

Relevant Law

25. In a claim for unfair dismissal it is for the employer to show the reason for dismissal, and that it fell within the categories of potentially fair reasons – section

98(1) Employment Rights Act 1996. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee' -**Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.**

26. Once the reason is shown, by section 98 (4) the tribunal must decide:

"…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."

28. Tribunals have been given guidance by the EAT on how a reasonable employer acts in **British Home Stores v Burchell [1978] IRLR 379; [1980] ICR303, EAT**. There are three stages:(1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct? (2) did they hold that belief on reasonable grounds? (3) did they carry out a proper and adequate investigation?

29.Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (**Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).**

30. Finally, tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason. The employment tribunal must not substitute its own view; instead it must consider whether the Respondent's decision fell within the band of responses open to a reasonable employer in those circumstances - **Iceland Frozen Food v Jones (1982) IRLR 439 EAT**, and **Post Office v Foley; HSBC v Madden (2000) IRLR 827 CA**. The need to apply the objective standards of the reasonable employer applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

31.The employer's decisions must not be considered not in isolation, but as part of the overall process, as was explained by the Smith LJ in the case of **Taylor v OCS Group (2006) ICR 1602 CA:**

> "… employment tribunals … should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-

mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.

32. The statutory ACAS Code on Discipline and Grievance sets out what an employer should do when considering disciplining an employee: investigate, hold a disciplinary meeting at which an employee can be represented where he can explain, and provide an opportunity to appeal any decision. ACAS also publishes more detailed guidance on the Code of Discipline and Grievance, which it describes as "Good practice advice for dealing with discipline and grievances in the workplace", to be used alongside the Code. While not prescriptive it is a useful indication of what reasonable employers do. This includes:

> **What should be considered before deciding any disciplinary penalty?**
>
> When deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to:
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> - whether the rules of the organisation indicate what the likely penalty will be as a result of the particular misconduct
> - the penalty imposed in similar cases in the past
> - whether standards of other employees are acceptable, and that this employee is not being unfairly singled out
> - the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service
> - any special circumstances which might make it appropriate to adjust the severity of the penalty
> - whether the proposed penalty is reasonable in view of all the circumstances
> - whether any training, additional support or adjustments to the employee's work are necessary.
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> It should be clear what the normal organisational practice is for dealing with the kind of misconduct or unsatisfactory performance under consideration. This does not mean that similar offences will always call for the same disciplinary action: each case must be looked at on its own merits and any relevant circumstances taken into account. Such relevant circumstances may include health or domestic problems, provocation, justifiable ignorance of the rule or standard involved, or

Discussion and Conclusion

34. The claimant suggests in his witness statement that he was disciplined because the respondent wanted to reduce the workforce. The tribunal does not accept that this was the respondent's reason for dismissing the claimant. There was no evidence other than the claimant's assertion that many people had resigned when transferred to service delivery teams. The tribunal concludes that the claimant was dismissed for conduct, as the respondent says.

35. The tribunal must therefore consider whether the process which leads to the dismissal was fair, not substituting its own judgement, but considering whether what occurred was within the range of responses of reasonable employers.

36. The allegations were based on the claimant's documented working times matched with where his van was at those times. He was always provided with this information. Having heard the claimant, the tribunal concludes that he did not engage in a detailed examination of where he was it any particular time over

those two weeks, or even check his own phone records for calls to control. He may have made some calls to control or to patch leaders, as he said. Clearly on two of the times unaccounted for he was attending the health visitor in working time. He knew that the facts alleged were substantially true. He acknowledged he had been late. There had been one, possibly more, occasions when he could not make the app work -this would account for signing off early before he got home.

37. It is notable that the respondent carried out no investigation other than checking the records and asking the claimant about them. Mr MacPhee and Mr. Parker could have asked control if the claimant had reported problems with the app, or if he had called them for work in the two weeks concerned. That might show whether his explanation was true. More surprising is that the previous line manager was not asked for his view of the claimant. They were looking at a period of two weeks. It was not suggested that the claimant had cheated on timesheets before in the three and a half years he had worked before this happened. He had worked on the Park at Home Scheme, which made it easier to misstate working time than when working on site with a partner, for four months before this happened. The previous manager could also have commented on the claimant's home life – perhaps he was exaggerating his difficulties. He had never been disciplined for anything. He had a good sick record. The previous managers could be asked whether the records showed previous similar behaviour or was, as the records showed, a lapse of two weeks after a change in his shift pattern. It might be thought that a reasonable employer would at least consider whether a sudden lapse in conduct matched with the change in shift pattern when needing to attend appointments, and an unsuccessful attempt to get time off for an appointment, suggested particular difficulty than bad character, cheating where he had the chance.

38. An employer is entitled to take very seriously false timesheets and absence in company time. Most employees know this without having to be told. The respondent's contract and disciplinary policy lists as an example of gross misconduct something very similar: Theft, fraud or other acts of dishonesty (like deliberately falsifying records to inflate your commission or expense claims, abusing your company credit card, phone and/or expenses). It is especially serious where an employee works on his own and has to be trusted to account for his time accurately. Lack of trust undermines the contract. They are also entitled to take account of the need for consistency, so that discipline can deter other employees from abusing the opportunity. A reasonable employer would have imposed some penalty.

39. The employer does not seem to have given any weight at all to the claimant's explanations, in effect, that he was overwhelmed by domestic difficulty and at not being able to get time off for family appointments. The failure to check what he said suggests it was discounted from the start. If these explanations were true, it was not consistent bad character but a response to difficult events. They would not have lasted. His partner will have recovered her health. Once aware there was a problem, his parents would help. If he had known of a process for temporary adjustment of hours, he could have asked. If he had known his new line manager better, he would have followed up. Had they at least checked with his previous manager to see if the claimant's account was confirmed, and had Mr Parker followed up what the claimant had done to seek a change from 5 day

week working, such as whether he did know to make a P&D request, that would have had some weight in the decision making.

40. It is true that the claimant said more about his troubles at each stage of the process, but neither Mr Parker nor Mr Hamilton went back to confirm whether any of it held water. They were asked if they had had HR advice. The replies suggested that their drafts were inputted to a computer system which would then authorise it to be sent, and that was all.

41. What seems to have happened is that the managers at each stage took the view that these lapses were beyond the pale and dismissal without notice was the only outcome. This is unfair by the standards of reasonable employers. It might have been fair if they had investigated the claimant's account and found it false or exaggerated.

42. It is essential to fairness that an employer decide on the right penalty "in all the circumstances". The respondent's decision makers accorded no weight to the particular circumstances described to them. The ACAS guidance suggests previous good record, special circumstances, and adjustments (to working hours and time off), all features of this case, should have been considered when deciding the penalty. The evidence suggests the respondent paid lip service only. If enquiries showed it was a sudden problem, a warning would have achieved a change in behaviour. If the respondent was concerned about the effect on other employees, a final written warning will have had a deterrent effect.

43. The tribunal concludes that the employer did not act fairly when dismissing the claimant without notice.

44. The respondent asks the tribunal to reduce any award on the basis that a procedurally fair dismissal would have made no difference to the outcome. The tribunal does not have evidence that the claimant was making up or exaggerating his difficulties and need to attend appointments. Mr Hamilton acknowledged his wife's immobility, expressed sympathy and did not suggest they were untrue. If the claimant's account was found correct, and this was a two week aberration following a shift change in particular domestic circumstances where the claimant had been without much sleep for several weeks, it is improbable he would have been fairly dismissed.

Remedy

45. The claimant was asked whether, if the tribunal found he had been unfairly dismissed, he wished to be reinstated or re engaged. He did not.

46. Assessing the appropriate basic award in compensation, he had been employed for more than three years years and is entitled to a basic award of three weeks pay at £592.91 per week, so £1,778.73.

47. Following dismissal on the 19th of July 2023, he was out of work until starting another job on 20 November 2023 at a similar salary. He is still on probation but expects it to be permanent. The loss of earnings and employer pension contributions for the four month period of unemployment amounts to £8,868.92. From this must be subtracted £498 earned driving for Amazon, so £8,370.92.

48. There was evidence of consistent attempts to find work over this. The respondent has not established that the claimant failed to mitigate his loss.

49. The claimant has lost his right to claim unfair dismissal for almost two years by reason of having been dismissed by the respondent. The tribunal awards £750 for this loss, assessed as 2 weeks pay discounted by (in round terms) one third for the risk he may leave the job in circumstances where he is not entitled to unfair dismissal compensation or a redundancy payment.

50. The compensatory award totals £9,120.92. It is reduced under section 123 by 20% for contribution by the employee, who acknowledged fault in failing to report lateness and early finishes, and who admitted to taking time off for appointments without permission. It would have been more, but credit is given for his reduced mental resilience at the relevant time. The discounted award is £7,296.74.

51. Adding that to the basic award, the award for unfair dismissal totals £9,075.47.

52. While out of work the claimant received payments of Universal Credit amounting to £1,213.61. That must be subject to recoupment. The monetary award is £9,075.47. The prescribed element is £6,696.74. The respondent is to pay the difference to the claimant now and the balance after DWP has notified the amount to be recouped from the respondent for benefit paid to the claimant.

Employment Judge Goodman
Dated: 1 February 2024

JUDIGMENT AND REASONS SENT to the PARTIES ON

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FOR THE TRIBUNAL OFFICE