EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Okoro	**v**	Bidvest Noonan (UK) Ltd

Heard at: Cambridge ET **On**: 17 & 18 June 2024

Before: Employment Judge Conley
Mr C Grant
Mr A Scott

Appearances
For the Claimant: Unrepresented and did not attend
For the Respondent: Mr J Lassey

JUDGMENT

The claimant's claim of unfair dismissal is well founded and succeeds.

The claimant's claim of wrongful dismissal is well founded and succeeds.

Any decision on remedy is to take into account the Tribunal's finding that there was contributory fault. The degree to which this is a factor is to be determined at the remedy hearing.

All other claims are dismissed.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 13 February 2023, following a period of early conciliation between 28 December 2022 and 17 January 2023, the Claimant sought to pursue a number of complaints in relation to the following:
   i. 'Ordinary' unfair dismissal;
   ii. Breach of contract/wrongful dismissal in relation to his notice pay;

iii. Unpaid accrued holiday pay
iv. Redundancy payment
v. Direct discrimination on the grounds of his race.

2. As a result of matters raised at an earlier Preliminary Hearing, it was accepted by the parties that the claims in respect of unpaid accrued holiday pay and redundancy payment would be dismissed upon withdrawal in due course. The Tribunal formally did so on the first day of this hearing in the context of a decision which was made in relation to a preliminary application on the part of the respondent, namely an application for strike-out.

3. The claimant did not attend this hearing, and instead made a late application for a postponement, by way of an email which was submitted to the Tribunal at 10.04am on the morning of the hearing. This application was supported by Mr Ononeme, the claimant's solicitor, who attended the hearing (albeit late), as a courtesy to the claimant, despite the fact that he wished to come off record as he was not in funds and did not have sufficient instructions. The respondent opposed this application and, in addition, applied for the claim to be struck out in its entirety.

4. A full oral decision was delivered dealing with these various issues on the first day of the hearing and it is unnecessary to rehearse the issues and the reasons given for that decision in the context of this decision. Suffice it to say that, in summary, the decision was as follows:
   i. The claimant's application for a postponement was refused;
   ii. The respondent's application for strike out was refused;
   iii. The claims in respect of holiday pay and redundancy pay would be dismissed on withdrawal;
   iv. The hearing would proceed in the absence of the claimant;
   v. Accordingly, the claim in respect of direct discrimination on the grounds of race would be dismissed due to the fact that the claimant could not satisfy the evidential burden that would rest upon him in the context of such a claim.

5. Mr Ononeme withdrew from acting on the claimant's behalf immediately thereafter as he did not have instructions with which to cross-examine the respondent's witnesses.

6. Therefore the only claims that remain for the Tribunal's determination are ones of 'ordinary unfair dismissal' and 'wrongful dismissal' against the respondent. The basis for the claim, put simply, was that, whether or not the claimant committed an act of misconduct (namely, falling asleep briefly while on duty), the decision to summarily dismiss him as a result was outside of the band of reasonable responses and was, as such, unfair.

THE ISSUES

Unfair dismissal

7. Where an individual has been dismissed for misconduct, the issues for the Tribunal to decide (as per *British Home Stores v Burchell*) are:

a. Was misconduct the reason for the Claimant's dismissal? (This is not in dispute.)
b. Did the Respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
c. Were there reasonable grounds on which that belief was founded?
d. Was the belief in misconduct arrived at having carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
e. Was the procedure within the band of reasonable responses, in other words, would a reasonable employer have carried out the procedure the respondent did?
f. Was the sanction within the band of reasonable responses, in other words, would a reasonable employer have imposed the sanction that the respondent did?

THE EVIDENCE

8. The evidence in this case came from the following sources:

a) The written and oral evidence of Muhammed Choudhry and Adelina Hrituleac on behalf of the Respondent;
b) An agreed Bundle of Documents amounting to 189 pages;
c) Statements from the claimant and his witness Mr Noah Akakpo, although we have been able to give them only limited weight, given their failure to attend the hearing to be cross-examined.

9. The Tribunal was provided with helpful submissions by Mr Lassey, Counsel for the respondent, to whom we are grateful, and which we have considered with care.

FINDINGS OF FACT

10. The Claimant was employed by the Respondent as a CCTV Controller from 26 November 2006 until the effective date of termination (EDT), which was 23 December 2022, when he was summarily dismissed for an act of gross misconduct.

11. His total period of continuous employment, therefore, was 16 years and 27 days.

12. At the material times, the claimant was working on the site of the Xscape Shopping Centre in Milton Keynes, which was a client of the respondent to whom they provided security services. One of his core duties was to monitor the CCTV from a control room on the site.

13. On 1 September 2022, Claire Hawes, the 'soft service manager' for the respondent conducted a spot check of the claimant as he was working in the CCTV control room and he was was observed to be asleep. She reported this observation by email to her supervisor Muhammad Choudry, the Key Account

Manager, at 0709 on 1 September 2022. Mr Choudry then reviewed the CCTV and confirmed Ms Hawes' observations.

14. A 'transcript' description of the footage was prepared which confirms that the claimant was asleep from 0503 to 0518 on the 1 September 2022. The Tribunal finds that this transcript, and the observations of both Ms Hawes and Mr Choudry are accurate and reliable and that the claimant was indeed asleep at the material time.

15. As a result of his observations Mr Choudry wrote to the claimant on 5 September 2022 inviting him to an investigation meeting at Xscape on 9 September 2022 at 0900.

16. This meeting took place from 0925 and 0940. In addition to the claimant and Mr Choudry, Alex Hetherington, HR Advisor, was present as a note taker. During the meeting the claimant was given an opportunity to view the CCTV footage.

17. The claimant's initial response was to deny having been asleep at all, indicating that he has received medical advice to close his eyes and look away from the monitors as a result of dry eyes. He produced some evidence of medical treatment in relation to an eye condition. He also stated that he 'wasn't dozing, personally want to meditate and think' *(sic).*

18. Whilst the Tribunal accepts that the claimant may have had some issues relating to discomfort in his eyes as a result of exposure to screens, we nevertheless find that both of these denials were lies - the claimant was sleeping.

19. The claimant did confirm that the day in question was his 6th consecutive night shift. His shift pattern was usually '4 on, 4 off' although we accept the evidence of Mr Choudry that this was not an exceptional shift pattern for employees performing the claimant's role, who would frequently work additional shifts as overtime.

20. As a result of the matters the claimant raised with regard to his eyes, Mr Choudry took the advice of the respondent's HR department and referred the claimant to Occupational Health (OH) for assessment.

21. However, despite the claimant's willingness to engage with the assessment, he declined to give permission for the content of the assessment to be disclosed to the respondent. The Tribunal could find no satisfactory explanation for his failure to give such permission.

22. On 9 December 2022, Mr Choudry completed an investigation report summary which concluded that the claimant had fallen asleep on duty and as such this was a matter which would be treated as gross misconduct and could lead to dismissal; and recommended that the matter proceed to a formal disciplinary hearing.

23. On 20 December 2022, Adelina Hritulac, Operations Manager (who was appointed as Disciplinary Hearings Manager) wrote to the claimant inviting him to a Disciplinary Hearing on 23 December 2022, attaching the Disciplinary Policy.

24. The Respondent's Disciplinary Policy states:

DISCIPLINARY RULES AND CATEGORIES OF CONDUCT

It is not practical to set out every example of conduct which may lead to disciplinary action. The disciplinary procedure may be invoked as a result of;

• A failure to observe the Company's rules or procedures including those set out in this procedure or in any part of their contract of employment.

• Any other instance of conduct which the Company believes should properly be dealt with under the disciplinary procedure. It is impossible to produce an exhaustive list of all instances of misconduct giving rise to disciplinary action, and it is also impractical to state which category of disciplinary action will be applied to; however, unsatisfactory conduct will fall into one of the following categories:

- Unsatisfactory conduct/Misconduct.
- Gross Misconduct.

Examples of acts of Misconduct

This list is non-exhaustive.

• Non adherence to company policies and procedures

• Unauthorised absence

• Poor timekeeping or attendance

• Unacceptable standard of work and inappropriate attitude or behaviour

• Refusing to carry out a reasonable request or instruction.

• Unacceptable standard of personal hygiene or appearance

• Use of personal mobile phones during working time if within Client procedures

• Breach of health and safety guidelines or practices

• Non reporting of any incident/accident incurred

Examples of acts of Gross Misconduct

Employees are liable to summary dismissal (i.e. without notice) for the following conduct. This list is non-exhaustive.

• Deliberate or serious breaches of conduct, standards/rules and regulations.

• Theft of money or property.

• Any action which can be construed as an intention to defraud/deceive the business.

• Being under the influence of alcohol and/or other intoxicants, drugs, or other substances.

• Fighting, or physical assault, or abusive/threatening behaviour.

• Wilful refusal to carry out a reasonable instruction.

• Deliberate, repeated or serious breaches of Health and Safety procedures.

• Conviction of an offence which has the potential to have an impact on the Company or on the employees' ability to perform their duties.

• Failure to notify the employer immediately of any:

• Conviction for a criminal and/or motoring offence;

• Indictment for any offence;

• Police caution;

• Legal summons; or

• Refusal, suspension or withdrawal (revocation) of a licence;

• Carrying out private work on the premises and/or in working hours, without permission.

• Gross negligence which causes, or has the potential to cause, unacceptable loss, damage or injury.

• Deliberate damage, destruction, or sabotage of Company property, or any property belonging to another employee, or a third party associated with the business.

• Deliberate or serious breaches of the Working Time rules and regulations.

• Discriminatory conduct, or harassment or other action contravening other company policies.

• Acting or working in a situation which constitutes a serious conflict of interest.

• Deliberate, or serious, breaches of the Company's computer/software/email/internet, rules and procedures in force from time to time.

• Destroying, erasing or altering documents, records or data without permission

• Making or signing any false statements

• Divulging confidential information to Customers/Clients either past or present without permission

25. It was asserted by Ms Hrituliac that the version of the Disciplinary Policy that the Tribunal has seen in the bundle is an earlier iteration of that document, and that the version that she was relying upon *did* include 'sleeping on duty' as being a specified act of gross misconduct. However, we find that had this been the case, given the central importance of this issue to this claim, the correct version would have been submitted to the Tribunal as part of the bundle. We therefore conclude the sleeping on duty is not itemised in this way and that Ms Hrituliac was mistaken.

26. The claimant was not suspended from work whilst awaiting the Disciplinary Hearing, and continued to work his usual shifts from the day of the incident until the hearing.

27. The meeting took place between 0600 and 0635, with a brief pause between 0618 and 0626. The claimant, Ms Hrituliac and Kevin Round (notetaker) were present. During the course of the meeting, the claimant continued to deny that

he had been asleep and maintained that he was looking away from the screen as a result of irritation in his eyes.

28. Having heard the claimant's representations, Ms Hrituliac concluded that the allegation was well founded and that the appropriate sanction was summary dismissal, and this was confirmed in a letter to the claimant of 15th December 2022 which stated that the dismissal took effect as from the 10th December 2022.

29. The claimant declined to appeal against this decision and instead lodged a claim with the Employment Tribunals on 13 February 2023.

THE LAW AND CONCLUSIONS

Legislation

30. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94). The Claimant plainly has served the relevant period and therefore has acquired that statutory right.

31. The legislative basis for 'conduct' being a potentially fair reason for dismissal stems from s98 of the ERA 1996 which reads:

s.98 General
(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—
(a)…
(b)relates to the conduct of the employee,
(c)…
(d)…
(3) ….
(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 issue

32. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. It is not in dispute that 'conduct' was the reason for dismissal in this claim.

33. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of *British Home Stores v Burchell* [1978] IRLR 379, as per the list of issues set out above in paragraph 3 above.

34. The function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted: *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. In *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal itself.

35. The Court of Appeal in *London Ambulance NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct.

Genuine Belief

36. Did Mr Choudry and Ms Hrituliac, acting on behalf of the Respondent, have a genuine belief that the Claimant was guilty of the misconduct alleged? We are quite sure that they did. We accept their evidence on this point unreservedly.

Reasonable Investigation

37. Did the respondent carry out as much investigation into the matter as was reasonable in all the circumstances of the case? Again, this is something of which we are perfectly satisfied. The investigation that was carried out was timely and thorough, supported by CCTV footage which was viewed by both Ms Hawes and Mr Choudry.

Procedure

38. We must next consider whether the procedure that the Respondent adopted was reasonable.

39. We find no basis upon which it could possibly be suggested that the procedure was anything less than fair. Mr Choudry conducted the investigation in an open and even-handed manner, gave the claimant every opportunity to make such representations as he wished to, allowed him the opportunity to view and comment upon the CCTV, and when issues relating to a possible health complaint were raised by way of explanation, they were fully explored by way of a referral to OH.

40. In our judgment the investigation process cannot be criticised.

Sanction

41. Was the sanction within the band of reasonable responses? Ultimately this is the only question to which the Tribunal has had to consider at any length. We accept that there were compelling arguments both for and against dismissal in this case.

42. In reaching our decision in relation to this issue we have reminded ourselves about the importance of not seeking to substitute the Tribunal's decision for the

respondent's decision - we understand and accept that a decision may not be unreasonable merely because it is not the decision that the Tribunal would have taken in those circumstances. We have instead sought to identify where the boundaries of that notional 'band of responses' lie, and whether the decision to dismiss fell within them.

In favour of dismissal

43. In favour of dismissal there is the fact that, where the claimant was solely responsible for monitoring the CCTV cameras, and that the importance placed upon this role was paramount as regards the service that the respondent provided to its client, the failure to perform this duty properly at all times and maintain wakefulness during the course of shifts was something that the respondent considered to be fundamental to the satisfaction of their contract with its client. As a result, the failure to remain awake at all times was potentially highly detrimental to performance of their contract and could have led to the cancellation of its contract, no doubt causing the respondent both immediate financial, and reputational, damage.

44. We also recognise that this was a lapse of performance that that could potentially have had serious consequences in that the security of the site was compromised for the duration of the period during which the claimant was asleep.

45. Finally there is the fact that the misconduct was compounded by the claimant's refusal to accept the obvious and maintaining what we have found to be lies about whether or not he was in fact asleep at the relevant time.

In favour of retention

46. In favour of retention and issuing a final written warning (which we consider to be the only other viable option open to the respondent) is the claimant's long and otherwise exemplary record with the respondent; the fact that this was not a calculated or deliberate decision by the claimant to take a nap during working hours but an inadvertent dozing off whilst obviously very tired having worked an additional 2 night shifts in excess of his regular shift pattern; the fact that the period during which he was asleep was relatively brief; the fact that there was no actual loss or damage caused as a result of his lack of vigilance.

47. We note the fact that the shopping centre was closed and securely locked at the time of the incident; and there were no members of the public present, and therefore nobody who was likely to be in any sort of physical danger as a result of the claimant falling asleep on duty.

48. We also have regard to the fact that falling asleep on duty, whilst plainly misconduct, is not specifically identified as an act of gross misconduct, and is of a very different order of seriousness when compared to the examples of gross misconduct set out in the respondent's disciplinary policy.

49. Looking at the respondent's disciplinary policy, one can immediately identify broad categories of behaviour which fall within simple 'misconduct' and those which merit the label 'gross misconduct'. Generally speaking, those which are

described as ‘misconduct’ are incidents of general poor performance, petty indiscipline, and acts of negligence where there are no major consequences; whereas ‘gross misconduct’ would appear to encompass wilful or persistent acts of defiance or bad behaviour, dishonesty, criminality and serious acts of of negligence.

50. Those distinctions are reflected in the ACAS Code at paragraph 88 which states as follows:

> Gross misconduct is generally seen as misconduct serious enough to overturn the contract between the employer and the employee thus justifying summary dismissal. Acts which constitute gross misconduct must be very serious and are best determined by organisations in the light of their own particular circumstances. However, examples of gross misconduct might include:
> - theft or fraud
> - physical violence or bullying
> - deliberate and serious damage to property
> - serious misuse of an organisation's property or name
> - deliberately accessing internet sites containing pornographic, offensive or obscene material
> - serious insubordination
> - unlawful discrimination or harassment
> - bringing the organisation into serious disrepute
> - serious incapability at work brought on by alcohol or illegal drug
> - causing loss, damage or injury through serious negligence
> - a serious breach of health and safety rules
> - a serious breach of confidence.

51. So where, then, do the facts of this case fall? How seriously should an employer, or more specifically, this employer, treat falling asleep whilst at work?

52. It seems to us that the seriousness of falling asleep on the job is something that very much depends upon its context. The Tribunal recognises a distinction that must be drawn between, for example, deliberately leaving one’s post and sneaking off to a secluded part of the premises to take a nap a one extreme, and momentarily nodding off for a few seconds with few if any consequences at the other.

53. We appreciate that in this case, the claimant was asleep for rather more than a few seconds (15 minutes to be exact), but nevertheless we do find that these facts are rather closer to the less-serious end of the spectrum, principally because of the fact that his actions were involuntary not wilful, and that although there was undoubtedly the potential for there to be serious consequences caused by this incident, we have regard to the fact that the potential was limited (for the reasons previously given) and that none were caused.

54. The Tribunal has considered what authorities there are on this situation, and in particular were are guided by the principle set out in *McDonagh v Johnson and Nephew (Manchester) Ltd EAT 140/78* that, by itself, sleeping on duty, although misconduct, is usually insufficient to ground a fair dismissal, although it may attract a very severe warning. We also note that there was no evidence before us to indicate that sleeping was the subject of a clear rule - a factor that we

would have been bound to consider - see *Ayub v Vauxhall Motors Ltd 1978 IRLR 428, ET* — although we note that the absence of such a rule does not necessarily render the dismissal unfair.

55. We have already referred to the distinction to be drawn between a situation where an employee simply drops off unintentionally and one where there is a deliberate plan to sleep while on duty, as noted in *Newton and anor v Ryder plc ET Case No.2801633/06.*

56. However, in our judgment, the factor which weighs most heavily away from summary dismissal, is the claimant's length of unblemished service. The claimant had no disciplinary record at all in 16 years with in the job. He fell asleep for 15 minutes at 5.03am on his sixth consecutive night shift, with no discernible consequences. In our judgment, whilst plainly serious, this does outweigh his many years of service and the decision to dismiss was outside the band of reasonable responses and was unfair. He should have been given a final written warning.

57. Accordingly, his claim for unfair dismissal succeeds, and his claim for wrongful dismissal also succeeds for the same reasons.

58. He did contribute to his dismissal, and at the remedy hearing, which could not be dealt with on the day of the hearing due to lack of time, the Tribunal invites representations as to the extent to which he did so.

_____
Employment Judge Conley
Date: 23/7/2024

Sent to the parties on: 13/8/2024

N Gotecha
For the Tribunal Office