Case No: 3311330/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Shkelzen Bucaj	v	All Service 4 U Limited

Heard at: Watford
On: 3 & 4 June 2024
Before: Employment Judge Alliott

Appearances
For the Claimant: Mrs C Step-Marsden (counsel)
For the Respondent: Mr S Perkins (Ops Manager)

JUDGMENT having been sent to the parties on 30 July 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent on 4 May 2021 as an Electrical Engineer Qualified Supervisor. On 15 August 2023, the claimant was given three weeks' notice of termination of his employment on 5 September 2023. By a claim form presented on 2 October 2023, following a period of early conciliation from 2 August to 2 October 2023, the claimant brings complaints of unfair dismissal and claims for a redundancy payment and unauthorised deduction of wages. The respondent defends the claims.

The issues

Unfair dismissal

2. What was the reason or, if more than one, the principal reason for dismissal? Did the respondent genuinely believe in the reason and was it based on reasonable grounds following a reasonable investigation?

3. If so, was the decision to dismiss fair taking into account section 98(4) of the Employment Rights Act and, in particular, was the decision to dismiss within the range of reasonable responses of a reasonable employer?

4. In addition, issues relating to "Polkey" may arise, that is to say if the dismissal procedure was unfair I must consider, had a fair procedure been adopted, what were the chances of the claimant being dismissed in any event.

5. Issues concerning contributory conduct on the part of the claimant and

compliance with the Acas Code of Conduct may arise.

Unauthorised deduction of wages

6. What sums were properly payable to the claimant.

The law

7. Section 98 of the Employment Rights Act 1996 provides as follows:

> "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—
>
> …
>
> (b) relates to the conduct of the employee,
>
> …
>
> (c) is that the employee was redundant.
>
> …
>
> (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."

The evidence

8. I had written statements and heard evidence from:

   8.1 Mr S Perkins, Fire Security and Electrical Manager for the respondent;

   8.2 The claimant.

9. I had a hearing bundle running to 213 pages.

10. Ms Step-Marsden provided written closing submissions.

The facts

11. The claimant was employed by the respondent as an Electrical Engineer Qualified Supervisor on 4 May 2021.

12. The claimant's contract of employment contained the following clauses:

12.1 Under "Company Van":

> "Private use of the vehicle is not permitted."

12.2 Under "Annual leave":

> "All holiday must be pre-authorised and as a general rule only one member of staff may be off at any point in time. Holiday allocation will be granted on a first come first served basis."

12.3 Under "Disciplinary":

> "The disciplinary policy and procedures are designed to establish the facts quickly and to deal consistency [sic] with disciplinary issues. No final disciplinary action will be taken until the matter has been fully investigated. The employee will be advised in writing of the nature of the complaint against him/her and the arrangements for the hearing.
>
> At every stage employee have the opportunity to state their case at a disciplinary hearing and be accompanied, if they wish by a work colleague.
>
> An employee has a right to appeal against any disciplinary penalty."

13 On 15 August 2023, the respondent sent the claimant a letter as an attachment to an email as follows:

> "Following a meeting today with Izhar Schulman and Matan Ofek (Directors of All Service 4 U Ltd) we have had to take the hard decision that we need to reduce the head count within the electrical team due to a downturn in the number of jobs we are receiving and as a result the profit (in the electrical team's case lose)
>
> As part of this decision, we have looked at various factors (Time with the company, profit made, working hours and days, location, attitude/work ethic, attitude to other members of the team and business).
>
> The outcome of this meeting was unfortunately to let you go by giving you 3 weeks' notice from today's date.
>
> Thus, your last day of employment would be 5th September 2023 at 5pm.
>
> From your pay on 10th September, we will deduct any money due to us as this is your last full pay. You will also receive some pay on 10th October 2023 which will cover the days in September."

14 On 17 August 2023, the claimant sent an email to the respondent as follows:

> "I would like to raise a formal grievance complaint. I believe I have unfairly been dismissed. And as I said before you have failed to consult with me about the headcount reduction and I'm not sure whether this letter terminating my contract is legally compliant."

15 On 17 August 2023, Mr Perkins replied as follows:

> "The business reviewed the number of heads we have based on the volume of work coming in and the decision was made to reduce the number of employed electricians to 3.
>
> …
>
> As a result we have ended up with 1 QS and 2 x Electricians within the company.
>
> The decision was made as based on a number of factors as per the letter.
>
> …
>
> If you want to continue with the grievance I would be happy for that to happen but is not going to change the outcome.
>
> Another option we could have taken is disciplinary action which would have led to the same conclusion but with immediate termination without notice."

16 Although this reads as a redundancy situation, in its response the respondent has pleaded:

> The claimant "was not made redundant but let go due to poor attitude, unauthorised time off, public false statements about colleague and serious professional errors which could have lost us our electrical accreditation."

17 In his oral evidence Mr Perkins reiterated that there was a business financial case for reducing the head count as the Electrical Team as a whole was not making money but it was not dealt with as redundancy as it was dealt with based on conduct.

18 The Electrical Team consisted of the claimant and one other QS and four electricians. One QS and two electricians were dispensed with. The claimant plus "Daniel" and "Macadis" lost their jobs. The latter two had less than two years continuous employment and so could not complain of unfair dismissal.

19 The first the claimant was aware of being disciplined was when he was dismissed. I find there was a total failure to comply with the respondent's own disciplinary procedure and the Acas Code of Conduct on disciplinary procedures and that that failure was unreasonable. The claimant was not invited to an investigatory meeting, was not notified in writing that he had a case to answer, was not provided with any information and a disciplinary meeting was not held. I find that the dismissal was procedurally unfair.

20 The respondent has gone on and sought to rely on a number of issues that it claims constituted misconduct. I deal with these in the order in which they appear in Mr Perkins' witness statement.

<u>Private van use</u>

21 Mr Perkins told me that on about six occasions the claimant had used his van for private use. It is clear that private use was expressly prohibited pursuant to the contract of employment. Mr Perkins produced two examples from April and May 2024 when the claimant had travelled to and from his

sister's property, a distance of about two miles in each direction. The claimant's sister had recently had surgery and the claimant went to visit her. The claimant told me that it was understood within the company that in emergencies or, for example going to or from the workplace, he could stop, for example, at a grocery store. It is clear to me that some private use in some circumstances was tolerated by the respondent. Issues relating to insurance may have arisen if the claimant was using the van for private use. That said, in my judgment, this issue was really one of simple management and if the respondent wanted to bring it to a total cessation then the claimant could have been spoken to and no doubt it would have ceased. In my judgment this issue has just been placed into the account in order to try and justify the respondent's dismissal of the claimant.

Annual leave

22 On 3 July 2023, the claimant sent Mr Perkins a holiday request to cover the period 24 July-8 August 2023.

23 Mr Perkins replied, probably on 11 July 2023, as follows:

> "Just going over your holiday request are you able to change the dates as Chris has already booked the last week of July off and we cant have both of you off that week."

24 Unfortunately, during the time it took for Mr Perkins to respond, the claimant had booked his holiday flights from 21 July.

25 On 11 July 2023, the claimant replied in an email as follows:

> "Thank you for reaching out regarding my holiday request, I understand that Chris booked his holiday same time with me, but unfortunately last Friday I have already purchased 4 flight tickets for us and the kids for my holiday starting 21 July evening.
>
> I apologise for any inconvenience this may cause, but I am unable to change the dates of my holiday at this point. I have made a non-refundable arrangement based on these dates.
>
> I will take my laptop and my work phone with me on holiday. I don't mind keeping some morning schedules to be available for any of the certificates or part-p notification that might be needed."

26 On 12 July 2023 Mr Perkins replied:

> "I will need to get Izzy and Matan to OK this as the whole point of having two QSs was we would always have one working (ie holiday cover).
>
> The issue is going to be you will have to be available through the day signing certs off and being able to make and receive calls especially as we are about to start working for Mears again and they must have the EICRs back within 2 days of the job.
>
> In your contract it does state you need to get holidays approved before you book them."

27 On 12 July 2023, the claimant responded:

> "I understand that.
>
> I am happy to do that as long as those will be counted as working days."

28 On 13 July 2023, Mr Perkins responded:

> "Unfortunately as a business we cant approve you holiday on the dates you have stated as we already have Chris off and we need an electrical QS to sign off and check certs before sending them out as well as being available for meetings if needed (ie Mears).
>
> …
>
> Thus, if you take this time off it will be classed as unauthorised leave and you will not get paid for it."

29 In due course the claimant told me that he had a phone call with Mr Schulman on 13 July 2023 during which it was discussed how the matter could be resolved. It is clear to me that the claimant's offer to be available on his laptop was agreed to, no doubt reluctantly by the respondent. In his normal working life the claimant was allowed approximately two hours in the morning to sign off the paperwork, mainly certificates. He told me that sometimes that could be less than two hours or sometimes more than two hours. A major part of the claimant's job involved going out on site and acting as an electrician. Clearly he could not do that when working remotely on holiday from Albania. The claimant tried to suggest to me that on holiday in Albania he spent the full nine hours, less lunch, sitting at his laptop monitoring it for messages and any other paperwork that may have come in. I find that inherently improbable. I would have expected the claimant, at best, to have monitored his laptop from time to time to see if there were any outstanding tasks or queries that he needed to deal with. The claimant was being indulged by the respondent by being allowed to work on holiday remotely and during the course of that week was paid for 10 hours for doing so. The claimant has presented no evidence in the form of screen shots or activity that he says he was undertaking other than the two hours that the respondent has allowed. In the circumstances, in my judgment, the claimant has failed to prove that he was working for the four days for the week 31 July-4 August and that consequently, the deductions made for holiday overpaid were not unauthorised deductions from his pay.

30 As far as the claimant not clearing his holiday prior to booking his flights and effectively presenting the respondent with no other option than to allow him to work remotely was, again, in my judgment, a matter of management and something that could have been drawn to his attention and was highly unlikely to reach the stage of misconduct.

31 The claimant was working on 21 July 2023. Normally the claimant would do his paperwork in the morning and then go out on site in the afternoon. No doubt because the claimant was going to catch a plane from Luton airport for a 7 p.m. flight on 21 July, so he cleared with the office that his work on site would be moved from the afternoon to the morning on that Friday. That arrangement took place. The tracker on the claimant's van demonstrates that he returned home by 12.30. The claimant told me he did his paperwork in the afternoon. As far as the timings are concerned it would have taken him about an hour to drive form his home to Luton Airport and he was

technically supposed to finish work at 5 in the afternoon. I find that the claimant probably left his home earlier than 5 p.m. That said, the claimant told me that when he arrived in Albania he checked his laptop and there was paperwork for him to do later that evening and he did it.

Conduct at work

32 One of the issues raised by the respondent is that the claimant did not return his van to the office on the afternoon of 21 July. At 10.13 on 21 July Mr Perkins sent the claimant an email as follows:

> "Just a reminder that the company van will need to be dropped off at the office at close of play before you go on holiday and you will then need to collect it on your first day back.
>
> We will cover the cost of getting you to and from the office."

33 Probably on the same day the claimant replied:

> "As I said on the phone. You have never told me to bring the van to the office. But I will arrange with our guys hopefully."

34 On 22 July 2023, Mr Perkins emailed the claimant stating as follows:

> "Alex told you when you dropped off the Megger calibration certificate that you van was needed in the office as he needs it for a job on Monday."

35 As it is, the claimant arranged for a work colleague to collect the van from his premises and return it to the respondent's office on the Saturday.

36 The claimant denied that Alex had told him to drop the van off in the office. In my judgment, it is unnecessary to come to a finding as to whether or not the claimant was tasked with returning the van to the office on the afternoon of 21 July 2023. If the claimant had been tasked to return it, then this was a minor failure to do what he had been required to do which was rectified the following day by a colleague picking up the van and taking it to the respondent's office. I do not find that this was sufficiently serious to constitute misconduct.

37 At some time in June the claimant was allocated by the system to go and work on the afternoon of a Friday at a job. The claimant gave an explanation that he did not attend that job and he explained that he had good reasons not to. Be that as it may, there was a meeting with Mr Perkins on 5 July concerning his non-attendance on site and on 7 July 2023 the claimant was issued with a verbal warning. The outcome letter indicated that the claimant had a right of appeal.

38 On 10 July 2023, the claimant wrote a long email, reiterating his explanation as to why he had not gone to site and indicting that he strongly disagreed with the verbal warning. That said, the claimant did not use the word "appeal" and it was not treated as an appeal by Mr Perkins.

39 Since the claimant had been dealt with under the disciplinary procedure and had been issued with a verbal warning, so, in my judgment, that issue was closed.

40 On 4 July, a customer sent an email to the respondent querying a certificate which had assessed his premises as unsatisfactory. I do not agree with Mr Perkins that this constitutes a complaint. The email reads as a query concerning the EIRC report. The matter was clearly escalated to the claimant and on 10 July 2023 the claimant sent an email to Mr Perkins as follows:

> "As you know this bs7671 it will leave information that could be interpreted in different way. At the time I failed the cert thinking he should upgrade (those have us do the work needed) the guy made a big deal out of it and started to call our Audit (NIC) proving that the work requested by me is not mandatory. To smoothen the situation I had to tolerate that part and give him another 5 years satisfactory report with only a code 3 on the finding. I would suggest not to bother the situation any more as the guy was happy for that."

41 Thus, in the face of the complaint by a customer, the claimant altered the electrical supply report, in effect to move a number of categories from potentially dangerous to improvement recommended and consequently was able to arrive at a satisfactory outcome.

42 The copy of the report that I have in the bundle indicates that the C3 category was inserted in a number of locations under the inspection report but in the observations and recommendations for action to be taken the report still had C2 (potentially dangerous).

43 The report has clearly been altered and the email from the claimant demonstrates that he certainly altered the report in certain respects. I do not make a finding that there has been anything underhand with this being deliberately altered to show the claimant in a bad light. In my judgment, the probability is that the C2s were left in in error and this is a documentation error. Again, in my judgment, this falls far short of constituting misconduct and was a matter that could have been dealt with by way of management instruction.

44 In an email dated 6 July 2023, sent by Mr Perkins to the claimant, Mr Perkins highlights 19 NICEIC reports where an incorrect trading name/report missing from job, had been done following a customer highlighting an error. The error appears to have been that All Service 4 U Ltd was entered on the report as All Services 4 U Ltd. That clearly appears to have been repeated in 16 of the reports. In my judgment, this is no more than a typographical error that falls far short of misconduct and would represent a matter to be dealt with by management instruction. It is noticeable that on his email signature block Mr Perkins himself has his company described as All Services 4U Ltd.

45 On 6 July 2023, the claimant posted a comment on the Electrician WhatsApp Group as follows:

> "Also I need to pull your attention from time your started you have shown negligence and irresponsible showing no attention or very little concern to quality of your work. This very often has had a very negative effect to our team and your colleagues."

46 This comment was addressed to Mr Chris Turner, another electrician. The WhatsApp extract that I have indicates that Mr Perkins then contributed:

> "Zen/Chris stop this conversation!!!."

47 On 6 July 2023, the claimant sent an email to Mr Perkins as follows:

> "The message was purely meant to being awareness. Not to put Chris in any investigation. I would not like any of that sort towards Chris. I remove my message from Whatsup and please stop any unnecessary action towards that. Let's not make unnecessary aggrievance toward no one."

48 And later the claimant said in an email:

> "Apologies for the text towards Chris after thinking I have withdrawn my text comment in relation to Chris. It was message made in a state of induced stress and I have no evidence, Apologies to all I'm sure Chris is at the best level."

49 Notwithstanding that apology, Mr Turner made a grievance about the comment. As the grievance had been received, so Mr Perkins was duty bound to investigate as per the company procedures. The claimant was invited to a meeting on 12 July 2023. Apparently notes were taken but they have not been produced in front of myself.

50 On 23 July 2023, Mr Perkins emailed the claimant as follows:

> "As you have not sent over any proof to back up your claim we have no choose other than to uphold the grievance against you based on the evidence we do have.
>
> As a result, YOU need to put an apologise in the electrical group of WhatsApp stating that what you said about Chris was wrong as you have no evidence to back your claim up."

51 There was some dispute as to whether the claimant had actually apologised. In an email dated 31 July the claimant stated:

> "And I also made clear on WhatsApp a formal email apology to get this closed."

52 Once again, the documentation in this case is not good and it would have been relatively simple to produce the WhatsApp chain of messages to indicate whether or not the claimant had apologised. Whether or not he had apologised, in my judgment this issue had been dealt with on an informal basis and the claimant had been told to apologise. No disciplinary action was brought against him as a result.

53 On 17 July 2023, the claimant posted a picture on WhatsApp showing that the last calibration date of his Megger Tester was overdue. It should have been done in December 2022 and had not been done by 17 July 2023. Mr Perkins accepted that the post was made in order to highlight to the rest of the team what should be looked at. The effect of the calibration being out of date was that test results would be invalid until they were proved to be accurate. This potentially affected some 40 test results. Mr Perkins clearly investigated the matter and in an email dated 17 July 2023 three of the electrician's testers were all in date as they had been tested internally on the respondent's own test equipment. Because the claimant had not been present, so his tester had not been tested in the same way. Mr Turner's tester was new and so did not need a test and "Macadis'" tester had previously been stolen. Thus the only out of date tester was the claimants.

54 Clearly, the claimant had a responsibility to ensure that his tester was valid and he was at fault in not doing so. That said, the same email from Mr Perkins states as follows:

> "Yes, I should have told you tour tester was out of date but as a QS you should know that the testers needed to be calibrated each year and it gave you a date of when it was due on the tester itself."

55 The claimant's tester was sent off for calibration and when it came back it was found to be accurate. I agree with Mr Perkins that, in effect, the respondent "got away with it" and did not have to go through the time and expense of potentially renewing 40 reports. No documentation has been produced before me indicating the seriousness as far as the respondent was concerned of this matter. In my judgment, and taking into account that Mr Perkins could also be said to have been at fault, this would not have reached the level of a misconduct hearing and again would have constituted a management issue.

Conclusions

56 I find that the principal reason for dismissal was to reduce the head count in the electrical department.

57 I find that the respondent has attempted to justify this by asserting that it dismissed the claimant for misconduct.

58 The respondent has not put its case as one of redundancy which is a potentially fair reason. Even if it had, I find that the procedure was clearly defective and unfair and that I would not be in a position to assess the chances that the claimant would have been dismissed in any event as I have no information as to the alleged redundancy situation, selection criteria or alternative employment positions.

59 I find that the allegations of misconduct have been raised in an attempt to justify the dismissal.

60 I find that the respondent did not genuinely believe that the misconduct alleged was sufficient to justify dismissal.

61 Mr Perkins said in evidence that there were a lot of low level instances in three/four weeks in July 2023 and in his closing submissions said that, of the issues raised, no one was sufficient by itself to justify dismissal but in combination they did justify dismissal.

62 I find that the respondent did not conduct a reasonable investigation. Had it done so many of the issues raised could well have been explained. There have been significant gaps in the evidence placed before me.

63 I find that the respondent did not have reasonable grounds to conclude that the claimant had committed misconduct whether individually or taken together.

64 I find that no reasonable employer could have dismissed the claimant in these circumstances and that the decision to dismiss was well outside the range of reasonable responses of a reasonable employer.

65 Therefore, I find that had a fair procedure been adopted there was no chance that the claimant would have been dismissed.

66 I find that the claimants conduct did not contribute to his dismissal.

67 I find that the dismissal was unfair both procedurally and substantively.

68 I find that the Acas Code of Conduct applied, there was a failure to comply with it, the failure was unreasonable and it would be just and equitable to award an uplift of 25%. Such an award does not involve double counting and I have decided in absolute terms that the uplift is not disproportionate.

Unauthorised deduction of wages

69 In my judgment, the claimant did work a full day on 21 July 2023. He may have left home before 5 p.m. in the afternoon but had the flexibility to work later that night. Consequently, I find that the respondent has made unauthorised deduction of wages in respect of that half day.

70 As regards the four days in the week from 31 July to 4 August I have already found that the claimant has not proved that he was working for those four days other than the 10 hours that he was paid. The sum of £969.21 was an agreed sum that the respondent acknowledged that it had over-deducted the claimant's wages. The extra £80.77 is half the daily rate of £161.54.

Mitigation of damage

71 The claimant is under a duty to mitigate his loss by making reasonable attempts to find alternative employment. The threshold is not a high one. The claimant was not in receipt of state benefits and I take into account that in the ordinary course of events there is an economic imperative on people to find alternative employment commensurate with their skills and experience as soon as possible. The claimant in his witness statement merely asserts that he actively applied for jobs. On day 2 of this hearing the claimant produced a printout indicating some of the jobs that he applied for. I accept the claimant's evidence and that he made reasonable attempts to find alternative employment and was not able to do so until 15 February 2024. Consequently, I find that there has been no failure to mitigate his loss and I award the loss of earnings as claimed.

72 The pension loss I have taken at the 3% auto enrolment rate.

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Employment Judge Alliott

Date: 17 September 2024

Judgment sent to the parties on

For the Tribunal office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/