EMPLOYMENT TRIBUNALS

Claimant: Mr J Peltak
Respondent: Serco Limited

Heard at: Watford Employment Tribunal (in person)
On: 28 January 2025
Before: Employment Judge French

Representation
Claimant: In person
Respondent: Mr B Jones, Counsel

JUDGMENT having been sent to the parties on 17 February 2025 and written reasons having been requested on 31 January 2025 by the respondent in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Introduction

1. The claimant brings a complaint of unfair dismissal by way of claim form ET1 dated 18 November 2024. The respondent denies unfair dismissal and states that they dismissed the claimant for the potentially fair reason of misconduct and that they followed a reasonably fair procedure in that regard.

Evidence

2. I had a bundle consisting of 131 pages. For the claimant I had a witness statement from the claimant himself. For the respondent I had statements from Mr Jeremy Gage and Mr Paul Hardwick. All of those witnesses attended the tribunal and had questions put to them. I also heard closing submissions from both parties, and I had regard to those submissions.

Findings of fact

3. There is little dispute between the parties in this claim. As such I largely address the same within my conclusions below.

4. The respondent is an international service company which provides crucial business processes for public sector organisations globally. The respondent holds key contracts with United Kingdom national and local government involving it in important areas of public service, including health, education, transport, science and defence. The respondent employed the claimant as a Prison Custody Officer (PCO) from 1st June 2010 until he was dismissed on 3rd January

2024.

5. The claimant was employed under a contract of employment which stated that the hours of work were annualised. This set out that on average his hours would be 40 per week over a 52 week period and 2080 per year. The contract further set out that he was expected to work further hours where necessary and as directed by his manager. 'Over hours', those in excess of contracted hours, worked were calculated on a 4/5 week period and paid at the normal rate.

6. The claimant became absent from work on 9th November 2023. This absence was reported by the claimant, and the reason that he gave for his absence was that he had worked his 2080 hours that year and was unwilling to do any over hours. The claimant's position is that he was not required to return to work because he had worked his annual 2080 hours.

7. This absence was considered to be unauthorised by the respondent. The respondent says that the claimant is contracted to work additional hours to meet business needs and the fact that he had met his annualised hours did not mean that he no longer had an obligation to return to work.

8. The key questions for myself is, what does the contract provide for in relation to hours and whether the respondent's belief in relation to what it provided was reasonable. I address those questions in my conclusions below.

9. Following the claimant's absence the respondent wrote to the claimant on 17 November 2023 at page 71 inviting him to a meeting on 21 November 2023. This meeting is re-arranged and takes place on 28 November 2023 and the meeting notes appear at page 74 of the bundle.

10. The meeting is used to ascertain the reasons for the claimant's absence and he confirms his position given to the absence line, namely that he considers that he has worked his annual hours. That meeting is conducted by Mr Jeremy Gage.

11. Following that meeting on 29 November 2023, the claimant is invited to a disciplinary meeting which can be seen at page 77 of the bundle. In that letter he is informed of the right to be accompanied and the given information in relation to the employee assistance scheme. He is informed of the allegation against him and told that the process may result in a finding of misconduct and dismissal.

12. The meeting subsequently takes place on 7 December 2022 and the meeting notes can be seen at page 79 onwards of the bundle. Mr Jeremey Gage also conducted this meeting. During that meeting the claimant is accompanied by a representative and has an opportunity to answer the questions put to him and explain his position.

13. Following the meeting the claimant is informed of the outcome by way of letter at page 85 of the bundle dated 8 December 2022. The allegations against the claimant were upheld and he was issued with a written warning. As part of the warning, he was directed to return to work. That letter gives the claimant an opportunity to appeal, which he does not exercise.

14. Following that warning the claimant did not return to work and on 27 December he was sent a further invitation to a disciplinary meeting which can be seen at page 89. Again, that letter informs the claimant of the allegations against him,

the right to be accompanied and the potential consequences of the disciplinary procedure including potential dismissal.

15. That meeting takes place on 3 January 2024 and the minutes can be seen at page 92 of the bundle. The outcome letter is at page 99 of the bundle. This finds the allegations to be upheld and gives its reasons for the same. The claimant is informed of his right to appeal.

16. The claimant was given a formal written warning at this stage however it is not disputed that the claimant was dismissed at that time because he was given a final written warning in relation to his absence when he had already received an earlier warning. The respondent's policies as outlined at page 54 were such a second written warning resulted in dismissal.

17. The claimant then does exercise his right to appeal and is invited to an appeal meeting by way of a letter dated 10 January 2024 which can be seen at page 102 of the bundle.

18. The appeal hearing takes place on 24 January 2024 and the minutes can be seen at page 104. It is chaired by Mr Paul Hardwick. During the meeting the claimant outlines his position, and his grounds of appeal are explored.

19. Following the meeting the claimant is informed of the outcome by letter at page 112 dated 26 January 2024. Within the letter, each of the claimant's appeal point is addressed in turn and its conclusions explained. The outcome of the disciplinary proceedings is upheld.

The law

20. Section 94 of the Employment Rights Act confers on employees the right not to be unfairly dismissed and enforcement of that right is by way of complaint to the Tribunal under s.111. The employee must show that she or he was dismissed by the respondent under s.95 but in this case the respondent admits that it dismissed the claimant.

21. S.98 of the Act deals with fairness of dismissals. There are two stages within s.98, the first is that the employer must show it had a potentially fair reason for the dismissal and second if the respondent shows that it had a potentially fair reason for the dismissal the Tribunal must consider without there being any burden of proof on either party whether the respondent acted fairly or unfairly in dismissing for that reason.

22. In this case the respondent states that it dismissed the claimant because it believed that he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under s.98(2).

23. S.98(4) then deals with fairness generally and provides that determination of the question whether the dismissal was fair or unfair having regard to the reasons shown by the employer shall depend on whether, in the circumstances including the size and administrative resources of the employer, the employer acted reasonably or unreasonably in treating it as a sufficient reason for

dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

24. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in British Homes Stores Ltd v Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

25. In Taylor v OCS Group Ltd 2006 ICR 1602, CA, the Court of Appeal stated 'It may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that S.98(4) requires the employment tribunal to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.' Therefore, where an employee is dismissed for serious misconduct, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee.

26. Thus, not every procedural defect will render a dismissal unfair. For example, in D'Silva v Manchester Metropolitan University and ors EAT 0328/16 the EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.

27. In Sharkey v Lloyds Bank Plc EATS 0005/15 Mr Justice Langstaff, then President of the EAT, observed that it will almost inevitably be the case that in any alleged unfair dismissal a claimant will be able to identify a flaw, small or large, in the employer's process, and that it is therefore for the tribunal to evaluate whether that defect is so significant as to amount to unfairness. Langstaff P stated: 'Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.' Therefore it is important for tribunals to consider the reasonableness of the whole procedure, including the decision to dismiss, in the round.

Conclusions

28. In terms of my conclusions, it was not the purpose of these proceedings to make a determination on whether or not the claimant worked regularly in excess of his hours. I do not think it is disputed in any event that the claimant was, on a regular basis, working in excess of his minimum contracted hours, of 40 hours per week.

Did the respondent genuinely believe that the claimant was guilty of misconduct?

29. I conclude that the respondent did have a genuine belief that the claimant was guilty of misconduct.

30. In reaching that conclusion I am assisted by page 33 of the contract of employment which sets out the annualised figures of 2080 hours. That is on a model of 40 hours per week but in the same paragraph that states, "You may be required to work additional hours when necessary." It goes on to say, "You will work hours as directed by your manager in accordance with the current shift pattern."

31. The claimant's position in relation to that is contained within the same paragraph which states, "any change will be notified to you" and he has indicated that there is nothing in writing within the bundle in relation to any changes. My observation in relation to that is there is also the reference to "as directed by the line manager."

32. It is not disputed in this case that the very nature of the business, is such that the claimant's role is a changeable one, and it is a variable role. The respondent company provides a prisoner transport service to courts and tribunals. The demand is variable in terms of the number of prisoners that need transporting on any particular occasion, to any particular court building and the hours vary based on those demands, which may often come at late notice due to either police arrests or sentences provided by the courts. I consider that it would be impossible for there to be a written notification, effectively, on what would be a daily basis, to inform an employee of the need to work extra hours because of particular business needs. It is a daily variable, and, in those circumstances, I consider notification would be informal on a need's basis.

33. On my reading of the contract itself, I conclude that there is a set requirement for the employee to work additional hours. Again, I acknowledge the claimant's point that actually this became the norm, and it was on a regular basis that this was being required of him and that that was not being managed. However, that does not take away from the respondent's interpretation of that contract, that being that there are the annual hours and a requirement to work additional hours where required on top of those annualised hours.

34. I conclude that there is not anything within the contract that would suggest that once an individual has reached their annual hours of 2080, that they are able to cease work.

35. In fact, to the contrary I consider that paragraph 3 on the same page (33) provides for the situation where 'over hours' are worked. The contract provides that at the end of the annualised hours year, all hours accrued and not yet paid will be paid at the hourly basic rate. This would not support an interpretation that once you have then worked your total annual hours of 2080, there ceases any obligation to continue to work.

36. I am satisfied, in those circumstances, of the respondent's interpretation of the same and, based on that, the genuine belief in the claimant's guilt. That is in circumstances where there is no dispute that the claimant has not attended work and it was the understanding of the decision makers that, based on that contract, he was required to attend.

<u>If so, was this belief based on reasonable grounds?</u>

37. I conclude that the belief was held on reasonable grounds and rely upon my reasons above in that regard.

38. I consider that looking at the contract of employment the respondent's interpretation of the contract was an entirely proper and reasonable conclusion.

39. There is nothing to suggest that, once an individual has reached 2080 hours, they are entitled to no longer attend work. Indeed, that proposition would make very little business sense in that it could effectively result in an employee working all of their annual hours for instance, in a short period of time at the beginning of the year, leaving the respondent with no cover for the rest of the year.

40. I acknowledge the claimant's position in relation to the number of hours that he was working and the fact that he considered that management were not managing his hours such that hours in excess of 40 hours per week became the norm. However, that does not take away from the respondent's interpretation of the contract that, regardless of whether or not the claimant is indeed working regularly over the 40 hours, and indeed has met the 2080 hours required for the year, he is still required to attend his employment and has not done so.

<u>Had the respondent carried out such an investigation into the matter as was reasonable in the circumstances?</u>

41. I turn now therefore to the question of whether the respondent carried out an investigation into the matter as was reasonable in the circumstances. Here there is a dispute over whether the original meeting takes place on 28 November 2023, which I can see at page 74 of the bundle, was an investigation meeting. The claimant's position is that it was an investigation meeting, and that the same person then does both the investigation and the disciplinary process which, he says, is a breach of the respondent's own policies but also the Acas Code of Practice on disciplinary and grievance procedures (Acas code).

42. The respondent's position is that this was not an investigation meeting and actually was an informal meeting set up to look into the claimant's unauthorised absence.

43. In that regard, I conclude that it was an investigatory meeting. The letter inviting the claimant to the meeting on page 71 does not state that it is an investigation meeting but does say, or suggest, that it is a meeting to decide whether or not disciplinary action should be taken. The notes of the meeting itself, at page 74, refer to "Once the investigation is complete there will be a decision on whether

or not the matter should proceed to a disciplinary hearing". Based on that I conclude that it was an investigation meeting.

44. I acknowledge that the Acas Code says that the investigation should be conducted by a different person to the person conducting any subsequent disciplinary process, where practicable. It is not disputed that Mr Gare carried out what I conclude to be an investigation meeting and the subsequent disciplinary procedure. The respondent is a large company, and I consider it would have been available to them to have different people conduct each stage.

45. That being said, I have to look at reasonableness. In this case I do concur with the respondent that there was little need for an investigation in circumstances where there was very little in dispute between her parties as to what had happened. This is not a case where there is a substantial dispute of fact, or some other reason advanced by the claimant as to why he was absent. I understand it is not challenged that when the claimant called the absence line, he had stated that the reason that he was not in attendance was because he had completed his hours, and the investigation effectively did nothing more than to confirm the same.

46. At the subsequent disciplinary meeting, the claimant did not dispute that that was the reason why he had not attended, and I draw a distinction there in terms of an investigating officer judging their own report where there are significant disputes of fact between the partes and this case where it is an interpretation of the contract.

47. I am also reminded by the case law above that I need to look at fairness and the procedure in the round and not one step in isolation. In nearly all cases there could be some sort of procedural flaw raised but that does not, in itself, render the entire process unfair. In these circumstances I do not consider that it was not reasonable for Mr Gage to have completed both the investigation and subsequent disciplinary proceedings.

<u>Did the respondent carry out a reasonably fair procedure?</u>

48. As to whether or not the respondent carried out a reasonably fair procedure, I have given observations in relation to the investigation which are relevant to fairness of the procedure also and I rely on the same.

49. The history of the procedure is outlined in full above. The claimant was given an opportunity to explain his position at the first disciplinary hearing which arose out of his first absence. He does so, and he presents his position. The result of that was that he was given a written warning and management instructions to return to work. He is given an opportunity to appeal that decision. He does not exercise that right of appeal.

50. The claimant then does not return to work, so the respondent proceeds with a further disciplinary meeting. Again, as part of that process, the claimant is able to advance his position. He is informed of his right to be accompanied at all stages of the procedure and exercises that right.

51. In all invitation letters he is informed of the allegations and the potential consequences if upheld, including dismissal. In relation to the second

disciplinary process he is issued with a final warning, the effect of which is his dismissal. He has a right of appeal, and he does exercise that. That is looked at by a separate individual and, ultimately, the outcome is upheld.

52. In the circumstances I conclude that the respondent carried out a reasonably fair procedure and indeed save for the investigation and disciplinary hearing having both been carried out by Mr Gage, the claimant also made little criticism of the same.

Was it within the band of reasonable responses to dismiss the claimant rather than impose some other sanction?

53. I turn finally to whether it was within the band of reasonable responses to dismiss the claimant rather than impose some other sanctions and this is in circumstances where the actual outcome was a final written warning but, as a result of the earlier written warning, it was such that it resulted in the claimant's dismissal. I do not look at this question as to what I would do, and I acknowledge that another respondent may well have done something different. The question is, was it a reasonable response that an employer could take in the circumstances, and I conclude that it was.

54. This is a case where the claimant had not attended work since 9 November 2022 despite a contractual requirement to do so. He did return in the new financial year when, effectively, the annual 2080 hours are renewed. However, at the further disciplinary hearing on 3 January 2023 the claimant's position was the same, namely he maintained that, once he had worked 2080 hours, he was not required to work beyond that. The respondent concluded from that that the issue was likely to arise again at a later stage and considered that once the claimant worked his annual hours of 2080, he would again refuse to attend work.

55. The claimant had been employed by the respondent since 2010. I do consider that there has been an acknowledgement of the claimant's length of service and the mitigation that he has advanced and that has ultimately resulted in a final written warning in both cases but it is in circumstances such that he is already on a warning that resulted in him being dismissed.

56. As a final point, I acknowledge the claimant's position; I acknowledge the number of hours that he was working such that it became that it was not an infrequent basis but rather it was on a regular basis that he was working in excess of 40 hours per week and I acknowledge his criticism of the respondent for failing to manage this. Ultimately, however, I have to look at the legal questions to be applied in these cases, and, when I do so, the fact that the claimant was working regularly in excess of 40 hours does not mean that he was entitled not to attend work.

57. In the circumstances, I conclude that dismissal was in the band of reasonable responses. As such, the claim for unfair dismissal fails and is dismissed.

Approved by:

Employment Judge French

3 March 2025

REASONS SENT TO THE PARTIES ON

4/3/2025

N Gotecha
FOR THE TRIBUNAL OFFICE