EMPLOYMENT TRIBUNALS

Claimant: **Mr P Soennecken**

Respondent: **Otis Limited**

Heard at: **London Central** **On:** **14 November 2018**

Before: **Employment Judge Davidson**

Representation

Claimant: Ms B Venkata, Counsel
Respondent: Mrs L Shaw, Solicitor

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and wrongful dismissal fail and are hereby dismissed.

REASONS

Issues

1. The agreed issues for the tribunal were as follows:

   1.1. What was the reason for the claimant's dismissal?

   1.2. Was the reason for dismissal a potentially fair reason for the purposes of section 98(1) and (2) Employment Rights Act 1996? (The respondent pleads that the reason for dismissal was conduct).

   1.3. Was the test of fairness in section 98(4) ERA 1996 satisfied?

   1.4. On the basis that the claimant was dismissed for misconduct, the *Burchell* test applies:

1.4.1. At the time of dismissal, did the respondent believe that the claimant had committed misconduct?
1.4.2. At the time of dismissal, were there reasonable grounds for that belief?
1.4.3. At the time of forming that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?

1.5. Was the dismissal within the range of reasonable responses?

1.6. By reference to the above tests, was the dismissal unfair for any of the following reasons:

1.6.1. The alleged failure to provide the claimant with relevant CCTV footage from inside the lift car?
1.6.2. The alleged failure to give the claimant the opportunity to respond to the allegation that he failed to apply the LOTO procedure?
1.6.3. The alleged failure to undertake a reasonable investigation? In particular, the failure to establish what the standard working practices were to rescue trapped passengers in the absence of a written procedure?
1.6.4. The alleged lack of a written procedure for rescuing trapped passengers?
1.6.5. The alleged lack of formal or informal training for employees in rescuing trapped passengers?
1.6.6. The alleged lack of a customer complaint that the claimant's rescue of passengers had been unsafe?
1.6.7. The claimant's length of service, disciplinary record and the mitigation he put forward?
1.6.8. The alleged inconsistency of the claimant's treatment compared with that of his named comparators, Mr P, Mr M, Mr A and Mr H?

1.7. If the tribunal finds any procedural flaw, did such flaw make any difference or would the decision to dismiss have followed in any event, pursuant to *Polkey*?

1.8. Should a reduction to any basic and compensatory awards be made pursuant to sections 122(2) and 123(6) ERA 1996 for contributory fault? If so, to what extent?

1.9. Was the claimant entitled to payment for his contractual notice period?

Evidence

2. The tribunal heard evidence from Richard Jenkinson (Branch Manager, formerly Field Operations Department and Engineering Manager, UK & Ireland) and Alex Lampe (London Service Director) on behalf of the respondent and from the claimant on his own behalf. In addition, the tribunal had before it an agreed bundle of documents running to some 270 pages which included stills from CCTV footage but not the footage itself.

Facts

3. The tribunal found the following facts, on the balance of probabilities:

   3.1. The respondent is a business which installs, services and repairs lifts. The claimant was employed by the respondent from 16 July 1990 as a Lift Engineer, responsible for servicing, maintenance and call-outs on a service route. His responsibilities included rescuing passengers who were trapped in lifts.

   3.2. The respondent established ‘Cardinal Field Rules’ which employees were required to follow: these included assuring protection from falling where a ‘fall hazard’ exists, protecting open lift shafts in an approved fashion, and following the lock out and tag out (LOTO) procedures whenever power was not required for the work activity. The Health & Safety Executive defines a ‘fall hazard’ as a gap of 300mm or more.

   3.3. The respondent had published procedures called ‘Method Statements’ which were available to employees through their personal digital assistants (PDAs). The implication in the guidance note provided to the tribunal is that there will be two engineers in attendance. In 2018, (subsequent to the events giving rise to this claim) the procedures were re-issued in an updated format with the implication that only one engineer would be attending.

   3.4. The tribunal had before it a print-out of the claimant’s training record showing frequent training courses. The claimant alleged that he had not received training on the specific issue of rescuing trapped passengers although the respondent contended that the training he received in May 2013 on ‘Landing Release Keys and Hand-Winding’ was relevant to this issue. Without further information on the training course, I was unable to conclude whether this training had covered the issue faced by the claimant in the incident which led to his dismissal.

   3.5. One of the sites which the claimant serviced regularly was the M&S store in Newbury. On 17 November 2017, he was asked to attend the store because two passengers were trapped in a lift. He arrived at the store, parked outside and entered carrying his test tool but without his personal protective equipment (PPE) or other equipment provided by the respondent to ensure protection of health and safety when working on lifts.

   3.6. The claimant had attended the store frequently and was familiar with the equipment. Usually the issue with the lift was resolved simply and quickly by pressing two buttons. He took the view that this was all that would be required in this case in order to rescue the passengers and did not bring all the equipment he would normally need if the issue was more complex.

3.7. In the event, when he reached the lift, he saw that it was stuck above floor level with the lift car doors and the landing doors slightly open. There were two M&S employees in attendance (Emily and Jack) and two passengers in the lift. The passengers had attempted to open the doors by tearing off some metal from inside the lift and, in the process, had damaged the lift. As a consequence, the claimant was unable to move the lift electrically or manually.

3.8. The claimant isolated the lift from the electricity supply in a number of ways but he did not use the LOTO process, which is the most reliable way to isolate the lift from the electricity source.

3.9. He proceeded to rescue the passengers from the lift by helping them to jump from the lift to the floor, which was just over 30cm from the floor level. He did not use a barrier to protect the gap between the lift and the floor although the two M&S employees were positioned to prevent members of the public accessing the lift area and the claimant was standing partially covering the gap.

3.10. After he had completed the rescue of the passengers, the claimant returned to his van and collected his PPE and other equipment and proceeded to repair the broken lift.

3.11. During the course of the rescue, the claimant spoke to the passengers and reprimanded them for damaging the lift. There is some conflict of evidence regarding the exact wording used and whether, as the claimant alleges, one of the passengers was brandishing the metal he had torn off, but it is accepted that he did speak to them about the damage they had done. This resulted in the passengers complaining to M&S about the claimant, which in turn led to M&S complaining to the respondent. In the complaint from M&S to the respondent, they referred to the comments made by the claimant to the passengers and also noted that he 'faffed around' on arrival before releasing the passengers. M&S had reviewed the CCTV footage before making the complaint and someone at M&S who had not been present at the time, noted that there was a gap between the lift and the floor and, as part of their complaint, M&S queried whether this was safe.

3.12. On receipt of the complaint, the respondent suspended the claimant pending an investigation carried out by Barry Sanderson. The allegations were

3.12.1. breach of the cardinal rule by failing to use effective barriers (Allegation 1);
3.12.2. breaches of health and safety by failing to wear safety cap and gloves (Allegation 2);
3.12.3. not following correct procedures when releasing passengers from a lift car (Allegation 3);

3.12.4. a complaint in the manner the claimant spoke to the trapped passengers (Allegation 4).

3.13. Mr Sanderson investigated by visiting the site, reviewing CCTV footage of outside and inside the lift, interviewing the claimant, returning to the site and interviewing Emily (he was not able to interview Jack). He concluded that the claimant had failed to adhere to full PPE usage and use of the barrier provided by the respondent. He therefore recommended that the matter proceed to a disciplinary hearing.

3.14. The claimant was invited to a disciplinary hearing by letter dated 7 December to answer Allegations 1, 2 and 3. The letter enclosed the supporting documents and notified him that the meeting may result in disciplinary action up to and including dismissal. The claimant objected to the disciplinary manager appointed by the respondent as there was an ongoing dispute involving both of them. The respondent agreed to appoint another manager and asked Richard Jenkinson to chair the hearing.

3.15. The disciplinary hearing took place on 10 January 2018 and was chaired by Richard Jenkinson. The claimant was accompanied by Tony Ruane, his trade union representative. The tribunal had sight of the respondent's minutes of the meeting, which were disputed by the claimant in particular in relation to whether Mr Jenkinson said (in relation to the gap) "You could fall down, people will fall down" or whether he agreed with the claimant that the gap was too small for someone to fall down. During the disciplinary hearing, the claimant maintained that he had prioritised rescuing the passengers, who were impatient and aggressive, and would do the same again if he was in that position. He stated that he did not consider that there was any danger in reality and that he took steps to ensure there was no accident.

3.16. The CCTV footage was viewed at the hearing. The footage was taken by and belonged to M&S. Its CCTV settings did not give a continuous stream and the coverage was only intermittent.

3.17. Following the disciplinary hearing, on 18 January 2018 Mr Jenkinson made a site visit to follow up representations made on behalf of the claimant and he reviewed the CCTV to see if any other footage was available and he re-interviewed Emily. The notes of this interview were not given to the claimant until after the decision to dismiss had been taken. He also obtained a written note from Jack dated 19 January 2018.

3.18. Having reviewed the evidence and the representations made on behalf of the claimant, Mr Jenkinson concluded that Allegations 1, 2 and 3 were made out and he took the decision to dismiss the claimant

summarily for gross misconduct. This was notified to him by letter dated 24 January 2018. He was given the right of appeal against the decision.

3.19. He appealed by letter dated 25 January 2018 and the appeal meeting was held on 6 February conducted by Alex Lampe. The purpose of the meeting was to review Mr Jenkinson's decision and it was not a re-hearing. The claimant was accompanied by two union representatives, Peter Clark and Bryan Kennedy. Following the meeting, Mr Lampe asked questions of Mr Jenkinson regarding the incident. Having reviewed the evidence and the representations made on behalf of the claimant, Mr Lampe upheld the decision to dismiss.

Law

4. The relevant law is as follows:

Unfair dismissal

4.1. As this is a case where conduct is the reason for dismissal, the test for whether the Respondent has acted reasonably in treating as a sufficient reason for dismissal is set out in *BHS v Burchell*. The tribunal must be satisfied that the Respondent had a genuine belief that the Claimant had committed the misconduct and this belief must be based on reasonable grounds following a reasonable investigation. In addition, the Respondent must follow a fair procedure and dismissal must be an appropriate sanction in the circumstances.

4.2. I am conscious that I must not substitute my view for that of the respondent and that I must consider if the respondent's actions were within the range of responses of a reasonable employer.

Wrongful dismissal

4.3. The employer is obliged to give an employee notice of termination of employment, or payment in lieu, unless the employee is in fundamental breach of contract, including committing an act of gross misconduct.

Determination of the Issues

5. I determine the issues as follows:

Unfair dismissal

5.1. I find that the reason for the claimant's dismissal was a reason related to his conduct. This is a potentially fair reason under ERA.

5.2. I find that the respondent (Richard Jenkinson) genuinely believed that the claimant had committed misconduct.

5.3. I find that there were reasonable grounds for that belief in that the CCTV evidence, witness evidence and the claimant's own account show that he had not followed the respondent's procedures as laid down in the cardinal rules and relevant policies.

5.4. I find that the respondent's investigation was reasonable in the circumstances. They reviewed the CCTV footage and took statements from Emily. They attempted to take a statement from Jack but he was not at work when they visited the site although he later gave a written statement after the disciplinary hearing had taken place.

5.5. I find that the respondent viewed the CCTV footage that was available. As the CCTV system belonged to M&S, the respondent did not have control of the settings and could only view the intermittent footage which had been taken.

5.6. I find that there was a procedural flaw in referring to a breach of LOTO without having put this directly to the claimant in the disciplinary hearing as a distinct allegation. However, I find that this made no difference to the outcome as the other allegations which were put to the claimant were sufficient to justify the decision to dismiss.

5.7. The written statement of Jack and the second witness statement of Emily was taken after the disciplinary hearing as part of the follow-up investigation. However, although these appear not to have been put to the claimant, I find that the decision to dismiss was based largely on the claimant's own evidence, most of which was consistent with the other evidence. To the extent that it was not consistent, those matters were not material to the decision to dismiss.

5.8. The claimant relies on the introduction of a new procedure to deal with the situation faced by him at M&S as evidence that there were no written procedures at the time of the incident. I accept the respondent's evidence that there were such procedures in place, available to the claimant on his PDA. I accept that the claimant may not have known about these specific documents but, in any event, the claimant was an experienced lift engineer and, on his own admission, took decisions based on his extensive knowledge, experience and training without reference to written policies.

5.9. I am unable to reach a finding whether appropriate training for this type of incident had been received but it is clear from the claimant's account of events that he knew what his options were and decided to rescue the passengers as a priority without delaying the process to comply with all the health and safety requirements laid down by the respondent, which he felt were not necessary on this occasion.

5.10. The customer complaint was originally about the way the claimant spoke to the passengers but there was a reference to the gap between

the lift and the floor which the customer had noticed and it was entirely reasonable for the respondent to follow this up by investigating the safety of the rescue.

5.11. I find that the respondent did take into account the claimant's length of service and clean disciplinary record and the mitigation he put forward regarding the circumstances of the rescue with the passengers having been trapped for nearly two hours.

5.12. The respondent has provided a schedule of disciplinary sanctions imposed on other cases of this nature from which it can be seen that summary dismissal is within the range of usual responses although not all cases result in summary dismissal. I am satisfied that the respondent considered the issue of consistency and concluded that dismissal was the appropriate sanction for the breach by the claimant, particularly in light of his failure to accept he should have acted differently. I find that the sanction of summary dismissal is within the range of reasonable responses and that there is no unfairness on grounds of inconsistency.

Conclusion

5.13. I find that the respondent did not unfairly dismiss the claimant and that it acted within the range of reasonable responses. The claimant's complaint of unfair dismissal fails and is hereby dismissed.

Wrongful dismissal claim

5.14. I find that the claimant committed an act of misconduct by disregarding the respondent's health and safety rules and making his own assessment. In reaching this conclusion, I take into account that the respondent would bear liability for any damage caused and, to protect its position and the safety of the public, it has developed 'cardinal rules'. It is clear that a breach of these rules will be regarded as gross misconduct. I find that the claimant breached the rules and therefore his wrongful dismissal claim fails and is dismissed.

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Employment Judge Davidson
21 November 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

23 November 2018
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FOR EMPLOYMENT TRIBUNALS