EMPLOYMENT TRIBUNALS

Claimant: Mr John Snell

Respondent: PGB Lifts Limited

Heard at: East London Employment Tribunal by Cloud Video Platform

On: 11 February 2022

Before: Tribunal Judge D Brannan acting as, an Employment Judge

Representation

Claimant: In person, assisted by his litigation friend Mr Derek Snell
Respondent: Did not attend

RESERVED JUDGMENT

1. **The respondent unfairly dismissed the claimant. The respondent is ordered to pay the claimant a basic award of £942.30 and a compensatory award of £2028.04 (net).**

2. **The respondent dismissed the claimant in breach of contract. The respondent is ordered to pay the claimant damages in respect of his notice pay of £1,693.51 (net).**

3. **The respondent unlawfully deducted £388.74 (gross) from the claimant's wages. The respondent is ordered to pay the claimant £322.42 (net) in respect of these unlawful deductions.**

REASONS

Background

1. The claimant brought his claim on 10 September 2021, having gone through ACAS conciliation from 30 June 2021 to 11 August 2021 following dismissal on 12 April 2021 from his employment at the respondent.

2. The respondent has never engaged with either the ACAS conciliation process or these tribunal proceedings.

Issues

3. The claimant claims:

   (b) The Respondent unfairly dismissed him

   (c) The Respondent dismissed him in breach of contract by failing to pay notice pay or give notice

   (d) The Respondent unlawfully deducted his wages by withholding pay equivalent to 33 hours from his final salary payment

4. The Respondent has not contested these claims. They are nevertheless the points which I am required to decide.

Facts

5. I accept the claimant's evidence because it is uncontested and I have no other reason to doubt it. He adopted his witness statement contained in the bundle he prepared following an affirmation at the hearing before me. The material points are set out below.

6. The respondent employed the claimant from 7 January 2019 to 12 April 2021.

7. The claimant's contract entitled him to an annual salary of £22,500 gross. His working hours were 7 AM to 4 PM with an unpaid lunch break of one hour. He was entitled to overtime pay at 1.5x his hourly rate. Other than this there was no provision for being paid on an hourly basis.

8. On 12 April 2021 the Mr Gerry Bazela, a director of the respondent, summarily dismissed the claimant alleging that the claimant had falsified timesheets.

9. On 27 April 2021 Mr Bazela provided the claimant by email with the details from the timesheets. He supplemented these on 3 May 2021.

10. The deduction from wages that the respondent did was purportedly to make up for the hours that the claimant claimed to have worked but the respondent concluded he did not in fact work. It was equivalent to 33 hours.

11. The claimant says that he never falsified any timesheets. He says that the reason for the alleged late clocking in, early departures and long lunch breaks is that the equipment on site did not always capture every entry or exit accurately and that he could not be on site without supervisor so had to wait in some circumstances. He also says that on one occasion he was sent to a different site.

12. I find the claimant did work the hours required under his contract. The claimant did not agree to any deduction from his wages in relation to the timesheets. He was entitled to his salary.

13. The claimant attempted to appeal against the dismissal on 30 April 2021. The respondent never arranged any appeal.

14. The claimant's evidence, which I accept, is that the last contact he had from the respondent was a call with Mr Bazela where Mr Bazela said he was closing the respondent and that he would offer a new job to the claimant but it would be on a self-employed basis at Mr Bazela's new company.

15. The claimant found new work which was better paid on 4 May 2021.

Law

Unfair Dismissal

16. Section 94 of the Employment Right Act 1996 ("ERA") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

17. Section 98 of the ERA provides:

> **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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (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.
>
> (5)...
>
> (6) Subsection (4) is subject to—
>
> (a) sections 98A to 107 of this Act, and
>
> (b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

18. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of section 98 in misconduct cases:

> (1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.
>
> (2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.
>
> (3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).
>
> (4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."

> If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.
>
> (5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.
>
> (6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.
>
> (7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.
>
> (8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.

19. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

20. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in Orr and added:

> As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.

21. It is impermissible for a Tribunal to substitute its own findings of fact for those of the decision-maker (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [40-43]). Nor is it for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did.

22. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because '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' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

23. When considering whether the employer acted reasonably, the Tribunal must look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

24. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

25. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC* (No.2) [1980] ICR 110).

26. The award can also be changed where either party failed to comply with a relevant ACAS Code of Practice under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 which provides, as relevant:

> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> > (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
> >
> > (b) the employer has failed to comply with that Code in relation to that matter, and
> >
> > (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
>
> (3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes...

Notice Pay

27. The claimant's claim for notice pay relates to the law of contract. If the claimant had committed an act of gross misconduct, the respondent could treat this as a fundamental breach of contract allowing the respondent to treat the employment contract as terminated by the claimant and summarily dismiss the claimant. If the claimant did not commit an act of gross misconduct, or the respondent chose to affirm the contract by not dismissing in response to gross misconduct, the claimant would be entitled to his notice pay under his contract, subject to any statutory minimum under section 86 of the ERA.

Unlawful Deductions

28. Section 13 of the ERA provides:

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
>
> (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
>
> (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
>
> (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Conclusions

29. I find that the respondent held no reasonable belief that the claimant had committed gross misconduct or even misconduct. This is because there was no investigation or opportunity for the claimant to answer the allegations at all so I cannot see how any belief was reasonable. I also find that the dismissal was not genuinely related to conduct because Mr Bazela offered the claimant an opportunity to work with him again with a different business.

30. The respondent purported to dismiss for reasons of conduct. In light of the absence of procedure I find the respondent to have been in breach of the Acas Code of Practice on disciplinary and grievance procedures. The respondent has avoided any efforts by the claimant to resolve this dispute prior to and after the claimant brought these proceedings. I consider the respondent's failure to follow any procedure to be unreasonable. I consider it to be just and equitable to uplift the claimant's compensatory award for unfair dismissal by 25%.

31. The deduction by the respondent of 33 hours was unlawful because the claimant had never agreed to payment of his basic salary on an hourly basis and, even if he had, I find he worked the hours required.

32. The employment contract of the claimant shows clearly he was entitled to one month of notice. I find that the claimant did not commit any act of gross misconduct so he was entitled to that notice of termination of his employment.

Calculation of Remedy

33. The claimant provided a schedule of loss which can be found at pages 64 and 65 of the bundle. There is one element of this that I queried and the claimant agreed should be removed. This was in relation to a travel allowance of £10 per day which was included in his compensatory award. The claimant was not entitled to this under his contract, but was rather entitled to reimbursement for actual travel expenses. He told me candidly that at times his actual travel costs would exceed this amount and at other times they would be less. It therefore seems clear to me that the £10 per day is an approximate reimbursement for travel and given that the claimant was not working during the period relating to his compensatory award so as to incur such expenses, he would receive compensation exceeding his actual losses were he to recover his travel expenses. He agreed with this assessment and withdrew his claim for this amount.

34. The basis for the awards is set out below.

35. Personal Details

    (a) Net weekly basic pay: £390.81

    (b) Contractual notice period: 1 month

    (c) Date of birth of claimant: 26 April 1996

    (d) Period of service: 7 January 2019 to

    (e) 12 April 2021

    (f) Complete continuous service: 2 years

    (g) Age at effective date of termination (EDT) (plus statutory

    (h) notice): 25 years

    (i) Gross weekly basic pay: £471.15

36. Basic award = 1 x 2 x £471.15 = £942.30

37. Compensatory award

    (a) Loss of basic salary to date of commencing new role = 3 weeks x £390.81 = £1,172.43

    (b) Loss of statutory rights = £450

    (c) Subtotal = £1,622.43

    (d) Increase in compensatory award due to respondent's unreasonable failure to comply with the Acas Code of 25% = £1,622.43 x 0.25 = £405.61

    (e) Total compensatory award = £2,028.04

38. Wrongful dismissal

    (a) Notice pay in lieu of one month's notice = £390.81 x 52 / 12 = £1,693.51

39. Unlawful deduction from wages = 33 x 381.91/40 = £322.42 (I note that my figure on this is different from that given in the schedule of loss but I cannot work out how the claimant's figure was arrived at. It is in the interests of justice and proportionate for me to make my own determination on this.)

Tribunal Judge D Brannan acting as, an Employment Judge
Dated: 5 March 2022