EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr R Oyefule **v** **Exclusive Contract Services Limited**

Heard at: Watford **On**: 3 February 2017

Before: Employment Judge Manley

Representation

For the Claimant: Miss F Almazedi, Solicitor

For the Respondent: Mr M Howson, Consultant

RESERVED JUDGMENT

1. The claimant was dismissed for reasons relating to his conduct and not for any reason connected to the TUPE transfer.

2. That dismissal was not unfair.

REASONS

1. **Introduction and issues.**

1.1. This matter was listed to hear the claimant's claim for unfair dismissal. A list of issues had not been agreed beforehand but the one submitted by the claimant's representatives was largely agreed. It reads as follows:

1.1.1. Was the whole or main reason for the claimants' dismissal a TUPE transfer?

1.1.2. Was the claimant automatically unfairly dismissed?

1.1.3. If not, what was the reason for the claimant's dismissal?

1.1.4. The tribunal then need to consider section 98(4) ERA

1.1.5. And section 98(4) ERA the principles of fairness established by case law.

1.1.6. If it is established that conduct/gross misconduct is the reason for dismissal,

1.1.7. The tribunal will need to consider whether the employer had a genuine belief in the employee's guilt,

1.1.8. Had reasonable grounds for that belief,

1.1.9. At the time I held that belief the employer had carried out as much investigation as was reasonable in the circumstances.

1.1.10. Is the dismissal procedurally fair?

1.1.11. Did the respondent breach the ACAS Code of Practice?

1.2. I asked the claimant's representative which particular aspects of the ACAS Code of Practice they were concerned with and this seemed to relate to no warning before the investigation meeting; the claimant not receiving a copy of notes of that meeting and not being allowed to appeal.

1.3. The representatives also asked me, if I decided the dismissal was unfair, to decide matters which might be relevant to remedy such as whether there should be a reduction as a result of the claimant's contributory conduct and, if the dismissal was unfair for procedural defects, whether a "Polkey" reduction was appropriate.

2. Hearing

2.1. I heard evidence from three witnesses for the respondent. I heard from Mr Brissett, who is an accounts manager for the respondent and who undertook the investigation. I also heard from Ms Hylton, who is a HR Manager, and from Mr Norris, who was, at the time, Executive Director of the respondent and who took the decision to dismiss the claimant. I heard evidence from the claimant and had before me a bundle of documents of around 80 pages. I did not need to look at all those pages and will refer to those most relevant in this judgment.

3. The facts

3.1. These are the following relevant facts.

3.2. The claimant worked on cleaning contracts from 2010 firstly for the predecessors of the respondent (Mitie) and then after transfer for the respondent from May 2016. The contract in question was a relatively

substantial one with Odeon Cinemas. The claimant worked as a manager and the TUPE Regulations applied to the claimant and those he was working with.

3.3. I saw contracts of employment both for Mitie and for the respondent. The respondent's witnesses suggested a number of times in the hearing that this is a small organisation but I do not accept that given that, on their evidence, they employ thousands of cleaners and their response form suggests employees of around 4,000 people. I am aware that Mitie is also a substantial organisation.

3.4. One of the issues which is common to Mitie and the respondent on this sort of contract is ensuring that those employed to work for them have the right to work in the UK. The claimant does not deny that it was part of his role to check whether the people working for the respondent had the correct documentation. His evidence, as I understand it, is that he needed to check the original documents, usually a passport and sometime some supporting documents and, when he was working for Mitie, he could take photographs which could be scanned to the Mitie offices.

3.5. In early 2016 the claimant was called to an investigation meeting, when his employer was still Mitie, with respect to various alleged breaches of procedure, including the checking of documents. A disciplinary meeting was held on 7 March and by letter of 5 April 2016 these matters were found against the claimant: -

> *" 1. Gross incompetence and a serious breach of policy and procedure in your failure to follow RTW procedures in relation to Yaya Deme.*
>
> *3. Gross incompetence and a serious breach of policy in procedure whereby in May 2015, June 2015 and December 2015 you continued to pay staff while on RTW suspension. Yaya Deme, Jacqueline Cardosa Da Silva and Kenneth Asamoah. The cost of business of this suspension was £91.13*
>
> *4. Serious breach of procedure whereby you failed to suspend staff when their visas have expired; Kenneth Asamoah.*
>
> *5. Gross incompetence in your failure to close down HR cases within a reasonable timescale.*
>
> *6. Serious breach of procedure when you paid staff from a location that has closed- Odeon Barnet. Costs to business circa £4,000"*

3.6. The claimant was told that he was to be given a "*first and final written warning"* which would remain live on his file for a period of 12 months. The claimant was informed of his right to appeal.

3.7. It is the claimant's evidence that he did indeed appeal against this final written warning. I have seen a copy of a letter (page 77 and 78 of the bundle) which does indeed appear to be a letter of appeal.

3.8. When the current respondent asked questions of Mitie with respect to whether an appeal had been lodged they denied that they had received any such appeal.

3.9. The claimant's evidence, which came late in the hearing and necessitated the recall of Mr Norris, was that the question of whether or not he had appealed had been discussed with the respondent some time later, probably in early May, when he had a meeting with a person named Jim and Mr Norris. The claimant said that Jim asked for proof that he had appealed against the final written warning and he sent a copy of this letter to Jim. Mr Norris denies that there was any such conversation and stated he had never seen the letter at page 77 and 78 of the bundle.

3.10. The claimant's evidence was that he heard nothing from Mitie and in late June (according to the proof of posting), he sent a further undated letter to Mitie chasing this appeal with a copy of that appeal letter.

3.11. I am not able to say whether the claimant's letter of appeal reached Mitie. It is possible that it did and that it was either ignored or was misplaced. I do not accept that the claimant gave a copy of this letter of appeal to anyone at the respondent involved in the disciplinary proceedings. This is the first time it was mentioned by the claimant and it is denied by Mr Norris. The final written warning, as far as the respondent was concerned and indeed as a matter of fact, remained live when the dismissal occurred.

3.12. In April matters were proceeding as the respondent had been successful in winning this rather large contract and were due to take over from Mitie. As I understand it, the respondent expected managers to get various details from those employees who were to be transferred and were asked to fill in various pieces of documentation. In particular, the relevant part on the respondent's "*New Starter Form*" which is relevant to the right to work reads as follows: "*Original passport, Visa or Work Permit (if required) seen, attach copies signed as confirmation*". There was then a Y for yes or a N for no. On the copy of the document which I have seen and which is dated 17 April, there is a circle for Yes with respect to a person by the name of Thompson Coffie with various other details. It appears to be signed by Mr Coffie and by the claimant. The claimant's evidence before me was that he had been asked to get these details from Mr Coffie and he had seen Mr Coffie by arrangement outside the Odeon in Leicester

Square where Mr Coffie was working; it was 3.30 in the morning and raining and the claimant was shown the passport and he took one of the photocopies that Mr Coffie offered him as proof. He also took a copy of a bank statement.

3.13. Ms Hylton gave evidence that there was an induction meeting in late April with managers on the Mitie contract at which further details were given of the process for checking right to work documents. The claimant accepted there was a meeting but could not recall anything about this aspect. There is no significant difference between what this respondent expected and what Mitie had required and which I accept is common practice in the industry, that is, that managers should check original documents rather than just seeing any photocopies.

3.14. The respondent had three months to check the relevant details of any TUPE'd employees and it had a fairly large number on this contract of around 750 people. Sometime in June or July it was noticed that these copy documents relating to Mr Coffie which had been sent in April looked rather suspicious. The respondent said that there were black marks around the photo on the passport and the top of the head on the photo was cut off and the bank statement appeared to have different font for the name and address.

3.15. The respondent decided they should look at further documents for Mr Coffie. I saw an email from Mr Brissett to the claimant and a colleague dated 7 July asking them to go and visit him and "*get some new Right to Work documents off him*". That colleague, Mr Katumba, appears to have followed that up and says in an email of 11 July "*I have had to stop him from coming in to OLS to work as he has admitted on phone to me that he was using someone else paperwork as the RTW*". The claimant's case is that he did not receive those emails. I accept that he took no further action but it seems to me likely that he did see the emails as the address appears to be correct.

3.16. The claimant was then called to a meeting with Mr Brissett who had joined the respondent around June. The claimant was given no warning that this was to be an investigation meeting. In his witness statement Mr Brissett called this meeting a "*disciplinary investigation meeting*" and it was put to him that meant he had decided it was a disciplinary matter. This matters not as Mr Brissett did not make any subsequent decisions save for forwarding the matter to a disciplinary hearing.

3.17. Notes were taken by Ms Hylton and I accept those notes are a relatively accurate record of the discussion which took place. The claimant has subsequently said that they are inaccurate but I do not accept that he said that at the time he was able to comment on them which was at the disciplinary meeting later in July. The relevant and important points are these: At one point Mr Brissett said "*Did you see the original passport? Please see this passport looks wrong. The*

picture has cut off his head and the copy of the bank details looks typed over. Did you look at the original documents?". The claimant is recorded as having answered "*No*". Later Ms Hylton said "*You have been trained by myself upon start during your induction of what to do as a part of the Right to Work checks. Do you remember this?"* and the claimant is reported to have answered "*Yes*". Both Ms Hylton and Mr Brissett gave evidence and stated that those notes are correct. The claimant said that they were not. The claimant did not receive a copy of these and did not sign them but he did refer to them at the disciplinary meeting. I accept that the notes are largely correct having heard clear and cogent evidence from Ms Hylton and Mr Brissett.

3.18. On 19 July the claimant was sent a letter inviting him to a disciplinary hearing to be heard by Mr Norris. He was asked for an explanation for the following allegations

"*Failure to adhere to the company Right to Work Policy; not checking the original documentation before signing up a new starter; you have allegedly signed starter documentation confirming you have seen the original passport for Coffie Thompson an employee based in Leicester Square. Upon further verification with you view you have admitted to failing to check the original document which has since been confirmed as a false identity and could have led to the business being at risk for employing illegal workers".*

The claimant was reminded that he had a final written warning on the file and was reminded about the terms of his suspension which had taken place earlier that week. He was told about his rights to be accompanied.

3.19. The claimant did attend the disciplinary meeting on 22 July. A different note taker was present. The claimant confirmed that he had received the letter inviting to the hearing but he said he had not received the investigation notes. An adjournment was granted so that he could read the notes. Some criticisms had been made because the adjournment appeared to last about five minutes but it appears to me that that is ample time for the claimant to have read those short notes from the meeting on 18 July. He did not ask for more time.

3.20. When the disciplinary meeting recommenced the claimant objected to the fact that he had not been told that he was being invited to an investigation meeting. He said he was invited "*under false pretences*". The claimant appeared to accept in the disciplinary meeting that the copy of the passport was of poor quality.

3.21. The claimant was asked to explain how he had met Mr Coffie about the documents on 17 April and he pointed out that he was still working for Mitie at that point and not for the respondent. Mr Norris replied that the claimant controlled his own hours and his own time presumably because he was a manager. The claimant then gave the information I

have stated above about how he came to meet Mr Coffie and then there was a further short adjournment.

3.22. In that adjournment Mr Norris checked with HR and understood that the investigation hearing was conducted fairly and decided to continue the disciplinary meeting. The claimant at this point also said that he had appealed his final written warning. There was further discussion about documentation and the Mitie procedures and Mr Norris asked the claimant what he understood the process to be at which point the claimant replied "*To get the passport, proof of NI and proof of address and then check and scan to the office*". He then repeated the information about the fact that it was raining heavily, that the photocopy was black and that he could not read any of the details. He stated that he did not have access to make a better copy and he indicated that he picked the best of three photocopies.

3.23. One part of the record suggests that the claimant accepted that he should have taken a photocopy of the original documentation as he appeared to be saying that he had in fact seen the passport which was an EU passport.

3.24. A further discussion took place and Mr Norris adjourned the meeting at around 10:15 to consider matters further.

3.25. At this hearing, the claimant gave some evidence to the effect that he raised some other matters in that meeting which are not recorded in the notes. In particular, he said that he raised the fact that the investigation notes were inaccurate but there is no record to that effect and I do not accept that it happened. He also said that he had told Mr Norris that he had sent proof of having appealed against the final written warning to Jim and Mr Norris denies that that was said and again there is no record. I do not accept that it was said or there would have been a record of it. The claimant has not indicated before that he has any difficulty with the accuracy of these disciplinary hearing notes but only those of the investigation meeting.

3.26. The claimant was dismissed by letter written on 22 July, although it might not have been posted until 27 July and possibly not received until 29 July 2016. Mr Norris' reasons for dismissing the claimant are set out clearly in that letter. It was that the claimant had failed to check original documents and that he had given contradictory statements about that in the investigation and disciplinary hearings. Mr Norris concluded:

"Having carefully reviewed the circumstances and considered your responses, I have decided that your actions are defined as gross misconduct despite any previous written warnings issues from your previous employer Mitie, to which summary dismissal I the appropriate sanction"

3.27. Mr Norris also stated in his evidence before me that he would have dismissed the claimant even if he had found it to be misconduct rather than gross misconduct because of the live written warning.

3.28. The claimant was told of his right to appeal. His evidence before me is that he contacted the respondent to try to appeal. Although he had not said this earlier, when Mr Norris was being cross examined, the claimant did say that he had left a message for Mr Norris asking to appeal. Again, this was very late evidence but in any event Mr Norris denied that he had received such a phone message. The claimant said that he also contacted somebody at the respondent's office and that he was told that it was too late to appeal. The respondent say it has heard nothing from the claimant and there is certainly nothing in writing which would seem to be any attempt by the claimant appeal. I do not accept that the claimant did try to appeal this decision.

4. **The law**

4.1. The law which I am bound to apply in this area is set out in the Employment Rights Act 1996 (ERA) particularly Section 98. Section 98 (1) and (2) contain the potentially fair reasons for dismissal including "conduct". The burden of showing a potentially fair reason rests on the respondent.

4.2. In this case, the claimant suggests that his dismissal was in connection with the transfer making it automatically unfair under regulation 7 TUPE 2006. It is for the claimant to produce evidence if he seeks to argue that was the reason or principal reason.

4.3. As to the fairness or otherwise of the dismissal, if I am satisfied that there was such a potentially fair reason, Section 98 (4) states; -

"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"

4.4. I am also guided in my deliberations, if this is a conduct dismissal, by the leading case of *British Home Stores v Burchell [1978] ICR 303* which sets out the issues which I should consider including whether the respondent had a genuine belief in the conduct complained of which was founded on a reasonable investigation and whether a fair process was followed. The investigation should be one which is fair

and reasonable and the band of reasonable responses test applies to that part of the process as well as to the overall consideration of the fairness of the sanction (*Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23*) I must also not substitute my view for that of the respondent, a point emphasised in *Iceland Frozen Foods v Jones [1982] IRLR 439* (and re-affirmed in *Foley v Post Office and HSBC Bank Ltd v Madden [2000] ICR 1283*). Rather, I must consider whether the dismissal fell within a range of reasonable responses.

5. **Conclusions**

5.1. The first question for me is whether the transfer was the principal reason for the claimant's dismissal. The claimant gave absolutely no evidence of this until he was pressed on cross examination when he made some reference to cost cutting. The respondent's witnesses were not cross examined on it and I do not accept there is any evidence before me that the claimant's dismissal had anything to do with the fact that the respondent had recently taken over this contract. The claimant was therefore not automatically unfairly dismissed. That answers the first two questions in the issues above.

5.2. Turning then to the question of whether the respondent has satisfied me of the reason for dismissal. I am satisfied that the respondent's investigation and disciplinary proceedings all centred on this particular point about the need to check documents for an employee's Right to Work and the claimant's failure to do so and that was the reason for dismissal. There is ample evidence that that was their main and central concern. This answers the third issue.

5.3. Turning then to the fairness or otherwise of the dismissal. I must first consider whether the respondent had a genuine belief in the conduct and whether that was founded on reasonable grounds. I can understand and appreciate that the respondent was concerned about the appearance of the documents with respect to Mr Coffie. Whilst it is not clear from the copies before me, it is not suggested by the claimant that those documents were correct or without suspicion. Indeed, as it turned out, it does appear that Mr Coffie might well have shown false documentation. The question for me is whether the respondent reasonably believed that the claimant had failed in his duty when he completed the new starters form. That is that he indicated that he had seen the original passport. I accept that the investigation was broadly fair and within the band of reasonable responses. It is possibly unfortunate the claimant was not warned that that was what was to be discussed but I cannot see that it alters what he said. I do accept that he said in that meeting that he had not seen the original passport.

5.4. Given that that is what he said and that could cause a real and serious risk to the respondent, the steps that it took from thereon in the disciplinary procedure were reasonable steps. I do accept that the

respondent had a genuine belief that there was misconduct on the part of the claimant in failing to follow what are important procedures. I do not necessarily accept that the claimant had undergone any new induction. It may be that something was said which he has forgotten. The truth of the matter is that the claimant did understand that he should see the original documentation and the respondent reasonably believed that he had not done so in this case.

5.5. The fact that the claimant changed his version of events to suggest that he did see the passport did not really help him as it contradicted what he said earlier. It is not for me to say whether her did or did not see the passport but for me to decide whether the respondent reasonably believed that he did not.

5.6. I turn then to procedural issues. The claimant was not warned that the first meeting was to be an investigation meeting but he does not need to have adequate warning of that. He does need to have adequate warning of a disciplinary hearing which he had. Nor does the respondent's procedure say that he is entitled to copies of notes of the meetings or he needs to sign them. It may well be good practice and it may be that the respondent wants to consider whether this is something that they should start to do in the future. However, I cannot say that it amounts to any unfairness in these circumstances given that I have heard directly from Mr Brissett and Ms Hylton. I have accepted their evidence that those notes are a true reflection of what the claimant said at that meeting. I have not accepted what the claimant has told me about his attempts to appeal. I can see that it is possible that the letter arrived with him a bit late. But I also accept Ms Hylton's evidence that if the claimant had asked, time would have been extended.

5.7. As for the question of breaches of the ACAS Code of Practice; I have identified no such breaches. I have not been taken to specific provisions that state an employee should be forewarned of an investigation meeting or provided with copies of the notes of such a meeting. The claimant did, in any event, see those notes at the disciplinary hearing. He was told of his right to appeal and did not do so.

5.8. I turn then, finally, to the substantive question of whether dismissal fell within the range of reasonable responses. My task is not here to substitute my view for that of the respondent. The respondent formed the view this incident alone amounted to gross misconduct. In the alternative, Mr Norris took into account the final written warning which remained live on his file. A substantial part of that final written warning was for very similar breaches of duty on the part of the claimant. I cannot see that the respondent can be criticised for taking that matter into account. In doing so, and a serious breach occurring so shortly after a clear warning to that effect, suggests that dismissal might be a reasonable sanction. Even if that written warning had not been in

place, I am satisfied that a reasonable employer could have considered dismissal to be within the range of reasonable responses. That might seem a harsh sanction for one offence but, in the circumstances of the criminal procedures which could have followed for the failure to properly check Right to Work documents, and the claimant's clear knowledge of what he should do, I cannot find that that would be outside the range of reasonable responses.

5.9. The claimant's claim therefore fails and is dismissed. There is no need for me to deal with the question of Polkey or contribution nor does a remedy hearing need to be arranged.

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Employment Judge Manley

Date: 10 February 2017

Sent to the parties on: 16 February 2017

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For the Tribunal Office