**Case Number: 2302624/2017**

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# EMPLOYMENT TRIBUNALS

BETWEEN

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr M Dayrell | and | London Ashford Airport Limited |

**Held at Ashford on** 9 February 2018

| **Representation** | **Claimant:** | In Person |
|---|---|---|
| | **Respondent:** | Mrs A Beattie |

**Employment Judge** Kurrein

# JUDGMENT

The Respondent has unfairly dismissed the Claimant and is ordered to pay him :-

1 A Basic Award in the sum of £1,223.51
2 A Compensatory Award in the sum of £13,162.62

# REASONS

## The Claim and Response

1 On 26 September 2017 the Claimant presented a claim alleging unfair dismissal to the tribunal. On 28 November 2017 the Respondent presented a response in which it contended that the Claimant had been fairly dismissed for reasons relating to his conduct.

## The Evidence

2 I heard the evidence of the Claimant on his own behalf. I heard the evidence of Mr B. Daly, airport manager, on behalf of the Respondent. I considered the documents to which I was referred and the submissions made on behalf of the parties. I make the following findings of fact.

## Findings of Fact

3 The Claimant was born on 31 March 1979 and started his employment with the Respondent as a trainee aviation firefighter on 5 November 2012. He duly became fully qualified. This involved both on the job training and attendance at a six week course at the International Fire training centre at Teeside. The Claimant was required to have full

knowledge of the operation and capabilities of all the equipment provided by the Respondent when he carried out his duties.

4 The Claimant was provided with full PPE and was required to assemble and test the breathing apparatus at the start of each shift and to disassemble it at the conclusion of each shift. I accepted his evidence that assembling and testing that apparatus at the start of each shift took at least 15 minutes.

5 The Claimant worked a shift pattern of three days on and three days off, each shift being 11 hours 25 minutes long. The normal complement of staff comprised of a watch manager, a crew manager and three firefighters. The crew manager and two firefighters would operate a fire engine to deliver foam. The third firefighter would operate a smaller auxiliary vehicle.

6 The Respondent is a small regional airport. The vast majority of the flights to and from that airport are private in nature. The Civil Aviation Authority ("CAA") does not require an airport that only handles private flights to have a particular level of fire-fighting capability. However, some of the flights to and from the Respondent are commercial in nature and for that purpose the Respondent is required to provide fire-fighting capability to level 3.

7 That level requires the Respondent to have a suitable vehicle, a minimum of three suitably qualified personnel and to be capable of responding so as to put that vehicle and those people in an appropriate position within three minutes of an emergency call being received. , A director of the Respondent, Mr H Mutlaq, had overall responsibility to the CAA for compliance. He was present throughout the hearing, but did not give evidence. I accepted the Claimant's evidence that neither Mr Mutlaq nor Mr Daly had full knowledge of, or any training in, airport firefighting.

8 On 14 June 2017 the Claimant was on shift. Mr M. Wilkins was the watch manager, Mr T Jolly was the crew manager, and the Claimant's colleagues were Mr A Magee and Mr G Ireland. All four of the latter were fully qualified firefighters.

9 It was common ground that:-

9.1 Mr Wilkins had granted the Claimant TOIL so that he could leave three hours early, at 15:00, that day.

9.2 About 15 minutes before the Claimant was entitled to leave Mr Jolly gave him permission to remove his breathing apparatus from the vehicle and disassemble it, as well as removing his PPE.

9.3 Mr Jolly, the Claimant and his colleagues were washing the fire engine and vehicles. In the course of this activity the Claimant asked Mr Jolly on more than one occasion whether it was time for him to leave.

10 It was the Claimant's case that Mr Jolly gave him permission to leave. It was the Respondent's case that the Claimant left early, without permission. Mr Jolly noticed the Claimant had left early and caused an entry to that effect to be made in the fire station logbook at 14:45.

11 Mr Wilkins was appointed to investigate this issue. On 19 June 2017 he interviewed the Claimant, Mr Jolly, Mr McGhee and Mr Ireland.

12 On an unknown date Mr Wilkins apparently made a statement himself to say that on 18 June 2016 the Claimant had approached him and said he owed Mr Wilkins a "massive thank you" for the TOIL. Mr Wilkins said he was "confused" by this statement as he had not known about "this extra time" of TOIL. It was not clear if he was referring to the 3 hours 10 minutes TOIL which was not in dispute, or the extra time the Claimant took by leaving early. I preferred the former explanation: it was never suggested by anyone that Mr Wilkins had approved the Claimnt leaving before 15:00./

13 Mr Wilkins reported his conclusions to Mr Mutlaq. Although the evidence suggested that this had been in writing I was told this was not the case.

14 Mr Mutlaq composed a letter to be sent to the Claimant inviting him to attend a disciplinary hearing on Monday, 26 June 2017 at 10 am. The allegation in that letter was as follows,

> "On 14th June you left the premises of the fire station at 14.41, without the authority of your Line Manager and Crew Manager. You disregarded the agreed leaving time of 15.00, exposing the airport Fire cover to be one member of staff short, which could have caused a serious confusion if there would have been an incident which may also have led to a serious Health and Safety issues which may have put people at risk. As well, as a delay to the requested response time as per the Civil Aviation Authority regulations."

15 That letter enclosed minutes of Mr Jolly's investigation, his interview with the Claimant, and the witness statements made by Mr McGhee and Mr Ireland. The Claimant was told that if the allegation were proven it would be considered gross misconduct. The letter advised the Claimant of his right to be accompanied and informed that a failure to attend the hearing might itself be a further disciplinary offence.

16 That letter was marked to be delivered by hand. I did not accept the Respondent's evidence that it did not have the Claimant's home address on file: it had used that address to correspond with him just a few weeks earlier. The Respondent intended to deliver that letter by hand on the next occasion on which the Claimant was rota'd for duty, the 24 June 2017. In the event, the Claimant was not well that day and phoned in sick. A colleague who was aware of the letter scanned it and forwarded it to the Claimant by email on the afternoon of that day. In effect there were no normal working hours between the Claimant's receipt of that letter and the hearing he was required to attend.

17 That hearing took place as planned. It was presided over by Mr Daly and Ms D Longman took notes. The Claimant was unaccompanied.

18 Shortly after it started Mr Daly gave the Claimant a copy of Mr Wilkins' statement, apparently in the knowledge that it had not been provided before. The Claimant immediately stated that the incident described in it had not taken place.

19 The Claimant went on to set out his position: to the extent that the crew had been short of staff or people had been put at risk or health and safety issues had arisen, that took place at the exact time that Mr Jolly had authorised him to remove his PPE and breathing apparatus. That was why he had thought it was 15:00. The Claimant then asked Mr Daly whether Mr Jolly had been asked for an explanation as to why he had told the Claimant he could remove his PPE and breathing apparatus, and was told that no one had asked that question yet. The Claimant asserted that he had twice asked Mr Jolly what the time was and had been told it was 15:00.

20 It then transpired that the Claimant had not been given stills from the CCTV the Respondent thought to show the Claimant leaving.

21 The Claimant was shown, and accepted, that the Respondent's handbook required staff to report to their line manager and obtain permission before leaving before the end of their shift. The Claimant reiterated his view that once he had been instructed to remove his PPE and breathing apparatus he was no longer operational so had thought it must be 15:00. Mr Jolly had confirmed this and was now denying it to avoid censure for allowing the Claimant to leave earlier than 15:00.

22 By the conclusion of the hearing matters had not moved on. Mr Daly thought there were more questions than answers and adjourned to carry out further investigations:-

22.1 He took photographs of various rooms and the clocks within them;

22.2 He met and questioned Mr Wilkins, Mr Jolly, Mr Magee and Mr Ireland.

23 On the 30 June 2017 Mr Daly invited the Claimant to a reconvened disciplinary hearing on 7 July 2017, reminding him of his right to be accompanied. He did not include the notes of his meetings, or the photographs he had taken, with that letter. They were sent to the Claimant by email on 6 July 2017 at 11:42.

24 The meeting reconvened as planned. The Claimant almost immediately complained about the lack of time to prepare for the first hearing. He also questioned the suitability of Mr Wilkins to have investigated, querying his experience. Mr Daly responded to the effect that Mr Wilkins had only been asking questions to pass on to Mr Fisher, the Fire Services Manager and stated that any report would be passed on to Mr Fisher to make a decision on what will happen next.

25 This was at odds with what I was told: no written report had been prepared. In addition, there was no record of any involvement by Mr Fisher: Mr Mutlaq appears to have taken the decision the Claimant should attend a disciplinary hearing.

26 The Claimant then complained that Mr Wilkins, as a witness, should not have been the investigator. He again raised the lack of time to prepare for the hearing and Mr Daly sought to explain this.

27 The Claimant also set out his position about not being on active duty at the time he left. He accepted that if his shift ended at 17:00 and there was an emergency call he would respond. He made it clear he would not remove his PPE and breathing apparatus until instructed he could. As long as it was in place he was "on the run".

28 This is a slang term used by airport firefighters to indicate that they are on active duty, in that they are in a position to respond instantly to an emergency call because their PPP and breathing apparatus is immediately available for use. Once a firefighter has removed their PPE and dismantled and stored their breathing apparatus away they are not "on the run" because they cannot respond at all until they have donned their PPE and checked their breathing apparatus. They are not allowed to enter a danger area without having done this.

29 Toward the end of the hearing the Claimant complained that the right questions had not been asked. He also asked for the outcome to be sent to him before he went on holiday on 12 July in light of the limited 5 day appeal window.

30 In the event the Claimant was not informed of the outcome until a letter dated 14 Jul 2017 was sent to him by Mr Daly. This set out the Claimant's principal position that he had been told he could leave and, in any event, was not "on the run" once he had removed his kit.

31 Mr Daly accepted that Mr Jolly had told the Claimant he could not leave until 15:00. He surmised, incorrectly as I find, that the Claimant would have left the premises by a particular route and seen one or more clocks along the way and/or seen the time from his mobile phone or car dashboard. He also surmised the Claimant chose that route to avoid his colleagues seeing him.

32 Mr Daly found that in the event of an emergency the Claimant would have been required to respond with his colleagues.

33 He took the view that the Claimant's action in leaving when he did might have caused confusion such that a response would have been delayed while the crew looked for him and it would have put people at risk and delayed the response time.

34 He found the Claimant to have committed an act of gross misconduct and summarily dismissed him. The Claimant was advised of his right of appeal but did not attempt to exercise it out of time. I did not think that was unreasonable.

## Submissions

35 It is neither necessary nor proportionate to set these out.

## The Law

36 I have considered the provisions of S.98 Employment Rights Act 1996:-

> **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) …..
> (3) …..
> (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."

37 I have also had regard to the following authorities:-

British Home Stores Ltd v. Burchell [1978] IRLR 379

Iceland Frozen Foods v. Jones [1982] IRLR 439

Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23

Taylor v OCS Group Ltd. [2006] IRLR 163

Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

and have applied the principles to be derived from them

38 I have had regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures which, at paragraph 9 relating to disciplinary matters, says:_

> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

## Further Findings and Conclusions

### The Reason for Dismissal

39 The Respondent satisfied me that the Claimant was dismissed for a reason relating to his conduct; a potentially fair reason.

### Investigation

40 I regret to say that I thought this was unsatisfactory.

41 I heard no evidence as to Mr Wilkins' training or experience in carrying out an investigation. Even basic training might have led him to consider his own suitability to carry out this investigation in light of the potentially adverse nature of the evidence he later gave. He would have known of this before he carried out his interviews of the Claimant and his colleagues, but did not think to raise it with his line manager or Mr Mutlaq, in his capacity of HR Manager.

42 More seriously, neither Mr Wilkins nor Mr Daly elicited any evidence:-

42.1 what being "on the run" was generally understood to mean;

42.2 why Mr Jolly instructed the Claimant to remove his PPE and breathing apparatus;

42.3 what operational effect this had on his availability for fire-fighting duties;

42.4 how the crew would have reacted if, following the Claimant's early departure, there had been an emergency call.

43 These were matters that were fundamental to the charge laid against the Claimant, but there was no direct evidence of them.

### Hearings

44 I concluded the Respondent was in breach of the ACAS Code of Practice in respect of both hearings. Bearing in mind the seriousness of the allegations and the nature of the evidence for the first hearing, the short notice of it, and a failure to provide all the evidence relied on, at a time when it would not be possible to seek independent advice was woefully inadequate. In respect of the second hearing the late delivery of the evidence was also an abject failure.

45 However, subject to that, I took the view that these hearings were conducted reasonably, in that the Claimant was given the opportunity say what he wished.

**Honest Belief and Reasonable Grounds**

46 I accepted that on the evidence before him Mr Daly was entitled to conclude that the Claimant had left work early without permission. Such a finding was reasonable, and it was honestly held.

47 However, I could not accept that his other findings, in particular that the Claimant's actions:-

47.1 had exposed the "airport Fire cover to be one member of staff short";

47.2 "could have caused a serious confusion in the case of an incident"

47.3 "may also have led to serious Health and Safety Issues" which may have put people at risk;

47.4 caused "delay to the requested respond timer" as per CAA Regulations.

were reasonable.

48 All those matters were a direct consequence of Mr Jolly directing the Claimant to remove his PPE and breathing apparatus. As of that instruction being complied with the Claimant was prohibited from acting as a fire-fighter unless and until he had tested the breathing apparatus and donned his PPE. That would take at least 15 minutes.

49 There were sufficient staff present to comply with the CAA Regulations.

50 In addition, there was no evidence that the crew, including Mr Jolly who had given the instruction, would have had any expectation that the Claimant would take part in any incident that occurred, or that his unavailability would have caused any delay. There were three fully-trained fire-fighters still present and "on the run" which was the full complement required for the main foam-dispensing fire engine.

51 I also find Mr Daly's assumptions as to the route the Claimant would have taken, particularly in light of his acceptance that the route the Claimant says he took was shorter, and that the Claimant would have seen one or more clocks to be unreasonable.

**Sanction**

52 I thought Mr Daly's evidence on this issue to be unsatisfactory. He had no regard to the Claimant's length of service or the fact that he had an unblemished disciplinary record. His only response to my suggestion that this might have been a case in which a (final) written warning might be appropriate was to rely on the potential seriousness of the possible consequences of the Claimant's action.

53 It appeared to me that Mr Daly had approached the matter of sanction with a closed mind. He had given no proper thought to what was appropriate and proportionate.

54 In light of all my above findings I have concluded that the sanction of dismissal was out of proportion to the seriousness of the actual offence of which the Claimant was reasonably found guilty.

**Conclusion**

55 For all the above reasons I find that the Respondent has unfairly dismissed the Claimant. It was both procedurally and substantively unfair.

**Contribution**

56 I have concluded that the Claimant contributed to his dismissal to the extent of 35%. His conduct was blameworthy, but not to the same extent as that of the Respondent. His Basic and Compensatory Awards must be reduced to that extent.

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57 In light of my above findings these principles have no application.

**Mitigation**

58 The onus is on the Respondent to establish that the Claimant has failed to take reasonable steps to mitigate his loss.

59 The Claimant's wife works full time. They have two young children. The Claimant has child care responsibilities when his wife is at work. His regular three on/three off working pattern with the Respondent made child care much more affordable.

60 He found part-time cleaning work earning £74.31 pw net after 6 weeks.

61 In the absence of clear evidence of a failure to mitigate I accepted the evidence of the Claimant.

62 I concluded that in light of his intelligence, training and skills he should find appropriate work with comparable earnings within 26 weeks of the hearing.

**S,207A award**

63 In all the circumstances I concluded that an uplift of 15% was just and equitable in this case. The Respondent's breaches were serious, but not so grave as to merit a higher award.

64 My calculations of the awards are set out above.

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Employment Judge Kurrein

13 February 2018