Case Number: 3313297/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Brown	**v**	Elevator Engineering Services (UK) Ltd

Heard at: Cambridge (by CVP)

On: 14 and 15 April and 13 May 2021.

Before: Employment Judge Cassel

Appearances
For the Claimant: Mr Tom Wilding (Counsel)
For the Respondent: Mr Craig Johnson (Legal Representative)

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

1. The claimant was unfairly dismissed and his claim of unfair dismissal succeeds.

2. The remedy hearing is listed for 21 June 2021.

RESERVED REASONS

Background

1. In his claim form received by the tribunal the claimant, Mr Raymond Brown, complains of unfair dismissal from his position as commercial director with the respondent company. The dates of employment are given as 1 September 2006 until 12 October 2018. In the response form submitted by the respondent company, dismissal is admitted and the reason for the

claimant's dismissal is given as either his conduct or for some other substantial reason. In respect of conduct the respondent avers that a full investigation was undertaken and a fair procedure was followed. In the alternative, for reasons of a gross breach of trust leading to a loss of faith he was dismissed for some other substantial reason.

2. In hearing evidence over the three days of hearing I was greatly assisted by both representatives, to whom I am grateful. The claimant and all but one of the witnesses gave evidence in the United Kingdom and the respondent's principal witness, Mr Brian Henderson, gave live evidence from Australia by way of video link. Mr Henderson's evidence was extensive and suitable breaks were arranged to accommodate him in view of the substantial time differences between the United Kingdom and Australia.

3. When the claim was first listed for trial, many months ago, in view of the intervening health crisis and revised measures to hear evidence, a shorter time estimate was provided for than in fact proved necessary. I heard evidence from the claimant, Mr Raymond Brown, Mr Jon Coldicott, workshop manager, Ms Emma Brown, accounts administrator, Mr Harry Middleton, office manager, and Mr Brian Henderson, director. All of the witnesses had prepared written statements and the claimant had also prepared a supplementary statement. I was provided with a bundle of 604 pages and additional exhibits were appended to the claimant's supplementary statement. I explained to both parties that documents relied upon should specifically be brought to my attention and neither party should assume that I would look at documents, other than the "pleadings", correspondence to and from the tribunal and documents specifically referred to within written statements of evidence. Mr Wilding provided a List of Essential Reading, referring to documents which I considered prior to hearing evidence. I also read the written witness statements on which the witnesses were then cross examined.

4. Skeleton argument were provided by both advocates at the conclusion of evidence and oral submissions were made amplifying those written submissions. At the end of those submissions, and having considered the evidence before me, I announced that my decision was that the claim of unfair dismissal succeeded and I gave brief reasons for that decision. A remedy hearing was listed for 21 June 2021, a date suitable to all of the parties, and subsequently a request was received for written reasons which I give herewith.

Findings of Fact

5. I make the following findings of fact based on the balance of probabilities having considered those documents to which my attention has been drawn.

6. The respondent company is a manufacturer and installer of metalwork and electrical elements mainly in the lift industry. At the relevant time it employed approximately 30 people from the factory site in Northampton and most of their engineers were described as field-based. Originally the business had

four directors and was formed in April 2003. By the time the claimant was employed, there were two directors including Mr Henderson who returned to Australia as a resident in or around 2012.

7. The claimant was originally employed by the respondent as an engineer. He was introduced to the company by his late brother- in- law, Mr Steven Price, who was also a director of the respondent company. Mr Price was also based in Australia and sadly died in February 2019. The claimant commenced employment in September 2006. The claimant had extensive commercial experience and was promoted to the position of commercial manager in November 2007 and in April 2009 to commercial director. In this role he was responsible for the day-to-day running of the operation of the respondent company. He remained in this role until his dismissal on 12 October 2018.

8. The claimant gave extensive and credible evidence as to the manner in which he conducted the respondent's affairs. It was apparent that Mr Henderson remained in Australia where he had other business interests and was able to receive bonuses from the business. Mr Henderson also gave extensive evidence as to the manner in which the claimant conducted his role. There was little dispute that up to around 2017 he had little concern as to the claimant's abilities and no reason to have concerns about the claimant. Everything points to the claimant being a competent manager of the business who sought and was given advice by, among others, the respondent company's independent accountant in respect of financial matters. In August 2017 Mr Henderson arrived in the United Kingdom from Australia for a series of short visits to the company premises.

9. There was a dispute in evidence as to the events thereafter. The claimant gave evidence that following Mr Henderson's return to the UK, Mr Henderson became far more involved with the business and that key aspects of the business to which he had access were slowly being withdrawn by Mr Henderson. Important business meetings were arranged when the claimant was on leave and other employees were trained in some of the roles for which he had previously been responsible. Dividend payments to him were ceased which had been paid over several years, although the amounts varied, but nevertheless were published in the annual accounts. The claimant gave evidence that on 1 February 2018 Mr Henderson requested that he remove all of his belongings and any furniture from the working office and stored in an old office space. He was told that the items had to be removed no later than by close of business on 9 February 2018. On this there was little dispute.

10. Following his return from holiday in February 2018 he was told that he was no longer responsible for the day-to-day running of the workshop. He received an email on 9 March 2018 which set out his role and to whom he was to report. He was told that in effect his role was now to work as a 3-D CAD operative and to report to a Mr Wheatley who had recently been appointed to a more junior role to the one enjoyed by the claimant. He considered this a "massive demotion" from the role of commercial director to CAD operative. On 18 June 2018 a bill was received from legal advisers

which was headed “Advice in connection with Raymond Brown” and in evidence Mr Henderson accepted that the advice sought and received was in relation to making the claimant redundant. On 4 September his company charge card was amended so that his credit was lowered from £10,000 to £2,000. On 28 September 2018 he was given a spreadsheet that had been provided by legal advisers. One of the entries referred to “Compromise Agreement/Redundancy” for the claimant’s role. When he queried this entry with the legal advisers he was told that he no longer had permission to receive information as his authority had been removed on 2 September 2018. On 4 October 2018 he discovered that he had been removed as an administrator from Microsoft 365 email account.

11. Mr Henderson gave evidence that he made sustainable business decisions in view of deficiencies and concerns that he had about the claimant’s ability to manage the respondent business. He was adamant that he had not undermined his authority or position or indeed, in reality, had unreasonably reduced the responsibilities of the claimant. He pointed to the discretionary nature of the bonus payments, that the respondent business had been poorly managed and there was a cash flow crisis in 2017 and that the claimant was unable to provide effective management or leadership. He considered that the training of others was important and that at no time had the claimant objected to it. There are good reasons, so he stated, why the claimant’s personal possessions had to be removed and in effect it was purely coincidence that a meeting or meetings were arranged for which the claimant could not attend. In view of financial difficulties of the respondent business it was not unreasonable to consider financial savings included in which was a consideration of dismissal by way of redundancy of the claimant. He gave evidence that the range of the claimant’s experience was in reality limited and that there were others within the organisation far more able to undertake necessary work than the claimant.

12. Mr Henderson accepted that the claimant had been removed from the legal advisers support service and this was on the recommendation of those legal advisers to ensure there was no conflict or “confidentiality issues”. It was accepted that he was removed as the only administrator from the Microsoft 365 email account as he “was monitoring all emails accounts without consent and in violation of GDPR rules and company rules”.

13. I prefer the account of the claimant to that of the respondent. In reaching the conclusion that I do, I considered the evidence of Mr Jon Coldicott. Mr Coldicott had been dismissed by way of redundancy in February 2018 by Mr Henderson and clearly had some reason to feel aggrieved. However he gave a history of treatment of the claimant by Mr Henderson at paragraphs 22 onwards of his statement which was consistent with the account given by the claimant. He was cross-examined and the salient aspects of his evidence were unchanged. I also considered correspondence and emails that were brought to my attention in the bundle of documents. These were consistent with the evidence given by the claimant of a campaign by Mr Henderson to remove him from the business. The conclusion I reach is that Mr Henderson was intent on removing the claimant and this conclusion is

particularly relevant when a disciplinary process was commenced by Mr Henderson.

14. Mr Henderson gave evidence that he commenced an investigation into certain aspects of the claimant's behaviour and performance in or around August 2018. It was Mr Henderson who undertook the investigation and it was in respect of a number of matters which can be described as P11D allegations, allegations in relation to health and pension payments and scrap metal dealings.

15. Before dealing with the specific allegations there was no dispute that it was Mr Henderson who undertook the investigation and who dealt with the disciplinary hearing. The claimant was invited to a hearing on 10 October 2018 at 11.00 a.m. No more than two hours' notice of the meeting was given and in giving evidence Mr Henderson stated "I understood that it was a very short time for him to prepare for the hearing, however I considered the nature of the allegations so important that they needed very swift resolution." Within the letter of invitation to the hearing, there were details of the 12 allegations that he faced and 13 sets of documents on which reliance was to be placed

16. The disciplinary hearing was chaired by Mr Henderson and notes of the meeting were taken by Mr Middleton. The claimant gave evidence and said "I tried to answer the questions the best I could bearing in mind that these allegations stretched back over 10 years ago. After the meeting I was told to go home and relax, I was not suspended from work." An email was sent to him later that day providing him with an opportunity to make further representations. He was given until 4.00 p.m. the following day, 11 October, to respond. In giving evidence the claimant stated that he found it to be too short notice to comply with and that he had great difficulty finding any documents that would stretch back that far."

17. At 11:19 a.m the following day, 12 October, the claimant was told that he was required to attend a meeting between 12.00 p.m. and 1.00 p.m. the same day. He was dismissed. A letter was prepared later that day giving reasons as to why he was dismissed. He was given the right to appeal, to Mr Henderson, within 20 days and he wrote a letter of appeal on 30 October setting out in some detail the grounds of his appeal. Mr Henderson responded on 12 November giving various dates when an appeal could take place and the claimant attended an appeal hearing on 13 December which was chaired by Mr Henderson. In evidence the claimant described it as "pointless" and several months later, on 22 February 2019, his appeal was dismissed.

18. One set of allegations relates to P11 D irregularities, or what were said to be irregularities that came to Mr Henderson's attention. It was alleged that there were deliberate breaches of reporting procedures to HMRC for the years that covered 2013 to 2018. What was apparent was that advice had been taken by the claimant at various stages from the respondent company's independent accountant who actually prepared the various forms

that were submitted to HMRC. There was no credible evidence adduced that the claimant had done anything wrong let alone misconducted himself.

19. A further set of allegations relates to the provision by the respondent company of health and pension benefits. I was shown email correspondence at page 58 of the bundle of documents which show that the claimant had made proposals to Mr Henderson for the inclusion of members of staff and in the words of the claimant "to include other family members" for forms of health insurance cover. Mr Henderson responded that he agreed with the proposals. However in deciding to dismiss the claimant Mr Henderson concluded that the claimant had misconducted himself although I could find no credible evidence of any conduct which could be properly described as misconduct let alone gross misconduct. Similarly, I could find no evidence whatsoever that there were grounds for Mr Henderson to conclude that the claimant had misconducted himself in relation to the introduction of the pension scheme. In this regard my attention was drawn to emails at page 51 of the bundle in which the claimant made proposals as to the introduction of the pension scheme as long ago as 2008, to which Mr Henderson agreed.

20. The third set of allegations relates to the alleged misappropriation of scrap steel by way of sale to 3rd parties in return for cash payment which were unaccounted for within the respondent company's accounts. Mr Henderson gave evidence that statements had been taken from members of staff which were presented to the claimant to show evidence of the misappropriation of company property, namely scrap steel, and that the claimant gained personally from these transactions. In reality these were unsigned emails from individuals who were not called to give evidence in these proceedings. There were substantial inconsistencies and discrepancies within those "statements". Apart from his own account of events the claimant relied on the evidence of two witnesses: Ms Emma Brown, and Mr Jon Coldicott. These two witnesses gave evidence on oath and were cross-examined. They both gave credible evidence that in reality small amounts of scrap metal were sold occasionally and the proceeds placed in a petty cash tin or container which sums were used for various work-related purposes. There was no credible evidence that the claimant gained personally and certainly none to substantiate apparent allegations that the claimant had obtained a large amount of money.

Conclusions

21 Under the Employment Rights Act 1996, Unfair Dismissal is provided for under Section 94 and as far as these proceedings are concerned, the relevant provisions are in Section 98. Very simply it is in the following terms:

> *(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

(2) (b) relates to the conduct of the employee.

25 Under paragraph 98(4) the following provisions are provided for:

(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.

22. The Respondent maintains that the Claimant was fairly dismissed for the potentially fair reason of conduct and that a fair process was followed.

23. I remind myself that I should not put myself in the position to decide guilt or innocence. There is no claim of breach of contract. What I have to decide, certainly at this stage, is whether the process undertaken by the Respondent was a reasonable one.

24. Burchell v British Home Stores is often cited as the Burchell test. I refer to Sheffield Health Social Care NHS Foundation Trust v Crabtree [2009] UK EAT 00331-09-1211, where HHJ Peter Clarke clarified the position for the benefit of Tribunals hearing conduct dismissal cases. At paragraph 14 he makes the following comment,

"It might be thought that the Burchell test as stated by Arnold J must be literally applied in conduct unfair dismissal cases. That would be a misunderstanding. The first question raised by Arnold J, 'Did the Employer have a genuine belief in the misconduct alleged?' goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions reasonable grounds of belief based on a reasonable investigation go to the question of reasonableness under s.98(4) and there the burden is neutral. To combine all three questions as going to the reason for dismissal is wrong."

25. The reason advanced for dismissal is conduct. There cannot sensibly be said to be another reason. It is potentially a fair reason.

26. In his submissions Mr Wilding characterised the disciplinary process as being grossly and manifestly unfair. I entirely accept that submission. The

process was undertaken from start to finish by Mr Henderson. He investigated the allegations, he held a disciplinary hearing at extremely short notice with no good reason, heard the appeal and decided to dismiss it. The claimant gave cogent evidence that Mr Henderson had decided that come what may he would dismiss him and pointed to a history of behaviour prior to the instigation of the disciplinary process that demonstrated that to be the case. I listened carefully to the evidence given by Mr Henderson and was entirely unconvinced that there were sound business reasons for his behaviour and I accept the evidence of the claimant that there was a concerted process to dismiss him. I do not find there was a genuine belief in the misconduct alleged.

27. I do not accept there was any good reason to deal so quickly with events that stretched back many years by calling a disciplinary hearing at short notice. Within hours it was apparently expected that the claimant could answer countless allegations with substantial amounts of supporting documentation. No reasonable employer would have done so.

28. Mr Wilding points to the methodology adopted in the disciplinary process and that it imposed a burden that was impossible to overcome. Evidence was presented by Mr Henderson which allegedly showed wrongdoing on the part of the claimant. There was no evidence of personal wrongdoing that I could ascertain, and Mr Henderson then placed the burden on the claimant for him to produce evidence that he had not done anything wrong.

29. The conclusion I reach therefore is that there were no reasonable grounds for the belief.

30. Finally the investigation itself was flawed. Witnesses were reinterviewed on the same day as the decision to dismiss the claimant was made without the claimant being given the opportunity of questioning them or responding to the statements. Other witnesses were reinterviewed after the decision to dismiss was taken and apparently relied upon to justify the dismissal.

31. The appeal did nothing to rectify the unfair dismissal. There was little realistic prospect that having decided to dismiss the claimant, Mr Henderson would consider the appeal in an open and fair manner.

32. The alternative reason given for the claimant’s dismissal, some other substantial reason, was not pursued in submissions by the respondent. In any event, and in view of the findings of fact I have made, I do not accept that Mr Henderson believed that there were such facts that led him to conclude that by his actions the claimant had caused him to lose trust and confidence in the claimant.

33. For these reasons I find the dismissal unfair and the remedy hearing is to take place on 21 June 2021.

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Employment Judge Cassel

Date: 27 May 2021

Sent to the parties on: 8 June 21

For the Tribunal Office