THE EMPLOYMENT TRIBUNALS

Claimant: **Mr K Dwumfour**

Respondent: **Interserve FS (UK) Limited**

Heard at: **East London Hearing Centre**

On: **7 April 2017**

Before: **Employment Judge Allen (sitting alone)**

Representation

Claimant: **Mr P Apraku**

Respondent: **Ms Ferber**

JUDGMENT

1. **The claim for unfair dismissal fails and is dismissed.**

2. **The claim for wrongful dismissal (breach of contract) fails and is dismissed.**

3. **The claim for unpaid holiday pay is dismissed upon withdrawal.**

REASONS

1. The Claimant, Kingsley Dwunfour, was employed by the Respondent as a cleaner from 15 December 2009 until he was dismissed on 4 July 2016. By claim form presented on 9 November 2016, he brought claims for unfair dismissal, wrongful dismissal and failure to pay outstanding accrued holiday pay upon termination. The claim for holiday pay was withdrawn at the hearing and is dismissed. The Claimant had also ticked the box for 'arrears of pay' but the Claimant's representative, Mr Apraku,

confirmed at the hearing that there was no free-standing claim for arrears of pay.

Procedural History

2. The claim was originally presented to the Birmingham Employment Tribunal and transferred to the East London Employment Tribunal on 10 January 2017.

3. On 7 April 2017, the Tribunal heard evidence from the Claimant and on behalf of the Respondent from Salih Salih, Senior Nights Operative; Kim Martin, General Manager; and Lucy Hawkins, HR Business Partner. The parties had not exchanged witness statements until the morning of the hearing. Both parties were given time to read the other side's witness statements and both parties agreed to the case proceeding on the day.

4. The Tribunal was directed to specific pages in an agreed bundle of documents.

5. The Tribunal heard oral submissions from both parties after the conclusion of the evidence.

6. Following the hearing on 7 April 2017, the Tribunal's decision was reserved.

Identification of Issues

7. The issues were clarified at the outset of the hearing. It was agreed that the Claimant had been dismissed by the Respondent.

8. It was agreed that the reason for dismissal was misconduct. Therefore the Tribunal needed to ask itself whether the decision to dismiss was fair in all the circumstances:

    a. Did the Respondent believe that the Claimant was guilty of misconduct?
    b. Did the Respondent have reasonable grounds for that belief?
    c. Had the Respondent carried out a reasonable investigation when it arrived at that conclusion?
    d. Taken as a whole did the Respondent follow a fair process?
    e. Was the penalty of dismissal fair within the range of reasonable responses?

9. If the Claimant was unfairly dismissed, the tribunal needed to determine whether the basic award should be reduced because of conduct of the Claimant and / or whether the compensatory award should be reduced on the principles set out in *Polkey* or on the basis of contribution or because of any lack of mitigation.

10. Separately, the Tribunal needed to determine whether the Claimant had been wrongfully dismissed in breach of contract. It was agreed that the

Claimant had been dismissed without notice. The question for the Tribunal was therefore whether on balance of probabilities, the Claimant had acted in a way that put him in breach of contract, entitling the Respondent to summarily dismiss him.

Findings of Fact

11. The Respondent has a contract with London Underground Limited to clean various tube stations. The Claimant was employed by the Respondent as a cleaner. He reported to Hristo Dimitorv (Area Supervisor) who in turn reported to Mr Salih (Senior Nights Operative).

12. The Claimant had previously been assigned to work at Kings Cross Station and was transferred to Great Portland Street Station in or about January 2016. The Claimant continued to 'clock in' at Kings Cross.

13. When he started and stopped work the Claimant had to clock in and out using the Respondent's automated system. The workers clock in and out by dialling a specific number from a BT landline phone and entering their PIN. In addition, London Underground required workers, such as the Claimant, attending at its sites, to sign in and out. It was the 'clocking in and out' process that determined the period for which the Claimant would be paid. The Claimant had been reminded of these processes including in memos signed by him on 9 August 2013 [53]; and in July 2014 where he was expressly told that a failure to comply was a disciplinary matter which could lead to termination of employment [54]. He also attended a 'Toolbox Talk' given by Mr Dimitrov on 14 January 2016, about the requirement to clock in and out and sign in and out [55-56].

14. The Claimant had been given a 12 month final warning on 12 February 2016 for unauthorised absence and sleeping at work on 16, 17 & 18 December 2015 [146-147]. He did not appeal that decision. The outcome letter told him that the likely consequence of any further misconduct would be dismissal *with notice*. In his witness statement the Claimant said that he had an unblemished record prior to August 2015 – this was not true – he had also received a final written warning on 23 July 2014 [117-119] for unauthorised absence – the Claimant eventually accepted this in his evidence to the Tribunal.

15. On 12 June 2016, the Claimant was due to work between 11pm and 7pm the following day. He 'clocked in' at Kings Cross at about 10.50pm. On his way to Great Portland Street, the Claimant had a telephone call from his partner who was at a party and needed a lift home. The Claimant went to give her a lift home. He did not inform any employee of the Respondent that he was doing so.

16. The Claimant's evidence was that he tried to inform his supervisor, Mr Histo, but that Mr Histo's mobile was switched off and he couldn't get through – but that he did call Mr Capocci, the London Underground Station Supervisor at Great Portland Street station, who gave him permission to be late. Mr Capocci did not attend the Tribunal to give

evidence but the Claimant has produced an undated letter signed by S Capocci which states ". . . on the night of 12 June 2016 I was working the night shift at Great Portland Street underground station. On the night concerned I recall receiving a call from station cleaner Kingsley Dwunfour informing me that he would be late for domestic reasons. I accepted his explanation, it wasn't a big issue due to presence of a second cleaner on station" [150]. That letter was not before any of the Respondent's decision makers.

17. It was common ground that Mr Capocci worked for London Underground and not for the Respondent and that Mr Capocci had no formal supervisory or line management responsibility for the Claimant.

18. The Claimant did not 'clock out' during the time that he was not working – and was therefore paid for the period when he was not at work. The Tribunal concluded that he would have been aware of this.

19. The Claimant received a call from Mr Histo asking him why he was not at work and the Claimant subsequently arrived at Great Portland Street after 1am – which is when he signed in. At no point – even after Mr Histo contacted him - did he clock out. At about 5.30am, Mr Histo and Mr Salih came to the station to ask the Claimant why he had been late for work. The Claimant was asked to attend a meeting with Mr Salih at 11am the following morning at the Respondent's office in Liverpool Street, which he duly attended.

20. The Claimant's evidence to the Tribunal was that his partner was heavily pregnant and was not feeling well and had problems with her vehicle on the evening in question, and that he had informed Mr Capocci of this - however this was not mentioned in the letter from Mr Capocci. Mr Salih's evidence was that this was not mentioned to him when he spoke to the Claimant the following day and it is not referred to in the notes of that meeting that the Claimant signed [59-62]. It is also notable that at this meeting, the Claimant did not refer to having spoken to Mr Capocci. The Claimant's evidence to the Tribunal was that at the end of that meeting Mr Salih told the Claimant that he wouldn't be pursuing the matter any further. Mr Salih denied this.

21. On these contested matters, on balance, the Tribunal preferred the evidence of Mr Salih. Mr Salih was an impressive witness with a solid grasp of the facts and the order in which things had happened. His evidence was supported by the documentary material before the Tribunal – which ran contrary to the Claimant's evidence.

22. The Claimant continued to attend work and was then on holiday for the period from 23 June until 30 June 2016. By letter dated 23 June 2016 the Claimant was invited to a disciplinary meeting on 4 July 2016. The invitation letter warned him that a potential outcome of the disciplinary process could be dismissal without notice [63-64]. On 30 June 2016 he was intending to return to work but he was contacted by Ms Martin on that date and told that he was suspended from work pending the

disciplinary hearing on 4 July 2016.

23. On 4 July 2016 a disciplinary meeting took place [68-73]. The Claimant did tell Ms Martin that his partner was pregnant and that she couldn't start her car (he did not mention that she was not feeling well). When asked why he didn't contact his manager or supervisor or 'PIN out' (meaning clock out with his PIN as described above), he said that he couldn't answer. The Claimant accepted in his evidence to the Tribunal that he did not tell Ms Martin that he had any disagreement with the note of his meeting with Mr Salih – which he had signed. The Respondent's note of the disciplinary meeting does not refer to the Claimant telling Ms Martin that he had spoken to the London Underground Station Supervisor about non-attendance on 12 June 2016. At the conclusion of the meeting, the Claimant was dismissed by Ms Martin on the basis that he had clocked in and then not actually attended work for over 2 hours for which he was paid – which she regarded as fraudulent and dishonest. This was confirmed by letter dated 15 July 2016 [77-78]. In evidence to the Tribunal, Ms Martin accepted that she had referred to the final written warning during the disciplinary meeting and stated that she couldn't say whether or not she would have dismissed the Claimant had there not been a live final written warning on his file.

24. The Claimant appealed and an appeal meeting took place chaired by Ms Lesley Juett on 26 August 2016. The Claimant's evidence to the Tribunal was that Ms Juett told him at this meeting that she was not content with the decision of Ms Martin and that she was going to ensure that he got his job back. The Respondent's note of the meeting, singed by the Claimant, does not contain such a statement. Ms Juett did not attend the Tribunal. The Respondent has produced an email from Ms Juett dated 17 March 2017 in which she states that she told the Claimant that she needed to speak to Mr Salih before making her final decision and that "At no time did I inform Mr Dwumfour that I would be [sic] overturn the decision and I am sure the notes of the meeting will reflect the same." [153] Ms Hawkins gave evidence that she had spoken to Ms Juett on her handover and that whilst Ms Juett wanted to investigate a suggestion by the Claimant that Mr Salih had effectively given him a verbal warning on 13 June 2016, she had not indicated that she intended to overturn the decision to dismiss if that verbal warning had not been given – and indeed that it was her intention to uphold the dismissal if no such warning had been given. Ms Hawkins spoke to Mr Salih who denied having issued a verbal warning on 13 June 2016 – supported by the notes of his meeting with the Claimant and the fact that a verbal warning is not a sanction provided for by the Respondent's disciplinary policy.

25. The Tribunal considered that at best, the Claimant had misunderstood Ms Juett – who had told him merely that she would investigate the matter that he had raised concerning Mr Salih – but who had also made it clear that no decision was being made until she had looked into that (as recorded in the appeal meeting notes [91]).

26. Ms Juett left the Respondent before the Claimant was informed about the outcome of the appeal. The Claimant made repeated attempts to discover the outcome and finally was informed on 27 September 2016 that his appeal would not be upheld. The letter informing him of this stated that it was from "HR Operations on behalf of Ms Martin" [93] (the original decision maker). Ms Martin gave evidence that this must have been a mistake made by HR and that she had no involvement in the Claimant's appeal. Ms Hawkins gave evidence that this was a mistake which had been made by Karen Sutcliffe, HR Manager. An amended letter was sent to the Claimant on 10 October 2016 replacing Ms Juett's name for that of Ms Martin [95]. The Tribunal accepted that the most likely explanation was that Ms Martin's name was on the letter in error.

The Law

27. The relevant law on unfair dismissal is set out in sections 94 and 98 of the Employment Rights Act 1996.

> ***94 The right***
>
> *(1) An employee has the right not to be unfairly dismissed by his employer.*
> *(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).*
>
> ***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.*
> *. . .*
> *(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.*

…

28. The three stage test in the case of *British Home Stores v Burchell* is relevant to a conduct dismissal:

    a. Did the Respondent believe that the Claimant was guilty of misconduct?

    b. Did the Respondent have reasonable grounds for that belief?

    c. Had the Respondent carried out a reasonable investigation when it arrived at that conclusion?

29. The Tribunal also needs to consider the fairness of the process followed overall and whether dismissal was a penalty within the band of reasonable responses.

30. The Tribunal reminded itself that its function was not to substitute its judgment for that of the Respondent but merely to ascertain whether the approach taken by the Respondent was within the range of reasonable responses.

31. In relation to the wrongful dismissal claim brought under the Extension of Jurisdiction Order 1994 for failure to pay notice pay, the Tribunal needs to ask itself whether there was a repudiatory breach justifying summary dismissal and whether the employee's behaviour disclosed a deliberate intention to disregard the essential requirements of his contract, that being a question of fact for the Tribunal.

Conclusions

Unfair Dismissal

Reasonable Belief

32. The Tribunal accepted Ms Martin's evidence that she believed that the Claimant had behaved fraudulently and dishonestly on the evening of 12 June 2016 by clocking in and failing to attend work without having clocked out and by failing to contact any member of the Respondent's management.

Reasonable Grounds

33. The Respondent had reasonable grounds on which to base its belief – the basic facts were not in dispute. The Claimant was not at work for over two hours after he had clocked in and he had not contacted any of the Respondent's management.

Adequate Investigation and fair process

34. The Claimant relied heavily on the failure by Mr Salih and Ms Martin to

speak directly to the London Underground Station Supervisor. The Tribunal have accepted Mr Salih's evidence that the Claimant did not mention to him that he had received some form of permission from the Station Supervisor and notes that Ms Martin had the note of the meeting with Mr Salih signed by the Claimant in which this was not referred to and that in the Respondent's note of the disciplinary meeting it was also not referred to. However even if it had been raised, this does not change the fact that the Claimant was absent from work, without having either clocked out or having informed any employee of the Respondent. The Claimant also did not refer to the illness of his partner at any stage of the process prior to the decision to dismiss being made.

35. The Claimant's evidence to the Tribunal was that he was insufficiently informed of the precise allegations against him prior to the disciplinary hearing. The Tribunal did consider that the invitation letter [63-64] was rather brief – but it was accompanied by the note of the investigation meeting with Mr Salih and the signing in sheet – and taken together they adequately (although only adequately) conveyed sufficient information to the Claimant as to what he was being disciplined for.

36. The Claimant was given the opportunity to put his case at the investigation meeting with Mr Salih, the disciplinary meeting with Ms Martin and the appeal hearing with Ms Juett. Taken as a whole, the matter was adequately investigated and the process followed was within the range of reasonable responses. The Respondent paid sufficient attention to the Claimant's length of service – and he did not have a clean disciplinary record.

Appropriate Sanction

37. The Respondent found that the Claimant had fraudulently and dishonestly claimed wages for a period of time when he was not at work. This is a breach of trust and dismissal is within the range of reasonable responses in such circumstances.

<u>Wrongful Dismissal</u>

38. Ms Martin was frank enough to accept that she did not know if she would have dismissed the Claimant had it not been for the live final written warning on his record – although her outcome letter does not refer to it [77-78]. However the test for the breach of contract claim is not whether she would actually have summarily dismissed the Claimant if it hadn't been for that warning – but whether the Claimant had breached his contract of employment by committing an act of gross misconduct, entitling the Respondent to summarily dismiss him.

39. The Respondent's disciplinary policy unsurprisingly includes 'dishonesty' as one of the potential grounds for a finding of gross misconduct [36] and the Claimant had been warned more than once – including in writing – that a failure to following the correct clocking in and out / signing in and out processes could lead to disciplinary action including dismissal. The

Tribunal considered that the act of dishonesty committed by the Claimant was capable of amounting to gross misconduct and that therefore the Respondent was entitled to dismiss summarily.

Employment Judge Allen

22 May 2017