



# EMPLOYMENT TRIBUNALS

**Claimant**

**Mr H Mohamed**

**v**

**Respondent**

**ICTS (UK) Ltd**

**Heard at:** Watford

**On:** 8 March 2018

**Before:** Employment Judge R Lewis

## **Appearances**

**For the Claimant:** Mr M Abubakar, Lay representative

**For the Respondent:** Ms N Cargill, Counsel

## **JUDGMENT**

1. The claimant was not unfairly dismissed by the respondent and his complaint of unfair dismissal fails.
2. The claim for holiday pay is dismissed.

## **REASONS**

1. The claimant asked for written reasons after I gave judgment. This was the hearing which I had listed at a preliminary hearing in August 2017. The order which followed from that hearing was sent on 25 August.

### **Case management**

2. Despite what seemed to me the clarity of the order, there were defaults in preparation on both sides. In purported compliance with the order to give details of the holiday pay claim, the claimant submitted a copy of his final pay slip under a one line letter from Mr Abubakar saying that he was owed 224 hours at £8.87 per hour, a shortfall of £1718.83. There was no witness statement and no explanation of how the claim was calculated. The respondent's case was that all holiday pay that was due had been paid.
3. There were difficulties with the respondent's bundling and statements, and Ms Cargill had to create additional copies before the hearing could start.

4. There was a main bundle provided by the respondent and a number of additional documents provided by the claimant. The claimant was the only witness present on his own behalf. He submitted two statements from Mr S Gulzar, his former Trade Union Representative; an email from Mr L Meechan of the Metropolitan Police; and a letter from his former solicitor, Mr R S Arora, which described the abortive criminal proceedings which arose from these events. Ms Cargill produced a helpful chronology.
5. I told the parties at the start of the hearing that I would break the proceedings into three stages. The first was the liability hearing for unfair dismissal; the second a remedy hearing on unfair dismissal if required, and finally the hearing on holiday pay.
6. The respondent called two witnesses. They were Mr Raj Kumar, Customer Service Manager, who had received the original allegation against the claimant, investigated it and suspended him; and Mr Matthew Skinner, Employee Relations Manager, who had rejected the claimant's appeal against dismissal. It was known well before the hearing that the dismissing officer, Mr Paolo Pinheiro would not attend. I was informed that the reason was ill health, but not given evidence to support that assertion.
7. I took the opportunity at the start of this hearing to reiterate to the parties that the legal test of unfair dismissal did not require proof of culpability, and that on the contrary, it pre-supposes an approach which is that in law it is possible for an employee to be fairly dismissed for something which he did not do and unfairly dismissed for something which he did do. Despite that caution, the hearing focussed disproportionately on issues relevant to whether the claimant was culpable or not.
8. There was reference to a wide range of issues. Where in these reasons I do not refer to an issue which was mentioned, or do not do so to the depth to which the parties went, that is not oversight or omission, but a true reflection of the extent to which the point was of assistance.

### **Factual matters**

9. The factual background can be shortly stated. The claimant, who was born in 1980, joined the respondent, a large security company, in 2004, and was in his twelfth year of service when dismissed on 3 June 2016. He was at that stage a Supervisor working airside at Heathrow. He had an unblemished disciplinary record before the events which led to his dismissal. I heard no word of criticism of his work.
10. His dismissal arose entirely out of one event on 23 April 2016.
11. The claimant was on duty airside at gate 31, providing security in the gate area for an American Airlines flight to Los Angeles.
12. He came into conversation with a passenger who was a Saudi Arabian national, who had transited through London from Saudi Arabia. They were seen in conversation by other ground staff, including Mr Malhotra.

13. The claimant's evidence to the tribunal and to the respondent was that the passenger appeared agitated and restless, and that the claimant spoke to him because he perceived a potential security issue. He also checked his visa documentation, as he was entitled to. In order to have the conversation with the passenger, the claimant took him to a stairwell in the jet bridge area, i.e. out of the sight of other passengers, past the desk where boarding passes were checked, and towards the aircraft. Their conversation took place outside the scope of airside CCTV.
14. Shortly after this interaction, the flight boarded, and the passenger went on board.
15. A member of American Airlines staff provided a description of what then happened, and that was in the bundle at 22-23. It is by far the single most important document in the case. It is a long document and should be read in full. The AA employee, Mr Param Singh Malhotra reported in short that before the doors closed the Saudi Arabian passenger stood up, asked to speak to Customer Services, and told Mr Malhotra that he had had to pay a fee of US \$200.00 to a security guard, allegedly because he was carrying too much cash. Mr Malhotra recognised the claimant from the passenger's description, and from having seen the two in conversation.
16. Mr Malhotra understood the passenger to say that the claimant had on bogus reasons asked him to give him \$200 in cash and that he had done so. Mr Malhotra wrote that when he asked the claimant if he had had dealings with the passenger, the claimant originally denied having done so, but Mr Malhotra had seen them together and knew that that was not true. He thought therefore that the claimant's denial was suspicious.
17. Mr Malhotra wrote that he escorted the claimant to the aircraft, where the passenger pointed to him and said, "This is the man I paid \$200 to." There was a dispute between the passenger and the claimant and the passenger declined to take his flight. He stated that he wished to leave the aircraft and complain to the police and his luggage was off loaded. In what seemed to me a small but compelling circumstantial point, Mr Malhotra wrote, "The passenger told me that if I walk to the stairwell I would see an elastic band on the window sill by the stairs. He stated that he had taken that elastic band off from his stack of money whilst paying... I did see the elastic band on the window sill by the stairwell later." The passenger travelled to Los Angeles on a later flight that day.
18. Mr Kumar was on duty, and he received a complaint to the same effect. The police were called, and questioned and searched the claimant. No cash was found.
19. Mr Kumar told the claimant to go home. Contrary to instruction the claimant returned airside, giving as a later explanation that he needed to conclude his security paperwork from that day's work.
20. Mr Kumar interviewed the claimant in the presence of Ms Byford, a note taker, the same day (3 -10), and interviewed two other staff the following day. On 26 April police reported what action had been taken to that date. On the following

day AA instructed the respondent, as it was contractually entitled to do, to remove the claimant permanently from its contract work.

21. The claimant returned to work from a period of leave on 27 April and was suspended that day by Mr Kumar (18) from which suspension he never returned. He was interviewed again by Mr Kumar about the incident (19) and Mr Malhotra gave his statement on 3 May (22–23).
22. On 13 May Mr Pinheiro invited the claimant to attend a disciplinary meeting (26). He set out five disciplinary counts, of which four related to taking cash from the passenger, and one related to returning airside when he had been instructed not to. The letter properly advised the claimant of his right of accompaniment and the risk of dismissal (26).
23. The disciplinary meeting with Mr Pinheiro took place in the first instance on 17 May and reconvened on 26 May. It was reconvened again on 3 June, and the claimant was dismissed. The dismissal letter (47–50) set out the sanction of immediate dismissal by reason of gross misconduct.
24. The claimant appealed and his appeal was heard by Mr Skinner on 22 June. Mr Skinner was not Heathrow based and was entirely independent of events.
25. After interviewing the claimant, Mr Skinner was on leave, and he conducted further interviews with a number of those, including an employee of the catering company Alpha, whom he telephoned on 5 September. On 14 September he wrote to the claimant to tell him that his appeal had failed (74–77).
26. No criminal proceedings were brought. The claimant was informed that the Saudi Arabian passenger declined to travel to the UK to give evidence. Mr Arora (the claimant's solicitor) commented that that would not have prevented a trial from taking place. That surprising proposition was of no assistance.

### **Discussion of unfair dismissal**

27. This was primarily a case of unfair dismissal. The first question is for me to decide what was the reason for dismissal, namely the operative consideration in the mind of Mr Pinheiro and confirmed by Mr Skinner. I find that the reasons were those stated in the dismissal letter, namely the claimant's conduct in extorting cash from a passenger being the primary matter. I consider that given the consistency of the paper trail, namely the allegation, the focus of the disciplinary investigation by Mr Pinheiro, and the contents of the dismissal letter, I am able to reach that conclusion in the absence of Mr Pinheiro.
28. That is a reason related to conduct, and therefore a potentially fair reason within the framework of section 98(2) Employment Rights Act 1996. I must then consider it through the framework of section 98(4) which provides "Determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and the 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 shall be determined in accordance with equity and the substantial merits of the case."

29. I must approach the matter through the framework of British Home Stores v Burchell 1978 IRLR 379, but bearing in mind that that case was decided when the burden of proof was not that which prevailed today.
30. At the first stage I ask whether the respondent in dismissing the claimant had a genuine belief that he had committed the misconduct complained of. I find that it did. It had primary evidence, namely the complaint and identification of the claimant by the alleged victim. It believed Mr Malhotra's account of what the victim had said.
31. The next question is whether the belief was based on reasonable evidence after reasonable investigation. I deal below with a number of the points which were made on the claimant's behalf, but I must bear in mind that a reasonable investigation does not need to be one in which all possible steps are taken, provided that the investigation was within a range of reasonable responses to the events in question.
32. The fundamental corners of the investigation were that the incident had taken place in a spot where there was no CCTV; that the alleged victim of the offence could not be traced by the respondent to co-operate further; that the respondent's best evidence was Mr Malhotra's account of the events on the day and the claimant's denial, involving a dispute which had to be resolved. Any further inquiry could be in to no more than circumstantial events.
33. I accept that where the claimant in no fewer than seven interviews indicated possible lines of enquiry, the respondent in general pursued those lines where it was reasonable to do so. However, no line of enquiry produced evidence which supported the claimant or refuted the complaint, and many circumstantial points indicated culpability on the part of the claimant rather than the reverse.
34. I find that the requirements of a fair procedure were generally fulfilled. The claimant was given all the necessary information to defend himself; he was properly advised of and offered rights of accompaniments and alerted to the risk of dismissal. He had a right of appeal.
35. Given that the allegation was one of a cunning, deliberate theft, at work, while on uniformed duty and representing the respondent, dismissal was plainly within the range of reasonable responses.

### **The claimant's points**

36. I turn now to points which were either circumstantial or which were made by Mr Abubakar. In this context I use the word 'circumstantial' to mean points which did not directly inculpate or exculpate the claimant; but which all cumulatively pointed towards his culpability, even if indirectly.
37. Repeatedly at this hearing the claimant challenged the authenticity of the minutes of meetings. He stated that the original manuscript notes of meetings had not been disclosed, and therefore that he had been deprived of the opportunity of comparing the originals with the typescripts which were in the bundle. He stated that there were deliberate omissions from the minutes of

things which he had said. He agreed however that there had not been a point in the procedures when he had raised this as an issue, or suggested it was a source of potential unfairness.

38. I accept the minutes as broadly accurate summaries, not transcripts. They need not be comprehensive. The point did not assist me.
39. The claimant complained that at his first interview by Mr Kumar, Mr Kumar was accompanied by a note taker, Ms Byford, who was involved in the events because she had witnessed the events when the allegation was first made. This did not seem to me a point of any substance.
40. Mr Abubakar in closing repeatedly referred to the respondent's failure to interview the passenger, who had been delayed in London for some hours before taking the next flight. At the time in question, the passenger was a victim of an alleged reported crime, and the police were involved. The respondent's status was that of the employer of the alleged perpetrator. It had no right to interview the passenger, and all that it could have done was to ask for that to be done by another person or through another person. However, it had no reason to do so, because it had Mr Malhotra's account of the passenger's own words. This did not seem to me a useful point, given in particular the certainty and clarity which Mr Malhotra's version attributed to the passenger.
41. Mr Abubakar's additional point, which was that a respondent should always look for corroboration and not dismiss on the word of one person alone, was not well made in law, and I disagree.
42. Mr Abubakar submitted that the incident was "a very very minor incident, and one complaint in a long career which was unblemished." I agree that it was a single incident in a long career, but I cannot accept that it can correctly be called "very very minor".
43. Mr Abubakar submitted that the outcome of the proceedings was pre-determined. I disagree in the sense that I accept that the respondent went through a process of investigation and discipline. I can see however that the gravity of the allegations was immediately apparent to all those involved, and that the respondent was swift to recognise that dismissal was a likely outcome.
44. I attach no weight to the police procedures and their outcome, because any criminal proceedings would have asked a different question from that asked by the tribunal, and applied the criminal standard of proof. I do not attach weight to Mr Arora's assertion that a prosecution could have proceeded in the absence of evidence from the passenger, and I disregard his observations about the claimant's dismissal.
45. Among the factors which the claimant could not explain and which seem to me important circumstantial factors, as they did to the respondent, were that the passenger had on the basis of a conversation with the claimant chosen to miss his flight, have his luggage unloaded, and made allegations of the utmost gravity. The claimant could give no explanation as to why that might have happened. I attach weight to the seemingly minor detail of the rubber band: it

was exactly a corner of tiny corroborative evidence which illustrates how powerful circumstantial evidence can be. Although Ms Cargill cross-examined the claimant on having given inconsistent versions of events in the course of seven different interviews, I cannot attach much weight to inconsistency as a factor. I accept that in a stressful artificial situation a member of the public may not proceed or express himself analytically.

**Holiday pay**

46. At the start of the hearing, and again before adjourning to deliberate on the unfair dismissal claim, I indicated to Mr Abubakar that I would invite him to show cause why the claim for holiday pay should not be struck out. It was incapable of fair trial, the claimant having failed to comply with the order of September by failing to give any evidence or analysis of the claim, save the one-line assertion that holiday pay was insufficient, to which was attached the claimant's final pay slip. In reply to my invitation to show cause, Mr Abubakar stated that the respondent understood the claim. That did not seem to me to remedy the difficulty and the claim was struck out on the grounds that it had no reasonable prospect of success and was not capable of a fair trial as a result of non compliance with the earlier order.

\_\_\_\_\_  
Employment Judge R Lewis

Date: .....28 March 2018.....

Sent to the parties on: .28 March 2018...

.....  
For the Tribunal Office