EMPLOYMENT TRIBUNALS

Claimant: Mr D Burgess

Respondent: Cabot Carbon Limited

Heard at: by video **On:** 25 January 2021

Before: Employment Judge Webb

Representation
Claimant: In person
Respondent: Mr M Williams, Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded. This means the respondent fairly dismissed the claimant.

REASONS

Introduction

1. The claimant, Mr Burgess, was employed by the respondent, Cabot Carbon Limited, as a process technician, until his dismissal on 16 July 2020.

2. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct in the form of falsification of company documents, failure to follow company values and intent to commit fraud, and it was entitled to terminate his employment without notice because this amounted to gross misconduct.

4. The claimant represented himself and gave evidence. The respondent was represented by Mr M Williams, counsel, who called evidence from Ms P Lloyd,

Environmental Plant Manager; Mr S Knight, facility General Manager; Mr R Anderton, Project Development Director; and Mr J Halls Operations Manager. I considered the documents from an agreed 334-page bundle of documents which the parties introduced in evidence.

Preliminary Matters

5. At the beginning of the hearing, before I heard any evidence, I had to deal with several preliminary issues.

Postponement application

6. By an email dated 24th November 2020 the respondent had requested a postponement of the hearing today and for it to be relisted with a time estimate of 3-4 days. There reason for the request was the number of witnesses they wished to call to give evidence. Mr Burgess responded by email to that request, disputing the time estimate and that with a new job offer in hand he would not be available for a 3-4 day hearing.

7. Before me at the hearing I raised the application with the parties, Mr Williams confirmed he had 5 witnesses in total, 3 of whom related to the unfair dismissal and 2 that related to financial matters. Mr Burgess indicated that in relation to one of the financial witnesses, Mr Halls, he had some questions about the unfair dismissal.

8. I proposed that rather than postponing the hearing the issues be split, with the unfair dismissal case dealt with today, with the possibility that the decision would be reserved and provided in writing, and then if appropriate and separate hearing to deal with any award. I made clear to Mr Burgess that he would be given an opportunity to ask questions of those respondent witnesses that he wished to. I considered that this was the best way to deal with hearing ensuring there was limited delay while saving expense to the parties.

9. Both Mr Burgess and Mr Williams confirmed they were content with this proposal.

Mr Burgess' witnesses

10. During the course of the preliminary discussion Mr Burgess told me that he had wanted 2 people to be witnesses for him. However, one had refused to engage with him, and one was not available due to an injury. Mr Burgess did not make any application to postpone the hearing in light of this and indicated that he was happy to continue with the hearing in their absence, relying on his evidence and the evidence in the agreed bundle of documents.

Observer from the Respondent

11. On the morning of the hearing the respondent had emailed the Tribunal asking permission for a member of their HR department to observe the hearing. I raised this with Mr Burgess during our preliminary discussion and he confirmed he was content for the observer to be present. I did however remind the observer that she

should not discuss the evidence of the witnesses with anyone who had not yet given evidence, she confirmed that she understood this.

Issues for the Tribunal to decide.

12. Having dealt with these preliminary matters, I agreed with the parties the issues for me to decide. Although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I agreed with Mr Burgess and Mr Williams that I would consider them at this stage and invited them to deal with them in evidence and submissions.

Unfair Dismissal

13. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

14. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant stated that the dismissal was unfair because the respondent followed an unfair process; he was not given enough time to prepare before the investigation meeting and disciplinary meetings and the respondent failed to interview other managers. He said that the respondent failed to consider his personal circumstances, including his recent illness and the effects of stress caused by the Covid 19 pandemic. The claimant maintained throughout that the actions of the respondent were not reasonable because the claim for ground rent was one that should have been paid as an out of pocket expenses for a holiday cancelled because of the actions of the employer. The appeal was incapable of correcting the unfairness.

15. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**; **Software 2000 Ltd v Andrews [2007] ICR 825**; **W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;** and **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**. The respondent said that the claimant would have been dismissed in any event, therefore any award should be reduced by 100%. The claimant contended that he would not have been dismissed.

Findings of fact

16. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

17. The claimant, Mr Burgess was employed as a process technician by the respondent, Cabot Carbon Limited, for just over six and a half years, from January 2014 to his dismissal on 16 July 2020.

18. His training record (page 153-156) shows that during his time employed by Cabot the claimant has attended 4 courses on business ethics, and the scheduling assistant printout (page 157) shows that he attended a course on Cabot Values in September 2019. In his evidence before me, Mr Burgess accepted that he had attended these courses and stated that he would not remember the detail provided. He stated that evidence shows that after a week people remember 25% of what is said in such courses. This evidence was not in the bundle but was information he had found on google.

19. While I accept Mr Burgess may not have remembered all detail from the courses, I find that he did understand the basic concepts of Cabots Values and Vision. He was reviewed against these concepts in his performance reviews (pages 158-171), in his evidence before me he agreed when questioned that he knew what dishonesty was, and that even without courses he would know what was right or wrong. I am satisfied that he was aware of the behavior that was expected of him as a Cabot employee.

20. The plant at which Mr Burgess worked has an annual shutdown period, during which essential maintenance is carried out and the leave that staff can take is limited to ensure that work is carried out safely. In 2020 the shutdown was initially planned for March, then in January the dates were moved to June.

21. On 27 April 2020, Mr Knight sent an email (page 195) to the Barry site, indicating that the shutdown would commence on 22 August 2020 and the usual restrictions on holidays being taken would be in place from 21 August to 12 September.

22. On 26 May, Mr Halls sent an email (page 196c) to shift mangers stating the Leadership Team wished to review the holidays booked during the shut down period. That email asked 3 questions that required answers from the employees:

    "1. What dates have they planned from / to for their holidays.
    2. Is it in the UK or abroad.
    3. Have they paid for the holiday with proof of purchase."

23. The respondent does not have a policy setting out expenses repayable for holiday cancelled as part of a change in the shutdown period. There is a European travel expense policy and procedure (page 128-137). The claimant stated that he was not aware of this policy at the time he was asked for information about his holiday. I accept his evidence on this, his evidence was that he had never submitted a claim for expenses previously, and had no need to look at this policy.

24. On 27 May the claimant was asked about his holiday plans by Mr Ferguson, his shift manager, and shown the email sent by Mr Halls. In response I find the claimant reported that he had a UK break booked for 21-29 August that it was paid for and he could provide a receipt if required. I find this information was provided to Mr Ferguson at that time as on that day at 14:29 Mr Ferguson, responded in an email to Mr Halls (page 196b), and in respect of the claimant reported the following information:

"Darren Burgess- August 21st -29th, UK break booked and paid for. Can supply confirmation of booking if needed?"

25. In a subsequent email sent later on 27 May (page 196a), Mr Ferguson confirmed that the cost of claimant's holiday was £2484 and that proof of purchase could be provided if required. I find that the information in both these emails could have only come from the claimant. In response Mr. Halls requested that a receipt or invoice be provided to pass on to M. Edmonds.

26. The claimant then provided details of his holiday in an email dated 28 May (page 196f) along with what he describes as an invoice from his banking app (page 219) showing a payment made on 15 November 2019 to Hall & Jenkins Leisure Ltd. He stated in that email that if the holiday was be canceled for the shutdown these would be the costs he would be out of pocket.

27. This information was forwarded to Mr Halls by Mr Ferguson, and Mr Halls requested that a VAT receipt be provided.

28. The information provided by the claimant in that email was considered by the leadership team in their meeting on 29 May, at which Ms Lloyd indicated she was alarmed about the amount being claimed by the claimant for a 1 week UK caravan holiday. Ms Lloyd undertook some investigation herself, asking Mr Halls about the caravan site was which the claimant intended to take his holiday, contacting that site and discovering that they do not rent out caravans for holiday as the caravans are privately owned, as part of these inquiries Ms Lloyd discovered that the amount the claimant was requesting was similar to the ground rent for a caravan at that site. Ms Lloyd felt uneasy and suspicious about the situation. The details of these inquiries were sent to Ms Edmonds in an email dated 29 May (page 200).

29. Ms Lloyd in her evidence before me was at pains to point out that although alarmed by the amount being claimed, her intention was to gather evidence to validate the claim in the absence of a VAT receipt from the claimant. Her evidence was clear that the claim would not be validated by the finance team with the banking printout submitted by the claimant, something Mr Halls also stated in his evidence. I am satisfied that this was her intention.

30. The response by Ms Edmonds to this information, in her email of 29 May (page 200) was measured, suggesting a full investigation be carried out before any conclusions were reached. Once that investigation was completed the report and recommendation were to be sent to Mr Halls.

31. The respondent has a disciplinary policy (page 38-46) which records that falsifying documents and breaching company rules can amount to gross misconduct. I find that it was these issues that exercised Ms Lloyd and Ms Edmonds and resulted in the investigation to establish the facts.

32. On 17 June the claimant was provided a letter (page 203) requesting that he attend a preliminary investigation meeting, to take place on 19 June. This letter sets out the focus of the meeting would be on 3 separate issues:

"Recent evidence gathered which does not correspond with the claim you have submitted.
Falsification of company documents including reports, accounts, expense claims or self-certification forms.
Whether a contravention of Cabot Values has occurred."

33. The letter went on to explain that the investigation may lead to a full disciplinary action being taken, including up to dismissal: a copy of the disciplinary policy was provided to the claimant with that letter.

34. The investigation involved Ms Lloyd interviewing the claimant. The record of the preliminary investigation meeting with the claimant (page 205) shows that it was only after a series of questions by Ms Lloyd that he admitted the cost referred to in banking app invoice related to ground rent for his caravan, rather than a payment to a holiday company.

35. In addition to that meeting Ms Lloyd also interviewed Mr Ferguson. The record of that meeting (page 211) shows that Mr Ferguson recalled having conversations with the claimant, and confirmed in those conversation the claimant had said the claim was for a holiday booked, and that he was unable to provide a VAT receipt because the Caravan Park was closed. Mr Ferguson confirmed the claimant had not asked if he could claim ground rent. Mr Ferguson is recorded as saying there were no other discussions with the claimant.

36. In addition to these meetings Ms Lloyd obtained evidence relating the cost of similar holidays to the one the claimant intended to take as well as confirmation of the cost of ground rent at the caravan park where the claimant owned his caravan.

37. In his evidence before me the claimant said that had he had more time he would not have said anything differently at the preliminary investigation meeting about the costs he was owed, but would have known more about the policies. When it was put to him by Mr Williams, the claimant did not agree that the correct procedures for that meeting had been followed. The respondents disciplinary policy (page 40) sets out that investigations are set up as a fact finding exercise, I am satisfied that the record of that meeting, and the record or the meeting with Mr Ferguson and the report produced by Ms Lloyd (213) show that this was a fact finding exercise.

38. Ms Lloyd completed her investigation and reported her findings and recommended that disciplinary action be taken.

39. On 25 June the claimant wrote an email (page 227) to Ms Edmonds, setting out a grievance about being investigated. Ms Edmonds responded to that email on 29 June (page 226), setting out that she understood that the issues were about her process that was being carried out and agreeing to call him to clarify the process of the investigation. A call was made during which Ms Edmonds advised the claimant to trust the process and to get everything in writing.

40. On 6 July the claimant was invited by letter (page 236) to a disciplinary meeting to take place on 8 July. That letter set out the allegations:

"Falsification of company documents including reports, accounts, expense claims or self-certification forms.
Failure to follow company values i.e. integrity: We expect adherence to the highest ethical standard through personal integrity and compliance with all laws and regulations.
Intent to commit fraud"

41. It further provided the evidence on which the investigation report was based and indicated that the allegations could result in disciplinary action including summary dismissal and that the meeting would be conducted by Mr Halls.

42. Rather than Mr Halls undertake the disciplinary meeting however, Mr Knight did so. The change being prompted by a grievance by the claimant against Mr Halls.

43. The note of the disciplinary hearing (page240 – 249) shows the claimant was asked questions by Mr Knight and was able to provide a statement supporting his case. Mr Knight did explore the difference between the accounts given by the claimant and Mr Ferguson in the preliminary investigation interviews. That note of the meeting goes on to consider the grievance raised by the claimant.

44. On 15 July the claimant was provided a letter (page 278) requesting that he attend that reconvened disciplinary hearing on 16 July. The meeting the note for the meeting (page 280 to 289) show that Ms Edmondson set out the findings of the preliminary investigation of the grievance and it was concluded that the allegations in that grievance could not be upheld.

45. Those note also covers the result of the disciplinary hearing. Mr Knight asked the claimant questions and then set out his findings and deliberations, Mr Knight upheld the 3 allegations against the claimant and considered the actions amounted to gross misconduct and the appropriate sanction to be summary dismissal. The claimant's contract allowed for summary dismissal in the case of dishonesty and gross misconduct (page 146). The disciplinary policy (page 38) provides examples of gross misconduct and among other specifies, "falsification of company documents," and "serious breach of company rules".

46. The dismissal was confirmed to the claimant by way of a letter dated 17 July (page 289a). In his evidence before me Mr Knight confirmed that he was always concerned with the health and well-being of his employees, and during the course of the meeting was looking to see if there were any concerns in this regard, and whether the claimant was happy to proceed with the meetings. I accept his evidence within this regard.

47. The claimant has disputed that he was dismissed for reason of gross misconduct. He suggests that he was dismissed as he had been absent for some time with covid, or alternatively was dismissed due to his involvement with a workplace accident that occurred on 27 February 2020. Mr Knight in his witness statement says that the work place accident was not something he considered when making the decision to dismiss, and in relation to the period of time off relating to covid, many other employees were also encouraged to self-isolate during the pandemic.

In his evidence Mr Anderton also confirmed that these issues were not factored into his decision making. Ms Lloyd in her witness statement confirmed that in relation to the incident on 27 February 2020, the claimant had acted as the respondent would have expected and that there was no wrongdoing on his part. I am satisfied on the basis of the evidence presented that neither the absence due to covid or the incident of 27 February were the reason for the decision to dismiss.

48. The claimant appealed the disciplinary decision to Mr Anderton by an email dated 18 July (page 290). The appeal hearing took place on 28 July, the notes of that meeting (page 295 to 301) show that the claimant was able to put across his reasons for disagreeing with the decision of Mr Knight. The claimant did not provide any new evidence in support of his case, nor did he suggest that other information could be provided by himself or others. Mr Anderton confirmed in evidence that during the appeal meeting he discussed with the claimant about the shift changes, and that the claimant had been allowed to take a day off to prepare for the preliminary meeting and that the underlying anxiety and fatigue caused by the pandemic were also taken into account in his decision. I accept Mr Anderton's evidence on this.

49. The outcome of that appeal was that it was that the decision to dismiss the claimant was upheld, this was communicated to the claimant by way of a letter dated 3 August (page 302). The claimant presented his claim to the Tribunal on 12 October.

Relevant law and conclusions – unfair dismissal

50. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 16 July 2020.

51. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

52. In this case it is in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. The claimant suggests the reason may be his sickness due to Covid, or an incident that took place in. I conclude based on my findings that the reason the respondent dismissed the claimant was misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

53. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

54. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23,** and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

55. Mr Burgess and Mr Williams provided oral submissions on section 98(4) which I have considered and referred to where necessary when reaching my conclusions.

56. The claimant contends that the respondent did not carry out a reasonable investigation, he says they should have interviewed managers to clarify what had been discussed, the investigation disciplinary meeting and appeal did not take account of his position, having just returned from time off. He relies on **Stuart v London City Airport Ltd [2013] EWCA Civ 973**. The claimant submits the respondent could not have had a genuine belief he was guilty of misconduct because the investigation was flawed.

57. Mr Williams for the respondent maintains the investigation was a reasonable one, the key players were interviewed, at all stages of the process the claimant was told of the charges he was facing, provided with the relevant documentation, was provided notice of meetings, was given an opportunity to explain his side of things and was allowed to ask questions; he was afforded the opportunity to appeal. The respondent recognised the seriousness of the case and approached it seriously and considered it fairly. Faced with an employee it considered had attempted to commit fraud, with no recognition by the employee that their actions were wrong, the respondent was entitled to, and had no choice but to dismiss, and this was a reasonable response.

58. I conclude that the respondent's management, Mr Knight and Mr Anderton, held a genuine belief that the claimant was guilty of misconduct. Their evidence was clear about why they dismissed, the dismissal and appeal letters were unequivocal.

59. I have the band of reasonable responses clearly in mind in reaching my decision. It is immaterial what decision I would have made. The claimant's case is that the

respondent's management did not undertake a reasonable investigation and failed to consider his personal circumstances.

60. I conclude that the respondent had reasonable grounds to hold that genuine belief that the claimant was guilty of the misconduct alleged. The evidence before the respondent was that the money being claimed was for ground rent for a caravan and this would have been payable if the Holiday planned by the claimant would be cancelled or not, representations had been made that this was money paid for a holiday. Only after an investigation and questioning by the respondent did this fact come out. Where the accounts differed between witnesses the respondent took that into account but was entitled to prefer the evidence of one witness over another.

61. I conclude on the facts above that the investigation was a reasonable one in all the circumstances. It was reasonable for the respondent to undertake a validation exercise in relation to the initial amount claimed by the claimant in the absence of a proper invoice issued by the holiday company. The validation exercise raised suspicions and it was reasonable for the employer to undertake an investigation in relation to those. The investigation took evidence from the key people involved. I have found the investigation provided the claimant with information about the allegations he was facing and provided him with an opportunity to answer those allegations. I conclude the investigation was a reasonable one in the all circumstances.

62. I further conclude that having found the claimant guilty of the misconduct alleged, it was within the reasonable range of responses to consider those actions to be gross misconduct and to dismiss the claimant summarily. The respondent's disciplinary policy indicated that action of this type may be considered gross misconduct and the claimant's contract of employment allowed for summary dismissal in the case of dishonesty.

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Employment Judge Webb

Date: 30 January 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 1 February 2021

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FOR EMPLOYMENT TRIBUNALS