EMPLOYMENT TRIBUNALS

Claimant: **Mr Ziaur Rahman**

Respondent: **Vigilant Security (Scotland) Ltd**

Heard at: **Central London (by video link)** **On: 8 & 9 March 2022**

Before: **Employment Judge R S Drake**

Representation
Claimant: Mr L Jones (Free Representation Unit)
Respondent: Ms J Letts (Legal Executive)

RESERVED JUDGEMENT

1 The claims against the Respondent described as Croma Proscription Ltd are withdrawn as of 28 January 2022 and therefore they are dismissed upon withdrawal by consent.

2 The Claimant's complaint of unfair dismissal fails and is dismissed because the Respondents have established that they dismissed the Claimant for a reason relating to conduct causing consequent loss of trust and confidence amounting to some other substantial reason, and the Tribunal is satisfied they acted reasonably in all the circumstances.

3 The Claimant's complaint of breach of contract in that the Respondents failed to give or pay for notice is also dismissed. The claim of unlawful withholding of holiday pay is dismissed on withdrawal.

4 Because this decision was not given extempore and required detailed deliberation of three witness statements, nearly 300 pages of documents, CCTV footage and consideration of the notes of oral

evidence, it was reserved and is now promulgated with full reasons as set out below.

5 Because of the above Judgments, the need for a Remedies Hearing is obviated and avoided.

REASONS

Introduction

First, I record my gratitude to the parties for their lucid, effective and in some cases disarmingly candid presentation of their respective cases. I commend the representatives' helpful and co-operative advocacy, and also extremely helpful preparation of the presentation of documentary evidence and the offering of final oral and written submissions.

Second, though I was able to read the 150 plus pages of documents on the day of hearing, after hearing all the oral evidence, cross-examination, and submissions, I recognised the need to read the documents with more focus in order to reach my conclusion on the merits of the substantive case. Therefore, I reserved the giving of full decision and reasons.

Issues and Respective Arguments

I determined (with the assistance of the parties, and thus largely by agreement), that the issues to be examined and respective cases were those identified below: -

1 Unfair Dismissal

1.1 The parties agree that the Claimant was dismissed with immediate effect on 18 February 2021;

1.2 Was the Claimant dismissed for one of the potentially fair reasons set out in Section 98(1) of the Employment Rights Act 1996 ("ERA")? If so, could the Respondents establish what was the reason (or, if more than one, the principal reason) for dismissal? The Respondent asserts their reason was principally a reason relating to conduct under Section 98(2)(b) ERA 1996 and/or (by implication) some other substantial reason under Section 98(1)(b) ERA being consequent loss of trust and confidence;

1.3 If a/the reason for the Claimant's dismissal was related to conduct as alleged:

1.3.1 Can the Respondents show - (i) they genuinely believed the Claimant was guilty of misconduct, (in this case they argue gross misconduct) - (ii) did they have reasonable grounds for such belief and - (iii) had they identified such grounds after undertaking as much investigation as would be conducted by another reasonable employer? The Claimant says that he had done nothing amounting to what the Respondents believed to be failures to comply with seat belt and face covering requirements, that he was treated unfairly in that the Respondents did not have reasonable grounds for concluding that failure to wear a seat belt and to use a face covering on the day in question amounted to gross misconduct, and that dismissal was outside the bounds of what a reasonable employer would impose as a sanction because of the absence of an adverse disciplinary record and the mitigation he offered which he regards as persuasive. In terms, he argued that the decision to dismiss was excessive. After testing of evidence he conceded the genuineness of belief relied upon by the Respondents.

1.3.2 In short, was the decision to dismiss arrived at in accordance with the above three-part test as set out by the EAT in **BHS v Burchell [1978] IRLR 379**;

1.3.3 If so, did the Respondents act fairly and reasonably in dismissing the Claimant on grounds as pleaded of gross misconduct (for the purposes of section 98(4) ERA 1996), or put more simply, was it reasonable in all the circumstances for the Respondents to dismiss the Claimant rather than impose a lesser sanction?

1.3.4 If not dismissed for misconduct, can the Claimant establish that he was dismissed for some other substantial reason? The Respondents case is that misconduct led to fatal loss of trust and confidence.

2 Remedy

If the Tribunal were satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason relating to conduct, but is satisfied the dismissal was nonetheless substantively and/or procedurally unfair, it would have to determine whether the Claimant would have been dismissed fairly in any event if a fair procedure had been adopted, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119 and 123 ERA. This was not a live issue once I reached my conclusions as set out below, but I seek to make it clear that

I started my consideration of this case overall with an awareness that this may become a live issue.

The Law

3 The relevant law applicable to this case (I have not quoted each part of the section/subsections not relevant to this case) is set out in Section 98 of the Employment Rights Act 1996 ("ERA") which provides: -

" - (1) In determining … whether 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…."

" – (2) A reason falls within this subsection if it -

(a) ……..
(b) It relates to conduct … "

4 If the Respondent satisfies the test set out in Section 98(1) and/or (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

"Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was 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."

5 The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office** and **HSBC Bank – v- Madden [2000]**) which is to consider whether the employer's actions, including its decision to dismiss, fell within the band of responses which a reasonable employer could adopt in the same circumstances, but not

substituting the Tribunal's view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. literally just one other) reasonable employer to act.

Findings of Facts and Reasons

6. I made the following findings of fact based upon evidence which I heard from the Claimant himself (who had been based at the Respondent's premises at Camden) and the Respondents' witnesses Mr Paul Brady (Head of Operations at Camden and also acting as dismissing officer in this case), and lastly M G Rampe (Operations Director at the Respondent's head office who heard the Claimant's appeal). Each was thoroughly cross-examined by Mr Jones, and I also raised questions to ensure equality of arms in respect of aspects of the testimony and background evidence with which I inferred the Claimant took issue. I commend both sides for the quality of their representatives' advocacy, and for giving candid and frank evidence even where they perceived that in parts it might damage their own positions. I also considered not only the written statements of the above-named witnesses, but also, when attention was drawn to it, the contents of a combined documents bundle comprising over 150 pages. Further, I considered the content of CCTV stills of the events in question depicting the actions of the Claimant which he eventually admitted. Lastly, time was allowed at the conclusion of oral testimony to enable both sides to express Final Submissions which were also considered in detail.

7. Using abbreviations of "C" and "R" for Claimant and Respondent respectively and referring to witnesses by their initials (**PB,** and **GR**) and the documents in bold type page numbers in the Evidence Bundle (**P1 to P164**) or paragraphs in witness statements, the findings of fact relating to the background circumstances leading to dismissal of the Claimant are as follows: -

    7.1 C was employed by R (Head Office based in Scotland) at the location of their clients Camden BC as a "Response Security Patrol Officer" who patrolled the streets of Camden at the client's behest in vehicles owned by the Respondents but badged as Camden vehicles, either as driver or passenger. He had been employed by the Respondent's predecessors since 2006 and his employment had transferred on several occasions (under TUPE) to different predecessors of the Respondent, but eventually to this Respondent.

    7.2 At the time of the summary termination (18 February 2021) of his employment by them, he had been and remained engaged on the basis of terms originally agreed with Camden BC (PP64-105). The terms include a number of Policies and a Handbook. The Handbook includes passages defining obligations as to conduct of driving and passenger duties. It includes the following:

7.2.1 P95 – “you have the responsibility to drive safely” which emphasises safety as a basic concern and from which I infer I can find that this defines a duty as to use to be complied with by both driver and passenger i.e. any user;

7.2.2 P96 – “it is your responsibility to ensure that the vehicle allocated to you is kept in working order at all times. *It will be liable to spot checks periodically by management*” (my emphasis).

7.3 Though the Handbook does not expressly provide that use of seatbelts is mandatory, it is trite to say that because failure to maintain proper use of seatbelts is a criminal offence, by simple implication I find that it thus becomes a contractual obligation by operation of law. To suggest otherwise would be plainly fatuous.

7.4 In addition to the obligations expressed in the Handbook, the Respondents rely on their staff to comply with lawful reasonable instructions which may be necessary according to prevailing external circumstances. In this case, to meet the challenge of the Covid-19 pandemic and consequent HMG advice on social distancing and personal masking, the Respondents issued a Briefing on 3 February 2021 (P106) requiring staff to use face masking to protect not only members of the public, but also and especially fellow vehicle users. The Briefing also emphasised use of seatbelts – the following instructions were made expressly clear – “wear a mask at all times … wear a seat belt at all times…”

7.5 These instructions were clear and unequivocal and I find that in the context of the prevailing circumstances the instruction in particular to wear a facemask at work or in a vehicle was lawful and reasonable, and that in any circumstances, the instruction to wear a seat belt at all times whilst in a vehicle was doubly lawful and reasonable because to fail to do amounts to commission of a criminal offence carrying with it serious consequences.

7.6 The consequences of not wearing a seat belt were that an offence would be committed and the offender could face criminal conviction, and that this (and any failure not leading to charge and conviction) would have to be reported by the Respondents to their client potentially causing reputational damage. Worse however was the potential consequences if an accident occurred which could lead to personal injury to both vehicle and other road users, and the voiding of insurance cover with all the consequences which would naturally follow from that. This was referred to briefly in testimony but I did not

need evidence to be aware of this, I am satisfied that such potential consequences were live considerations in the minds of PB and GR.

7.7 C had 15 years' service with R and/or their predecessors and thus had extensive daily working experience and awareness of the requirements of Road Traffic law as well as his contractual obligations.

7.8 There are few conflicts of evidence in the considerable volume of documentary and oral evidence before me. I find the accounts of what happened, and the train of consideration and thinking described by PB and GR to be persuasive and cogent. Furthermore, I find the accounts of what they had in mind and the sincerity of their attention to what was said to them by C to be convincing to the required standard of proof, which is on a "balance of probabilities". I do not find impeachable as to credibility any aspect of their testimony.

7.9 C argues that there must be something questionable about how and why investigation into his actions on 1 February 2021 came about in that there was no reason in his view for CCTV footage of his colleague and him in their vehicle to be examined. This argument has no weight since the trigger for an investigation does not of itself have to be justifiable so as to avoid any subsequent investigation thus becoming impeachable, and in any event he was aware that spot checks were permissible under R's policies referred to above.

8. The chronology of main events, being the findings of fact specific to the dismissal events, is as follows with my further findings about them duly added: -

8.1 Para 4 of PB's Statement (uncontested) - as a result of an unrelated incident, spot checks were carried off out on company vehicles CCTV and in particular a vehicle driven by C's colleague with C being seen as passenger; stills from this CCTV footage, later shown to and accepted by C, showed that C was not wearing either a face mask or seat belt;

8.2 C was called to an Investigative Meeting undertaken before Debbie Bryant on 9 February 2021 (recorded at PP109-114) at which time he was shown the CCTV stills - he accepted what they disclosed;

8.3 C was called to a Disciplinary Hearing scheduled for 16 February 2021 before PB to answer 4 allegations

- alleged travelling in the front of a vehicle without a seat belt in breach of section 14 of the Road Traffic Act 1988 whilst a passenger in a company vehicle

- alleged non-compliance with guidelines for tackling COVID-19

- alleged breach of breach of health and safety requirements with regard to failure to wear a seat belt and failure to wear a face covering in a vehicle with another person present

- alleged bringing the company into disrepute through his acts or failures

8.4 At this meeting, C accepted the facts of what he had done but questioned their seriousness/significance and their potential consequences – that is still a significant limb of submissions on his behalf today; He offered mitigation by explaining he had a medical exemption from wearing a mask and he produced a letter from a Doctor purporting to confirm this. Though I find that PB took the letter into consideration, I have seen that letter (P117) but find that all it says is that C is a registered patient with the that particular Doctor's surgery, that he suffers from a sore and blocked nostril for which he uses medication, and that he has difficulty wearing a mask as the condition is noted to aggravate his underlying medical condition. The Doctor asks R to "look favourably to give consideration for an exemption from wearing a mask" but of itself this letter does not constitute any form of certification of an exemption per se. C also pleaded as he did in later appeal that he had been absent for 6 months before 1 February 2021 and was under stress because of domestic pressures and today argues that either this was not taken into account or was not attached sufficient weight.

8.5 Further in mitigation, C pleaded that his 15 years of good service should count in his favour and that he had an unblemished disciplinary record; this later point was checked by PB who found that a number of matters were the subject of as yet unresolved disciplinary and grievance procedures and he referred to them in the outcome letter which I find was only because the absence of a record had been specifically raised by C.

8.6 I find that all these mitigation points were addressed by PB in his own mind – he was cross examined thoroughly on this and I found his testimony both plausible and credible – but he regarded the failures to wear a seat belt and a face mask were sufficiently serious as to outweigh the mitigating explanations. In terms he found that C's actions were deliberate since his long service should show he was fully aware of the need to buckle a seat belt properly and the fact he was seen sitting on an already buckled belt must show he we aware of what he was doing (or not doing) with full awareness. PB was aware that if a belt is not buckled, an alarm sounds incessantly, but that if a belt is buckled and sat upon, no alarm sounds and this made him feel even more sure that it was reasonably likely that C knew what he was doing. PB considered but rejected C's explanations and mitigation as being

insufficient to outweigh the seriousness of what he accepted he had done. "Not accepting" is not the same as "not considering", and I am satisfied PB did consider all that was put before him by C.

8.7 PB made a finding that both failures were deliberate and constituted gross misconduct and he dismissed C summarily – PP127-12 refers. This letter details a full account of PB's reasoning, but it refers to consideration of past record. C says this tainted PB's thinking and prejudiced the final outcome, but PB says he investigated it because C had raised absence of adverse record and though he could see there was one matter still open for conclusion, C he was right despite referring to it. I note that PB writes - "*I know that you are engaged within disciplinary concerns and that this is not indeed your first disciplinary concern in your continuous years service …. I unfortunately, due to your acknowledgement of your responsibilities within your role, your statements within investigation and disciplinary hearings respectively, have proved your acceptance by your actions and that there is no mitigation towards these breaches*". This wording is regrettably somewhat equivocal and unclear, but I am minded to find that PBs conclusion was based principally on C's acceptance of his actions and not any notional incomplete record, which in this is no record as such.

8.8 C appealed and his hearing came before GR on 15 March 2021 – PP135-143 refer. Harshness of the sanction imposed by PB was the first and main limb of this appeal. Insufficiency of investigation and consideration of mitigation was also pleaded together with lack of past adverse record. Lastly length of service was emphasised in mitigation, but I find this factor sounds in the analysis of whether the sanction was too harsh. The cause for the spot check was also questioned, but I have dealt with that already above and find it is no good basis for questioning the actions taken by R.

8.9 GR ensured, as had PB before him, that C be accompanied at the hearing. Considerable leeway was given to C by rearranging the date of the hearing several times, but without that fact affecting the hearing or its outcome in any way. The meeting was thorough and C has not questioned the fairness of its conduct, as indeed again he merely questions the outcome as being too harsh in that GR upheld PB's decision and confirmed summary dismissal – PP144-147 refer. This letter is thorough in that GR addressed each of the grounds of complaint in detail and without challenge today. GR conducted a full review by speaking to other parties whose responses he made known to C, who again does not challenge the fairness of this aspect of procedure.

8.10 GR addressed C's plea that his actions were inadvertent and thus should not attract so harsh an outcome. GR writes in response

"*The use of seat belts has been, as you are aware, compulsory since January 1983. As observed, you can be seen in the vehicle with the belt engaged but positioned behind you, this appears to be a potentially deliberate and premeditated act … something you would have to done or at the very least noted as you entered or exited the car throughout your shift, but seemingly chose to ignore, and therefore not a momentary lapse. Moreover, you chose not to wear a face mask or alternatively a face shield while in close proximity to a colleague …* " This shows that GR believed that the facts as agreed by C spoke for themselves as to his state of mind given his awareness that he had considerable length of service and experience, and considerable awareness of statutory and contractual obligations which a long service employee could be expected to have.

8.11 In submissions, C questions the thoroughness of the investigative process. However, I find that once C admitted what he had done, what was left to PB and especially GR was the question of how those facts should be interpreted and by another reasonable employer, which is indeed also test which I must apply today.

Conclusions on Application of Law to Facts

9. I find that R has shown that C was dismissed because of a reason relating to conduct, which is the reason they had in mind for dismissal and that they also had in mind resultant loss of trust and confidence of their commercial client because they noted the purported diminishment of the acts done as evidenced by C's efforts to minimise them by mitigation. Thus, they could not be sure that he accepted the seriousness of the situation C had created by doing what he did. Rather, I find that all PB and especially GR could reasonably conclude was that C was fully aware that by doing what he did in the way that he did it on one occasion knowingly, there would be a risk of recurrence.

10. C urges me to conclude that PB and GR did not have reasonable grounds for believing that C's actions amount to gross misconduct. He argues that intention cannot be reasonably concluded. He says that regardless of the Safety Briefings and C's experience and the position of the seatbelt, it does not follow that despite these a finding can be made that C's actions were deliberate and that such an argument does not follow. I disagree. Though C pleads the distraction of past absence and stress, this in my finding is outweighed by his admitted knowledge of the state of the law since 1983, the admitted regularity of his use of seat belts in the past at work and in his domestic life, and that use is almost always in this day and age reflex action. Thus, I do not find it implausible to conclude that not using something one knows one must use is deliberate or at the best knowingly done.

11. The key point relied on by C is harshness of sanction being disproportionate to the simple and modest level of misconduct he committed. In terms he says no other reasonable employer would characterise this as gross misconduct and nor would it dismiss summarily or at all. He prays in aid Para 31 of the ACAS Guide on Disciplinary and Grievance Procedures at Work 2019. This says *" … If an employee is charged with or convicted of a criminal offence, this is not normally in itself reason for disciplinary action, as consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and the relationship with their employer, work colleagues and customers …*." He also cites para 19 which says " … *Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning* … "

12. First, I note that this is "Guidance" not a "Code of Practice". Second I note that para 31 refers to the need to consider the effect/consequences of the act complained of not just its nature which in this case involved considering its historical context of what C knew he should and should not do, what he actually did, and what might have resulted had there been any untoward consequences. Third, I note that para 19 says that it is "usual" to give a warning for a first offence but this is not mandatory and allows for individual case facts to dictate different outcomes, when judged on their own merits. The ACAS Guide is simply that – a Guide - and it does not restrict/obviate a conclusion which another employer can justifiably reach. Fourth, I disagree with C's minimisation of the committed offence, It may not be the worst in criminal law terms, but it is very serious in civil law taking account of the potential consequences.

13. There was no challenge to the way in which the procedures at investigative, disciplinary and appeal levels were undertaken. I agree with this part implicit and part express concession. Everything comes back to a difference of opinion as to whether the sanction was disproportionately harsh and whether that impeached the procedure fatally. I deliberately avoid substituting my own view by examining whether I can envisage "an" other reasonable employer reaching the same decision. It is clear from the authorities that this test is not requiring me to find that if I can envisage another employer reaching a different outcome, I must conclude that this R must or should have done so. That is plainly not the test.

14. This employer was faced with clear wrong-doing, and wrong-doing which was breach of contract. It could conclude either that the acts were deliberate of inadvertent and they chose the former. They addressed their collective mind to the pleas offered in mitigation but found they did not outweigh the acts and the interpretation which the admitted facts could attribute to them. I find they were entitled to do so for the following reasons:

14.1 They were aware that C was long serving and could thus be expected to be more rather than less aware of his obligations as to use of seat belts, an obligation of long and express standing, and a more recent and topical requirement as to use of a face mask.

14.2 R was entitled to conclude that C would be aware of what could conceivably happen if whilst not wearing a seat belt an accident occurred jeopardising his own and others' safety and also R's insurance and its relationship with its client.

14.3 R was entitled to conclude that C would be aware of the risks of not wearing a mask especially in close proximity to a working colleague in a vehicle - yet he chose not to do so, for reasons which are not medically verified by any detailed or quality of medical evidence put before them or even before me today.

14.4 R is criticised for PB writing that R's reputation was put at risk when this had not been checked. However, by the time the matter came to GR on appeal, the latter had checked with the client and no doubt as he said he was embarrassed by having to disclose that a member of staff had been dismissed for not using a seat belt or a face mask. The fact that actual damage to reputation had not happened by the time of the disciplinary hearing before PB does not obviate the risk of it when GR had to disclose the facts to Camden.

15. Thus, when examining the question of whether an other employer could reach the same conclusion as to characterising the acts as deliberate, as gross misconduct and that they merited summary dismissal, I can envisage an other employer reaching that conclusion, though admittedly not all such employers. Therefore, I am drawn to the inevitable conclusion that the dismissal was fair and that as there was admitted breach of contract by C, and the combined wrong doings could thus be characterised as gross because they were found to be knowing (and I agree), then R is relieved of the burden of giving or paying in lieu of notice and that c was not dismissed in breach of contract.

16. I find that "gross misconduct" according to all the decided authorities is the only legally valid and fair basis for terminating someone's contract without notice and in this respect all the authorities require that "gross" means the most serious form measured not simply by reference to intent and mental state of the perpetrator of the misconduct, but also in cases of awareness of risk, to the measure of the consequences as seen by the and any objective victim.

17. A person may be justifiably and fairly dismissed for gross misconduct even if there is lack of intent, but where the awareness of consequences is serious. In short, I can find that the reason thus relied upon in the disciplinary hearing, and confirmed on appeal as a basis for dismissal, was

a sufficient reason on the facts of this case. R has shown to my satisfaction that it had conducted a fair and reasonable procedure in leading up to and reaching a conclusion to dismiss. This was manifestly fair, though I recognise C's sincerity in his challenge of the witnesses both at the time and today as he was entitled to test them in formal evidence giving.

18. The dismissal was therefore both fair and not unlawfully in breach of contract.

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Employment Judge R S Drake

Date: 09 March 2022

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REASONS SENT TO THE PARTIES ON

11/03/2022.

FOR THE TRIBUNAL OFFICE