EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
B Diawara	**v**	Securitas Security Services (UK) Ltd

Heard at: Watford - In person hearing **On**: Friday 18 June 2021

Before: Employment Judge H Allen sitting alone

Appearances
For the Claimant: Rep: S Martins Esq (lawyer)
For the Respondent: Ms Young (in house lawyer)
Interpreter: Mr Shamim

RESERVED JUDGMENT

The claimant's claims for unfair dismissal and breach of contract are not well founded and are dismissed.

REASONS

1. In a claim brought by Mr Diawara and received by the tribunal on 8 August 2019; within statutory time limits; the claimant seeks compensation for unfair dismissal and breach of contract.

2. **Background**

2.1. Mr Diawara had been a full-time employee since 18 January 2018 but had continuous service with the respondent from 11 July 2014 by virtue of an earlier contract. At the effective date of termination, he had 4 years, 10 months and 3 days continuous service.

2.2. The claimant was employed as a gallery assistant (SO) at the National Gallery but this does not fully describe his duties. Whilst no job description has been produced both parties accepted that the claimant's duties involved monitoring the public visiting the gallery and protecting the works of art displayed.

2.3. On 4 April 2019 the claimant was employed in Temporary Exhibition Space 6 (TEGs6). On 14 May 2019 he was dismissed for conduct following a disciplinary process which found he was sleeping on duty. He appealed and the dismissal was upheld.

2.4. The contract of employment is at pages 66-76 of the agreed bundle. Page 76 was signed and dated by the claimant on 18 January 2018.

Section 17 of the contract (page 72) states employees are entitled to 1 weeks' notice per year of service after 2 years continuance service. Section 18 of the contract (page 72) alerts employees to the Disciplinary and Grievance Procedures and directs them to the Employee Handbook.

2.5. The Disciplinary Policy and Procedure document is at pages 36-46 of the agreed bundle. Categories of conduct are divided into Misconduct and Gross Misconduct (page 37). Under the heading of Misconduct, it states it must be recognised that breaches affecting service to or relations with a customer will be treated more seriously than they might be in other employment because of the nature of Securitas's business. There is a schedule of examples of Gross Misconduct (pages 38-39); sleeping on duty appears on page 39. That schedule is headed with a note on summary dismissal:

> 'summary dismissal (dismissal without any right to notice or pay in lieu of notice) may occur in the event of gross misconduct only after the matter has been considered through the formal disciplinary process.'

2.6 The list is followed by a statement that it is not exhaustive. Disciplinary sanctions (page 43) include summary dismissal. The disciplinary and appeals process (pages 40-45) mirrors that recommended by Acas.

2.7 The claimant's work required him to stand for long periods. In March 2019 the claimant produced a GP's letter confirming that he had pain in his knee requiring him to sit at regular intervals (page 77). On the day in question the claimant was able to sit down.

3. The Allegation

3.1. Between 13:37hrs and 13:40hrs on the day in question a supervisor, Mr Aju Thomas (AT), observed the claimant sitting in TEGs6 and formed the view he was sleeping. He called another SO, Mr Scepanovic (MS), who was a few feet away in TEGs 7 to come and be a 2nd witness. MS immediately walked up to the claimant, nudged him awake and told him to wake up. That MS told the claimant to wake up was conceded by him during the investigation and in his live evidence. AT enquired after the claimant's wellbeing. The claimant replied he was fine and not on any medication. AT sent the claimant on a short 'refresh' break. The claimant subsequently denied that AT was present. That AT was present is supported by MS's 2nd interview and the CCTV. That the claimant denies his presence in my view demonstrates how deeply asleep and unaware of his surroundings the claimant was.

3.2. At 14:46hrs that same day AT sent an email setting out what he had seen (page 80). Later that day AT produced a handwritten statement adding more detail to his email that he observed the claimant with eyes closed and nodding. I have heard no evidence to suggest AT has any motive to lie about what he saw and notwithstanding the claimant's denial I accept AT formed the opinion the claimant was sleeping.

3.3. OC was appointed as investigator on 10 April 2019. On 16 April 2019 OC interviewed the claimant, a note taker was present. The claimant remembered the incident but denied he was sleeping and said "the person following me came to me for panic button. He told me I need to wake up" and that AT had sent him. The claimant denied anyone else was present. The claimant then signed the interview notes as did OC (pages 82-84).

3.4. The same day OC requested by email that the CCTV operator Vincent Ramlugon (VR) review the relevant CCTV footage and produce an account of the claimant's actions. VR responded he couldn't see if SO was sleeping on duty due to the poor-quality cameras. However, on a couple of occasions it did look to VR that the SO was dozing on and off. He confirmed that AT walked past the room at 13:37 and spotted SO. VR later provided a summary of the CCTV footage and notably included 4 separate occasions between 13:17hrs to 13:35hrs when the SO 'dozed' off and at 13:37hrs AT walked past TEGs6. Although VR does not name the SO at no stage has it been challenged that the SO in question was the claimant.

3.5. On 23 April OC interviewed MS. Notwithstanding that OC misstated the date at the beginning of the interview he clearly set out the events being investigated, namely that AT asked MS to check on the claimant because he was sleeping. Unless this is a regular occurrence; and the evidence was that this was the only incident of its kind with the claimant; OC gave sufficient information for MS to recollect that day which was a little over 2 weeks before. MS was singularly unhelpful answering every question with 'I don't remember' (pages 87-88). On 25 April MS was asked to view the CCTV before being further interviewed about the allegation. On this occasion he confirmed AT had approached him and expressed concern for the claimant's wellbeing asking MS to check on him but again declined to confirm the claimant was sleeping insisting only that he was 'alright' (pages 91-92).

3.6. OC prepared an investigation summary on 25 April (pages 89-90). It is a comprehensive account of the interviews conducted. This summary states that on 16 April **BH** was invited to view the CCTV, he refused and on 18 April it states **BH** viewed the CCTV. This was never put to OC, I conclude BH is a typographical error and should in fact read BD I.e., the claimant, there is no other actor in these events who could be BH; this does not in my view undermine the value of the document. He concluded the evidence from MS was inconclusive; however, having viewed the CCTV for himself he was satisfied there was sufficient evidence to support Gross Misconduct.

3.7. I find that the evidence of AT and VR was consistent in that both say they thought the claimant was either sleeping, nodding or dozing. All 3 terms indicate a lack of awareness of his surroundings. That they use different descriptors is to be expected. Had they used identical language they would have been accused of conspiracy. That MS was an unhelpful witness does not in my view undermine the value of the evidence provided by AT and VR supported as it was by CCTV which

OC had viewed for himself. I find that OC's decision to continue with the investigation was correct.

3.8. OC took no part in the decision to allow the claimant to continue on normal duties during the disciplinary proceedings.

3.9. For the avoidance of any doubt, I am satisfied the investigation was thorough and fair, that the evidence gathered by OC was consistent with CCTV and that MS was an uncooperative witness.

4. **Disciplinary Proceedings.**

4.1. 30 April 2019 HT invited the claimant to a disciplinary hearing. The letter is detailed and, in my view, complies with the Acas recommended procedure in that it sets out the details of the allegation, gives adequate time for the claimant to prepare (72 hours in this instance); characterises the allegation as gross misconduct which could be dealt with by dismissal; scheduled attached documents and noted material not attached (CCTV) but that would be available to be viewed at the hearing and a copy of the disciplinary policy and procedure document. The claimant was advised of his right to be accompanied.

4.2. The hearing was rescheduled to 9 May 2019 and a new letter of invitation was sent. Its contents mirrored that of the earlier one.

4.3. At the hearing the claimant was represented by Mr Graham Eve, PCS Union. A note taker was present at the hearing and the notes of the meeting were offered to the claimant at the end for him to endorse; he refused (pages 99-106). The allegation was put to the claimant and he was given the opportunity to answer it and comment on the evidence against him.

4.4. It has been suggested that failure to provide a copy of the CCTV with either letter did not give the claimant 24 hours to consider this evidence. That is correct, it didn't but I find it did not render the disciplinary process unfair. The CCTV was played to the claimant and his representative at the beginning of the hearing, when the claimant asserted, he had not seen it before HT played it a 2nd time. Finally, the first part of the footage was played a 3rd time at the request of the claimant and his representative. The Acas guidance only advises that the claimant is given adequate time to prepare, I am satisfied that he was.

4.5. Much was made by the claimant's representative that VR; a CCTV operator of some 20 years experienced; states he could not see or guarantee that the claimant was sleeping due to the poor quality of the cameras. It is significant in my view that having viewed the CCTV at the disciplinary hearing (and again at the appeal hearing) neither the claimant nor either of his union reps commented on the quality of the recordings.

4.6. I find it significant that in the disciplinary hearing and recorded in the notes:

a. The claimant agreed he could be seen checking the time on his phone to see how long he had to go in that room;
b. Was rubbing his face and moving around apparently trying not to fall asleep;
c. He stated he was sleepy after his holidays; the room was warm and he may have closed his eyes for a bit;
d. The Claimant insisted he did not fall asleep although he may have been nodding off;
e. He claimed to be alert but denied AT had been present;
f. The CCTV was replayed and the claimant then said that AT hadn't spoken to him and he may have just been passing by;
g. The claimant asked why AT had not spoken to him;
h. He had been taking a painkiller at the time of the incident.

4.7. The claimant asserts he declined to sign the notes because they were fabricated. I find the discussion about what AT did and why he didn't speak to the claimant entirely credible prompted as it was by re watching the CCTV; this in my view makes it more likely than not that the notes are accurate. On 17 May 2019 HT was asked to amend the notes to include a definition of sleeping. It is significant in my view that the claimant did not take the opportunity to challenge the veracity of the notes at that point; nor were the notes challenged at the appeal hearing.

4.8. I did not find the claimant a credible witness on the accuracy of the notes. I reject his explanation today on why he declined to sign them as not worthy of belief given that this is the first time he has suggested they were fabricated. If that were the case, I would have expected the notes to be challenged much earlier and certainly at the appeal.

4.9. HT was challenged for not taking the claimant's disciplinary record into account however I see that the notes record he did ask the claimant if he had any *'disciplinaries unspent'* in the circumstances I find the claimant's record was taken into account.

4.10. It was put to HT that 10 minutes to make his decision was unfair. Acas makes no recommendation as to an appropriate length of time. I accept HT's evidence that he prepared for the meeting by reviewing all the evidence and consequently only needed to reflect on what the claimant told him during the disciplinary hearing in the context of the material he had reviewed in advance to make his decision.

4.11. The claimant was dismissed following a dismissal hearing on 14 May 2019. The letter does not state the date of dismissal however it makes it clear this was a summary dismissal therefore I conclude the date of dismissal was 14 May 2019. The notes of the dismissal hearing say that he was told to clear his locker and return his pass that day.

4.12. Further CCTV was referred to in the hearing however HT was unable to play it. at the end of the hearing the claimant informed HT he would

appeal and his representative asked to be able to see that CCTV in preparation. It was not provided.

4.13. The outcome of the disciplinary hearing was confirmed in a letter on 14 May 2019 which summarised HT's findings.

4.14. HT was asked to explain why he decided that summary dismissal was the appropriate sanction for a first offence. I accept his explanation that had the claimant admitted that he was indeed asleep or even just nodding off he would have felt able to deal with this by way of a lesser penalty. However, despite all the evidence to the contrary the claimant insisted he was alert and vigilant. HT concluded that the claimant's out right denial gave no positive element to justify a lesser penalty. He confirmed that in the past he has indeed imposed a lesser penalty where the employee accepted he was nodding off.

4.15. I find there is no foundation for the claimant's accusation that HT was determined to sack him following a disagreement about leave or evidence that OC, HT or PH conspired against the claimant.

5. **The Appeal**

5.1. On 21 May 2019 the claimant appealed the decision to dismiss him on the grounds the evidence was misinterpreted and there was no clear evidence that he was 'sleeping on duty (page114)'. It should be noted that his appeal requests that the CCTV be available at the appeal hearing and not provided to him in advance of the hearing. It should also be noted that on 18 May the claimant requested copies of a variety of documents relating to his employment but again not the CCTV used in the disciplinary hearing (pages 112-3).

5.2. On 21 June 2019 PH wrote to the claimant inviting him to an appeal hearing to be held on 2 July 2019 (page 117). I am satisfied the letter complies with the ACAS guidance.

5.3. On 2 July 2019 PH conducted an appeal hearing with a note taker (notes at pages 118-125), the claimant was accompanied by Ian Hall, PCS Union rep. Mr Hall indicated he had been fully briefed by Mr Eve. It is significant therefore that he did not challenge the veracity of the notes of the disciplinary hearing.

5.4. CCTV was played again. I note that the CCTV from the disciplinary hearing contained 2 camera angles. The claimant asserts he never saw the footage HT was unable to play. Given that the original footage contained 2 camera angles I cannot exclude the possibility that PH may have been mistaken and the longer footage was not played. Given that Mr Hall conceded the footage played showed the claimant was neither alert nor vigilant and that all the respondent's officers concluded the claimant was sleeping by viewing the same footage I find that this has not undermined the disciplinary and appeals processes.

5.5. PH refers to Standard Operating Practice 13 (SOP13) which requires vigilance at all times. Mr Hall challenged whether the witnesses actually say the claimant was asleep. Mr Hall asked for the CCTV to be played again *'from when Aju* (AT) *comes into the room'* this is confirmation from yet another source that AT was present notwithstanding the claimant's assertion he was not. Mr Hall acknowledges that the claimant is not in control of the room, he is neither alert nor vigilant. That the claimant's own representative acknowledges this having seen the video is significant as is the fact he does not challenge the quality of the recording since the claimant's representative made much of that today. Mr Hall nevertheless continues to insist the case is weak for gross misconduct because *'vigilance is not gross'*.

5.6. PH upheld the decision to dismiss the claimant which he confirmed in a letter dated 4 July 2019. The letter summarises briefly the main issues discussed at the appeal hearing and confirms PH viewed the CCTV himself.

6. **The law**

6.1. Section 98 (1) & (2) Employment Rights Act 1996 (ERA)

"(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) not applicable,

(b) relate to the conduct of the employee"

(c) or (d) not applicable.

6.2 Section 98 (4) ERA

"[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.

6.3 British Home Stores Ltd v Burchell [1980] ICR 303, EAT, a three-fold test applies. The employer must show that:

- it believed the employee guilty of misconduct
- it had in mind reasonable grounds upon which to sustain that belief, and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
- This means that the employer need not have conclusive direct proof of the employee's misconduct — only a genuine and reasonable belief, reasonably tested.

6.4 This case of course pre-dates the 1996 Act but remains a useful expression of the test to be applied.

Conclusions

7. What was the reason for dismissal?

7.1. The claimant was dismissed on 14 May 2019 for conduct which is a potentially fair reason for dismissal in accordance with S98(4) of the Employment Rights Act 1996.

7.2. There was a concerted effort by and on behalf of the claimant during the discipline and appeals process to define sleeping, dozing and nodding off. No doubt this is because the disciplinary policy specifically categorises sleeping on duty as Gross Misconduct.

7.3. Whilst I heard evidence that PH took the time to check a dictionary to define these terms in my view this was a distraction. The investigation manager, the disciplinary manager and the appeals manager all viewed the CCTV for themselves and independently reached their own conclusion that the claimant was sleeping.

7.4. That AT and VR use 'dozing' and 'nodding' at varying stages of their written accounts does not undermine the managers' conclusions the claimant was sleeping.

7.5. No evidence was put forward to suggest there was another reason for the dismissal although the claimant did suggest during his oral evidence that the respondent's witnesses had conspired against him. I found no evidence to support this accusation.

7.6. I conclude that the reason for dismissal was conduct, namely that the claimant was sleeping on duty.

8. BHS v Burchell

8.1. The next question is the three stages in the BHS v Burchell case? Burchell was decided at a time before S6 Employment Act 1980 which amended the burden of proof on questions 2 and 3 below to a neutral one. Having said that the evidence I heard today leaves me in no doubt that the respondent had reasonable grounds for concluding the

claimant was guilty of gross misconduct and that the respondent had carried out as much of an investigation into the matter as was reasonable in the circumstances.

8.2. Did the respondent reasonably believe that the claimant committed the conduct as alleged? Given that at each stage of the disciplinary and appeals process the respondent's officers viewed the CCTV and independently formed the view the claimant was sleeping on duty I conclude that the respondent did reasonably believe that the claimant committed the conduct as alleged namely that on 4 April 2019 between 13:37hrs and 13:40hrs he was asleep on duty.

8.3. Was that belief held on reasonable grounds? I find that it was. The decision was based on the CCTV and was consistent with the evidence of the supervisor and eye witness.

8.4. At the stage at which that belief was formed on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances? This means that the employer need not have conclusive direct proof of the employee's misconduct — only a genuine and reasonable belief, reasonably tested. I am satisfied that the disciplinary procedure and the appeals procedure carried out in this case were consistent with the Acas code of conduct. I have found no grounds on which to conclude the process was unfair and I dismiss this element of the claim.

8.5. At each stage of the process the CCTV was reviewed by OC, HT and PH (and by VR who I did not hear from but read his emails which refer to sleeping and dozing off). The CCTV was played at both the disciplinary and appeal hearings and replayed on each occasion at the request of the claimant and his representatives. I reject the argument that the claimant was disadvantaged by not being provided with a copy in advance of the hearing. It occurs to me that such recordings might be a valuable resource to those planning mischief at the Gallery and I make no criticism of the decision to control the viewing of it.

9. Did the respondent act consistently with S98(4) ERA in treating the claimant's conduct as sufficient reason for dismissal and was that within the range of reasonable responses open to the respondent.

9.1. By itself, sleeping on duty, misconduct, is usually insufficient to ground a fair dismissal, although it may attract a very severe warning. All the circumstances must be considered and additional factors that are likely to be taken into account by tribunals include whether the employer has a clear rule on the matter known to all those affected but the absence of such a rule will not necessarily render the dismissal unfair. In this instance the Disciplinary policy and procedure document lists 'sleeping on duty' as an example of gross misconduct. The same document states under 'Misconduct' that '*breaches affecting service to or relations with a customer will be treated more seriously than they might be in other employment because of the nature of Securitas's business*'.

9.2. The National Gallery is in a unique situation. It has in its collection priceless works of art. Art theft and protests involving criminal damage to works of art is not unknown and the visible presence of uniformed staff in gallery spaces is a valuable deterrent. That the respondent's officers concluded the claimant was sleeping in such circumstances was serious.

9.3. Case law on sleeping on duty is not helpful in this instance because it tends to deal with situations where the employee's conduct carries minimal risk e.g., In Ayub v Vauxhall Motors Ltd the claimant fell asleep during his shift having completed his quota and it was held that no reasonable employer would conclude that was gross misconduct. Were the claimant watching a building locked up for the night the fact he nodded off for a few minutes would not in my view be a sackable offence.

9.4. Notwithstanding his assertions to the contrary the claimant was unaware his supervisor stood close to him before calling on MS to witness his conduct. At the disciplinary hearing the claimant insisted AT was not present at all. I agree with the respondent's officers that the claimant was neither alert nor vigilant and was in no position to protect the works of art in his care.

9.5. I found HT's evidence as a former SO/gallery assistant persuasive. He understood that in a warm room, possibly suffering from jet lag and tired from travelling it was potentially difficult to keep from nodding off. He recognised the signs from his own experience which included checking time on a phone and rubbing his face; both of which the claimant was observed to do and conceded as much during the disciplinary hearing. HT was very clear that had the claimant not gone on to insist that he was alert and vigilant HT would have felt able to impose a lesser penalty. In his letter to the claimant of 14 May 2019 HT explained that the claimant's denial gave him concerns as to the *'standard of service which you deem to be appropriate for Securitas and the National Gallery. For this reason, I could see no other alternative but to terminate your employment with immediate effect'*.

10. Was the claimant dismissed in breach of contract?

    10.1. He was not. The disciplinary policy clearly identifies sleeping on duty as gross misconduct for which the penalty is dismissal. The policy document makes it plain summary dismissal may occur in the event of gross misconduct only after the matter has been considered through the formal disciplinary process.

    10.2. I conclude that the claimant's claims of unfair dismissal for an unfair reason by an unfair process and breach of contract are not well founded and dismissed.

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Employment Judge H Allen

Date: ……8 July 2021

Sent to the parties on: ..16 July 2021.
THY
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For the Tribunal Office