Case Number: 2302120/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE CORRIGAN (Sitting Alone)**

BETWEEN:

Mr J G Counday **Claimant**

AND

Asda Stores Limited **Respondent**

ON: **15 April 2017**

Appearances:

For the Claimant: Mr R Oulton, Counsel

For the Respondent: Mr S Crawford, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:-

1. The correct name of the Respondent is Asda Stores Limited and the title of proceedings is amended accordingly.

2. The Claimant was unfairly dismissed.

3. The Respondent is ordered to pay the Claimant £1,200 as reimbursement of the tribunal fee paid by the Claimant.

REASONS

Introduction

1. By the Claimant's complaint dated 26 October 2016 he brings a complaint of unfair dismissal.

Issues

2. The issues agreed with the parties at the outset were:

   2.1 Was there a potentially fair reason for the dismissal? The Respondent asserts that the reason was some other substantial reason or conduct.

   2.2 Was it reasonable in all the circumstances for the Respondent to dismiss the Claimant for that reason? In particular, did the Respondent have a genuine belief in a sound good business reason to dismiss the Claimant, based on reasonable grounds and following a reasonable process? Did the Respondent genuinely believe the Claimant had committed misconduct, based on reasonable grounds and after a reasonable investigation?

   2.3 Was the dismissal within the band of reasonable responses?

   2.4 Was there an unreasonable breach of the ACAS Code?

   2.5 Should the Respondent be required to pay the tribunal fee paid by the Claimant?

3. The Respondent accepted at the outset that it could not pursue dismissal for the fair reason of illegality as that requires continuing employment of the Claimant to in fact be a contravention of the law following *Bouchaala v Trusthouse Forte Hotels Ltd* 1980 ICR 721.

Hearing

4. I heard evidence from Mr Jayaschandran Pillai (Deputy Store Manager) and Mr Andrew Marsh (Store Manager) on behalf of the Respondent. I heard evidence from the Claimant on his own behalf.

5 There was a bundle of documents. The Claimant, with the agreement of the Respondent, submitted further documents during the course of the hearing.

6 The Respondent's Representative prepared a written submission and both parties made oral submissions.

7 Based on the evidence I heard and the documents before me I found the following facts.

Facts

8 The Respondent has over 300 stores in the UK and employs around 170,000 staff. The Claimant began working for the Respondent on 24 July 2002 as a Sales Assistant and at the time of his dismissal had 14 years' service. He worked for the Clapham Junction Store.

9 At the relevant time the Claimant was on a career break, due to return in August 2016. Career breaks were only granted to employees with good records and it was not disputed that the Claimant had a clean disciplinary record. He took the career break to support his wife who was pregnant and then gave birth to their second child during the career break.

10 Prior to his career break the Claimant worked 19.5 hours a week on night shifts.

11 The Claimant had temporary leave to remain in the UK and his current visa was due to expire on 26 July 2016. He therefore had temporary right to work as a result of this visa.

12 In fact the Respondent's career break policy advises against allowing a career break to extend beyond the expiry of a temporary visa. It states (at page 59 of the bundle) "to ensure best practice in line with our policy it is recommended that the end date of any career break is a minimum of 2 months prior to the date of the visa expiry. This will then give sufficient time to follow [the Respondent's procedure below] prompting the colleague to provide evidence of their ongoing right to work". The policy allows for the end date of the career break to be reviewed if prior to the end date they can show their visa (and therefore their right to work) has been extended.

13 The Respondent has a detailed right to work policy setting out the duty to make ongoing basic document checks for staff with temporary right to work in order to maintain what is known as the employer's "statutory excuse". If the employer does not have the statutory excuse and is found to have employed someone without the right to work they can be fined up to £20,000 per worker or face criminal prosecution.

14 The policy sets out the steps to be followed as the date of expiry of right to work approaches (bundle pages 39-52). Step 4 on page 43 relates to repeat checks. The Claimant's documentation falls within List B, Group 1 and the Respondent was required to check his documentation when his existing permission to work expired. The Claimant had gone through a similar process a number of times before though not when he was on a career break.

15 The procedure for managing right to work checks for those who fall within List B Group 1 is as follows (bundle pages 44-48)

15.1 60 days prior to the visa expiry a People Manager should meet with the employee to discuss the expiry and their plans to apply for a new visa, followed up by a confirmation letter (the 60 day letter) explaining the requirement to produce evidence of their application for a new visa and proof of postage to show they have applied within the correct time;

15.2 30 days prior to the visa expiry, if evidence of an in time visa application or new right to work documents have not yet been provided, a People Manager should meet with the colleague for an update on their visa application process, again followed by confirmation in writing of the evidence required with a deadline for providing the evidence (the 30 day letter). This letter should also warn of the potential consequences including summary dismissal if the evidence is not provided.

15.3 The policy makes clear that if at the time the visa expires the Respondent's Manager is reasonably satisfied that the employee has an outstanding application to extend their visa the statutory excuse continues for 28 days from the expiry of the current visa.

15.4 During the 28 day period the Manager must contact the Home Office Employer Checking Service to obtain what is known as a Positive Verification Notice (PVN) confirming ongoing right to work. It suggests allowing 14 days prior to checking for postal applications.

15.5 The policy states that visa applications sent to the Home Office's Durham office are not being acknowledged on receipt and if the employee does not have an acknowledgement letter the Manager is to email the "Labour and Employment SME" with the following details: name of employee, date of birth, nationality, date application was made and posted.

15.6 The policy states more than once that if an employee is unable to produce an acceptable document because of an outstanding application to the Home Office the Manager must contact the Employer Checking Service and obtain a PVN.

15.7 The Respondent has a Policy Team who can contact the Home Office in what is referred to as the rare circumstances where an employee says they have an outstanding application that the Employer Checking Service has been unable to confirm (page 48).

16. Neither party referred to it but there is an undated example of a completed Employer checking service enquiry form for the Claimant from which it can be seen that a reference number for the visa application is required to be able to conduct a check.

17. As the Claimant was on a career break a People Manager did not meet with him 60 days prior to the expiry of his visa. Instead on 23 May 2016 the 60 day letter was sent to him. That letter gave examples of documentation which the Respondent would accept as including a copy of his completed visa application with proof of postage and/or an acknowledgement letter from the Home Office confirming receipt of the application. It said the Respondent would then complete a check with the Employer Checking Service. He was asked to produce documentation by 26 July 2016 (page 101).

18. Again 30 days before the People Manager did not meet with the Claimant but sent the 30 day letter (page 102). Again the deadline given for producing the documentation was 26 July 2016.

19. On 22 July 2016 the Claimant met with Amy Chandler, People Manager, and provided a letter from his solicitor dated 12 July 2016 saying that his application for leave to remain had been forwarded to the UK Border Agency by special delivery and gave the special delivery reference. He also supplied proof that the item with that special delivery reference was delivered on 14 July 2016 from the Durham Delivery Office, suggesting that it had been sent to the Home Office's Durham office, which the policy explains does not provide acknowledgment. For the avoidance of doubt I accept that the Claimant's visa application was submitted to the Home Office, in time, on the 14 July 2016.

20. On 22 July 2016 Amy Chandler said that the solicitor's letter was not enough and she required a copy of the Claimant's actual application form by the 26 July 2016.

21. The Claimant did not provide this and so by letter dated 26 July 2016 Amy Chandler wrote to the Claimant saying he had failed to comply with the request for sufficient documentation evidencing his ongoing right to work, inviting him to a hearing on 28 July and suspending him without pay. He was warned that the hearing could lead to summary dismissal.

22. The hearing was dealt with by Mr Pillai. The minutes of the meeting say that the only documentation the Claimant had provided was proof of postage but in fact Mr Pillai accepted in evidence the letter from the Claimant's solicitor was in the file he saw but he believed this was not something he could consider in making the decision and that he required either an acknowledgement letter from the Home Office or a copy of the application itself. From his evidence it is clear he considered he had very little discretion but to dismiss unless the Claimant provided either the application to the Home Office or an acknowledgment from the Home Office. He did not consider he was in a position to be able to verify what the Claimant was saying and he did not think the Respondent gave him discretion to consider the solicitor's letter as proof that the Claimant's visa application had been submitted. He did not give the Claimant any further time to get the application as he considered the Claimant had already had enough chances to provide the application.

23. The Claimant confirmed that he had phoned the Home Office and they had told him they do not send acknowledgment any more but that he would receive a letter for biometrics in up to six weeks. He said that this was the first time he had been required to provide his application and that he had told the People Manager it had already been sent or was about to go. He was asked if his solicitor had a copy and he said he had not asked as he believed proof of postage was sufficient. At the end of the meeting the Claimant was dismissed.

24. The reasons for dismissal are at page 119 and state that Mr Pillai decided the Claimant did not currently have the right to work in the UK based on the evidence he had supplied. He had been given the 60 day letter, the 30 day letter and had a conversation with the People Manager on 22 July 2016. The Claimant had chosen not to get a copy of the application form from the solicitor as requested on all three occasions. Therefore as he believed Asda could not continue to employ the Claimant without evidence of his ongoing right to work he decided to dismiss.

25. In evidence Mr Pillai said he was unaware of the Claimant's length of service when he made this decision though it has been inserted in the letter at page 119. He said he had no personal information about the Claimant save that he was on a career break but not the reason for it.

26. The Claimant appealed by letter dated 8 August. In his appeal letter he said he now had additional documentation to support the fact the application was sent on 13 June 2016 (in fact his solicitors' letter said it was sent by 12 July 2016).

27. The Claimant was invited to an appeal hearing on 1 September 2016.

28. On 1 September the Claimant provided a copy of a letter dated 8 August from the Home Office to his solicitor. This included a reference number and confirmed receipt of the Claimant's application for permission to stay.

29. The appeal was conducted by Andrew Marsh. Although he had had training in hearing appeals some four years previously this was his first appeal hearing. In the appeal the Claimant relied on the fact that he now had the acknowledgement letter with reference number. Mr Marsh's focus was on the fact the Claimant had provided the letter from the solicitor on 22 July 2016 but that this was not the application or acknowledgement requested in the Respondent's correspondence and that he had not obtained the application from his solicitor by the disciplinary hearing on 26 July 2016. The Claimant said that he had called the Home Office and been told his employer could check with them. Mr Marsh asked the Claimant if he did not provide the application due it being sensitive information. The Claimant said there was confirmation on there about his family but that was not the reason he did not provide it.

30. Mr Marsh gave his decision on the same day, which is documented at page 136. He said the Claimant had now presented an acknowledgement letter which now allowed the Respondent to obtain an ECS check however he took the view the Claimant had chosen to disregard the reasonable requests from the Respondent (both verbal and written) to provide the required documentation. He considered the Claimant had been told a copy of the application was needed prior to his solicitor sending the application to the Home Office. He found the Claimant had made no effort to obtain a copy of the application in the time frame required. He found the decision to dismiss fair and upheld the dismissal on grounds the Claimant had not provided Asda with sufficient evidence of his ongoing right to work.

31. The Respondent's appeal policy in fact says that if any new significant evidence is offered at the appeal stage it must not be heard as part of the appeal but referred back to the original hearing manager to consider whether the information has any impact on their decision or whether further investigation is required. Mr Pillai was asked in evidence what he would have done if the letter of 8 August 2016 (p125) was referred back to him. He said that by the time he would have seen the document it would have been more than 28 days after the expiry of the Claimant's visa and he would have sought advice from the Regional Senior Director of HR as to whether he could reverse his decision and do an ECS check. When asked what he would have done if he had been told he could he said he would have followed instructions.

Relevant Law

32. The law in relation to unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3). . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

33. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

34. Similarly, where an employer cannot establish that there was in fact a statutory ban on employing the Claimant, it may nevertheless be able to rely on "some other substantial reason" if the employer had a genuine belief, based on reasonable grounds after a reasonable investigation, that the continued employment would be illegal.

35. In applying section 98 (4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the

range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

36. There is a Code of Practice on Preventing Illegal Working which states what an employer should do when an employee's documents in List B Group1 expire. It states that if, at the point the employee's permission expires, the employer is reasonably satisfied that the employee has an outstanding application to extend their leave in the UK the time-limited statutory excuse will continue for a further 28 days to enable the employer to verify whether the employee has permission to continue working for the employer. During the 28 day period the employer should contact the Employer Checking Service and receive a Positive Verification Notice.

Conclusions

What was the reason for dismissal?

37. The reason for the dismissal was the Claimant's failure to provide the Respondent with a copy of his application to the Home Office for renewal of his visa by 28 July 2016. In the dismissal letter this was categorised as a failure to provide sufficient right to work documentation. Although some of the language used by Andrew Marsh suggested that by the appeal he was considering the matter as a case of misconduct he did ultimately uphold the decision to dismiss on grounds the Claimant had not provided sufficient evidence of his ongoing right to work.

38. Failure to provide sufficient evidence of ongoing right to work is potentially some other substantial reason sufficient to justify dismissal.

39. For the avoidance of doubt I do not find the reason to be misconduct. I do not find on balance that is how the Respondent described it at the time. Nor do I consider that the Claimant's conduct in all the circumstances can amount to misconduct. He was on a career break and was not invited to the meetings required under the Respondent's policy. He was sent letters that said he was required to renew his right to work documentation and gave examples of the evidence required. Although one example given in the letters is the application, from the way the letters are phrased it is not compulsory to prove right to work this way if it can be proven another way. This is also clear from the Respondent's policy. The letters also said that Asda would complete a check with the Home Office.

40. Prior to the deadline he was given the Claimant produced a letter from his solicitor confirming he had submitted an application along with proof of postage. Although not strictly one of the documents listed in the letters I am not satisfied that this was not sufficient for the Respondent to conduct the promised checks with the Home Office. On the contrary, give the Respondent's policy provides that additional checks can be conducted when the Home Office does not provide an acknowledgment, I find that what the Claimant supplied was sufficient both to give the Respondent the 28 day extension in order to do the requisite checks and was sufficient for the Respondent to carry out the checks. I also note the avenues for making checks open to the Respondent within its policy under paragraphs 15.6. and 15.7 above.

41. It also cannot reasonably be said that the Claimant was ignoring the Respondent's requests given that he did provide this evidence by the date he was given. Moreover, it was not appropriate for the Respondent to insist on a copy of the actual application form given its nature as a sensitive personal document and therefore failure to provide it was not failure to comply with a reasonable instruction.

Was it reasonable in all the circumstances for the Respondent to dismiss the Claimant for that reason? In particular, did the Respondent have a genuine belief that the Claimant's continued employment would be illegal? Was this based on reasonable grounds and following a reasonable investigation? Was the dismissal within the bands of reasonable responses?

42. Mr Pillai genuinely held the belief that the Claimant had not supplied sufficient evidence and that consequently his ongoing employment was illegal. This was because Mr Pillai erroneously understood the policy to require either a copy of an acknowledgement from the Home Office or an application form. He was not aware of the paragraph in the policy that states the Home Office does not always give an acknowledgement and advising management to check with the Home Office in those circumstances.

43. Mr Marsh did not hold this belief as he accepted that by the time of the appeal the Claimant had provided sufficient evidence for the Respondent to conduct an ECS check.

44. Mr Pillai's belief that the Claimant's ongoing employment was illegal was not based on reasonable grounds after a reasonable investigation. The Claimant had provided evidence of a letter from his solicitor that his application had been sent in time to the Home Office along with proof of postage. As I found above, on the balance of probability this was sufficient to give the Respondent 28 days extension after the visa expiry to conduct checks with the Home Office.

45. It is clear from the Claimant's proof of postage that the item was delivered in the Durham vicinity. Durham is the office which does not provide acknowledgement of the application. The Respondent's policy provides that management can check with the Home Office's "Labour and Employment SME" in those circumstances. A reasonable investigation would have included such a check and on the balance of probability this would have led to confirmation of the Claimant's in time application.

46. It was not reasonable to dismiss the Claimant without doing this check.

47. It is not clear what the application form itself added prior to the ECS check as an application form does not have a reference number within it. That is provided once the Home Office acknowledges the application or presumably once the employer has done the above check in circumstances where the Home Office does not send an acknowledgement. It was not reasonable to insist upon provision of the application form instead of conducting a check with the Home Office. I have not been shown any basis for the Respondent's insistence upon seeing the application form itself and it is a sensitive personal document with personal details of the Claimant and his family.

48. Given there was evidence before the Respondent that the Claimant had submitted an in time visa application it was not reasonable to dismiss the Claimant prior to the expiry of the 28 days and conducting an ECS check. The Respondent's own policy suggests that for a postal application it is best to wait 14 days before conducting an ECS check (within the 28 day period).

49. Even if the Respondent did not obtain a reference number via the "Labour and Employment SME" or otherwise verify the Claimant's application through that route, on the balance of probability the letter from the Home Office, dated 8 August 2016, with the reference number, would have been available before the 28 days expired. At that point an ECS check could have been conducted in the usual way.

50. On the balance of probability an ECS check would have led to a Positive Verification Notice in respect of the Claimant.

51. On the basis of the above it was outside the range of reasonable responses to dismiss the Claimant for some other substantial reason on 28 July 2016 and this is unaffected by the appeal.

52. However for the avoidance of doubt it was not reasonable to uphold the dismissal on appeal without conducting a check with the Home Office/ECS check. Given the reason for the dismissal was the failure to produce sufficient information the Respondent should have investigated further and conducted an ECS check once the Claimant had provided the Home Office letter with the reference number.

53. To the extent that the dismissal was upheld because the Claimant had not provided a copy of the application form by 26 July 2016 this was not reasonable as the Claimant had provided the letter from his solicitor and proof of postage. The application form is a sensitive document and it is not clear what it adds. In considering any alleged failure by

the Claimant in this respect (which I do not accept) it was also unreasonable to ignore the Claimant's 14 years' service; the fact the Claimant was on a career break and that the Respondent's policy advises against a career break within two months of the visa expiring; and the Claimant was not offered the 60 day and 30 day meetings.

54. There was no evidence before me that the expiry of the 28 day period by the date of the appeal was a relevant consideration in the mind of the Respondent but in any event it was the Respondent that controlled the date of the appeal. There has been no explanation as to why the Respondent did not hold the appeal within the 28 day period. The Claimant informed the Respondent well within the 28 day period that he had further information.

55. For all of the above reasons the Claimant's dismissal fell well outside the band of reasonable responses open to an employer.

Was there an unreasonable breach of the ACAS Code?

56. The Claimant's representative did not point to the specific parts of the code that it is alleged were breached. The Respondent did invite the Claimant to a meeting and warned that summary dismissal was a possibility. The Claimant was offered the right to have a representative but chose to continue without one. He was also invited to an appeal and offered the right to have a representative. Had the charge against the Claimant been altered from failing to provide sufficient documentation of right to work to a misconduct charge between the first meeting and the appeal then that might well have been a breach of the ACAS Code. However reading the appeal letter, it is clear that the previous decision was upheld for the same reasons as were given at the dismissal. In my view the decision to dismiss was substantively unfair but I am not satisfied it involved a breach of the ACAS Code.

57. It does appear that the Respondent did not follow its own procedure in failing to refer the additional information back to Mr Pillai and that had this been done a different decision might have been reached. However I have not been shown how this could be a breach of the ACAS Code.

Should the Respondent be required to pay the tribunal fee paid by the Claimant?

58. Having found in favour of the Claimant it would normally follow that the Claimant's fee should be paid by the Respondent. The Respondent has not suggested any reason why this should not be the case here.

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Employment Judge Corrigan
22 March 2017