Case Number: 2301739/2016

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S Kugathasan	and	Tesco Stores Limited

Held at Ashford on 3 and 4 April 2017

Representation	**Claimant:**	Mr H Allison, solicitor
	Respondent:	Ms C Petrucci, solicitor

Employment Judge Wallis (sitting alone)

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was not unfairly dismissed by the Respondent;

2. The claim was therefore unsuccessful and accordingly dismissed.

REASONS

Oral reasons were given at the end of the hearing. The Claimant requested written reasons. These reasons have been typed from the recording of the oral reasons being announced to the parties.

ISSUES

1. By a claim form presented on 12 September 2016 the Claimant claimed unfair dismissal and holiday pay. The holiday pay claim was subsequently withdrawn and dismissed by a separate judgment.

2. The Claimant suggested that his dismissal was unfair both in terms of the procedure followed and in particular he pointed to the level of authority of the person who dismissed him; and he also argued that it fell outside the band of reasonable responses. He suggested that there could have been no genuine belief that he had committed the misconduct.

3. At the start of the hearing the issues were agreed, particularly by reference to a list of issues drawn up by the Respondent. The issues were as follows:-

    i. What was the reason for dismissal;

    ii. If the reason was conduct, did the Respondent have a genuine belief that misconduct had taken place;

    iii. Was such a belief based on reasonable grounds following a reasonable investigation;

    iv. Was there a fair procedure;

    v. Did the decision to dismiss fall within the band of responses open to a reasonable employer;

    vi. If the dismissal was unfair, should any compensation be reduced having regard to any contributory conduct by the Claimant;

    vii. If the dismissal was unfair because of any procedural flaws, should any compensation be reduced having regard to whether a fair procedure would have made any difference to the outcome.

4. It was agreed that evidence would be heard in respect of liability first.

DOCUMENTS & EVIDENCE

5. There was an agreed bundle of documents and separate bundle containing mitigation documents. There were written statements from each of the witnesses.

6. On behalf of the Respondent I heard from Mr Nicholas Boalch, store manager and the person who decided to dismiss the Claimant; and Mr Matthew Polson, employed as an area manager at the time of the Claimant's dismissal, and the person who heard his appeal against dismissal.

7. I also heard from the Claimant himself Mr Senthuran Kugathasan and read both his witness statement and the supplemental statement headed 'summary'.

8. I should mention that the Respondent produced copies of two authorities namely ***Tayeh-v-Barchester Healthcare Limited [2013] EWCA Civ 29***; and ***UPS Limited-v-Harrison EAT/0038/11.***

9. In addition, the Claimant produced a copy of the Home Office guide for employers in respect of Right to Work checks.

FINDINGS OF FACT

10. The Claimant began working for the Respondent in August 2008 and by 2012 he had become a store manager. I was satisfied that he had received substantial training and refresher training in that role in respect of the Respondent's policies and practices and the policy that is relevant to this case is the Immigration and Right to Work Policy which was in the trial bundle. I was satisfied that the Claimant had been trained and had undertaken refresher training on the computer in respect of that policy and his answers within the computer training which were also in the bundle demonstrated that he was aware of the process and the requirements and the importance of seeing documents in respect of a right to work in the UK before any of the employees were allowed to start work. I was satisfied that the Respondent's training documents set out the responsibilities of site managers in respect of Right to Work documentation checks.

11. As site manager of his store it was the Claimant's responsibility to ensure compliance. I noted that he had the resources of a personnel manager and a compliance department if he was unsure about any matter. I heard about how Ms Ntow an employee in the Claimant's store was working on a visa that expired on 21 January 2016. He reminded her about that and the need to renew the visa by a text of 2 January 2016. He did not hold a meeting with her or write formally to her as required by the procedure. Unfortunately although the visa subsequently expired the Claimant allowed her to continue working because he accepted her assurances that she would bring to him proof of her application to renew the visa. When the proof of posting was brought in by Ms Ntow it showed that she had applied for the visa to be renewed after the expiry date, and so the Respondent's policy, if consulted, was clear on that point that she should not have been working. However the Claimant took no action about that and only raised it with the personnel manager Ms Hall when Ms Hall was due to conduct an audit on 6 February 2016.

12. Text messages in the trial bundle show that Ms Hall advised the Claimant that Ms Ntow's paperwork was not sufficient and he replied that he would not allow her to work in that case. Despite giving that assurance to Ms Hall, he did allow Ms Ntow to continue to work and that therefore placed the Respondent at risk of a fine for a breach of immigration laws.

13. In addition, at around the same time the Claimant was sent a new recruit for the store Ms Ranjath, and he found that an error had been made by the recruitment people in respect of her right to work documentation. He was unable to sign her

into the payroll system because he did not have the authority to proceed with that from the Respondent's compliance section. Instead of sending her home until the compliance letter was received, he allowed Ms Ranjath to train and shadow at work for no payment and that appeared to go on for some months until it was discovered by another manager in February 2016. I heard how the Respondent later gave her some back pay in respect of those hours.

14. The Claimant was suspended on 15 February 2016 in respect of another matter which involved the misuse of vouchers. Mr Boalch investigated that particular matter and I was satisfied that he played no part in the decision-making process in respect of that matter. The decision in respect of the vouchers was a final written warning and that was given to the Claimant on 14 April 2016. Once that process was completed there was an investigation into the two right to work matters and during that second investigation the Claimant was allowed back to work although he was working at two different stores and not at his original store.

15. It is right to say that I was concerned that the Respondent had not suspended the Claimant and my concern was that if they thought that the right to work breaches were serious I wondered why there had not been a suspension. I asked the Respondent's witnesses about that but they were unable to assist me with the reasons for that decision. I return to this later. Keeping to the chronology, the Respondent's investigation officer interviewed Ms Ntow, Ms Ranjath and the Claimant. He was accompanied by his trade union representative. He confirmed that he was aware of the procedures in respect of right to work documentation and he could offer no clear explanation for his actions. He suggested that other managers had agreed with his approach to the problems.

16. The Respondent therefore interviewed the other managers that the Claimant had mentioned but none of them supported his assertion. A further investigation meeting was then held with the Claimant. Again he was accompanied by his trade union and he was able to respond to those matters. It was decided to forward the matter to a disciplinary meeting. It was at this point, when reading the documentation, I noted that the person who was conducting the investigation, Ms Lanfia, is recorded in the notes of that second meeting as suggesting that as the Claimant was 'not a threat to anyone further suspension is not required'.

17. I was satisfied therefore that the Respondent in the person of Ms Lanfia had in fact considered whether suspension was an appropriate step and had come to a decision that in itself was not unreasonable in the circumstances as clearly the Claimant was not a threat to anyone personally. An invitation letter was sent out for the disciplinary meeting on 18 May and that set out the charge of knowingly allowing a colleague to work in the Claimant's store without the correct right to work in the UK documentation. It set out that the possible outcome could be dismissal and it also set out his right to be accompanied.

18. One of the arguments in the case was the way in which the disciplinary procedure was put into action by the Respondent and I was drawn in particular to page 44 of the trial bundle which sets out the levels of authority to take in

disciplinary decisions. I noted that the way in which the managers are described in that document does not tally with what happened in this case.

19. I listened carefully to the explanation from the Respondent about that and I accepted their evidence that there had been a recent restructure exercise which had not yet been reflected in the written procedure, and the important point was that a manager of the correct work level should make the relevant decision. In this case the relevant work level was work level three because the person on that level was able to undertake disciplinary action against a manager who was at work level two and there was no dispute that the Claimant was work level two and Mr Boalch was work level three and there was email confirmation of that within the trial bundle.

20. I could not therefore agree with the Claimant that because Mr Boalch was level three for only 49 days before he chaired the disciplinary meeting that that in itself made some difference to the fairness of the decision.

21. I noted Mr Boalch's evidence that he had some four years experience as a disciplining officer and he had worked as a senior manager for some months before being signed off as a work level three grade, so I was satisfied that he had sufficient authority and experience to make a decision about the Claimant.

22. The disciplinary hearing took place on 24 May 2016; again, the Claimant was accompanied by his trade union representative and I have had a look at the minutes of that meeting and I find that the Claimant and his representative had every opportunity to raise whatever points he wanted to raised about the charges and the situation in general. It was unfortunate perhaps that he did not seek to raise all of the points that he has now raised with me at the Tribunal but of course I could only consider what Mr Boalch had before him and the information that he had as the basis for his decision. Certainly the Claimant reiterated that other managers had told him that he had done the correct thing in respect of the two employees but Mr Boalch was also aware from the investigation that the managers had been interviewed and had not supported the Claimant about that.

23. The Claimant complained at the Tribunal that not all of the relevant managers had been interviewed but he did not make that point to Mr Boalch. Perhaps the most important thing to note is that at the meeting with Mr Boalch the Claimant accepted that he had not followed the correct procedure and he accepted responsibility and he also reassured Mr Boalch that it would not happen again. After an adjournment Mr Boalch announced his decision which was to dismiss the Claimant and he explained in his evidence that he felt unable to trust him any further not only because of what had occurred but because he was not satisfied with some of the things he had said at that meeting. That decision was confirmed in a record of dismissal which was signed by all parties on that day and that set out that Mr Boalch considered that the Claimant's actions amounted to gross misconduct and he described them in the paperwork as 'knowingly allowing two colleagues to work in store without correct right to work

documentation leaving the company vulnerable to legal action and breaching trust placed in store manager'.

24. I noted that the Respondent's disciplinary procedure, under the gross misconduct section, provides for one of the descriptors of gross misconduct as 'deliberate disregard or abuse of (the Respondent's) procedures' and I was satisfied from Mr Boalch's wording in his decision documentation that that was what he considered had happened in this case.

25. The Claimant appealed against that decision and there was a dispute at the Tribunal hearing as to which documents or grounds of appeal had been put forward to Mr Polson who heard the appeal. That was to some extent clarified in the Claimant's oral evidence.

26. I found the Claimant's letter of appeal to be very brief and it referred only to one item which was that the process was not followed correctly. In evidence the Claimant accepted that the page in the bundle which sets out several grounds of appeal was not handed to Mr Polson who heard the appeal and Mr Polson in his evidence denied that any other grounds were raised with him.

27. I've seen the notes of the appeal meeting on 8 July 2016; again the Claimant had a trade union representative with him and it is clear from those minutes that he did not try to raise any other grounds of appeal despite Mr Polson giving him the opportunity to do so. The minutes show that his trade union representative in fact reiterated that the appeal was 'on process only' so Mr Polson checked whether Mr Boalch was employed at the correct level to dismiss the Claimant. After an adjournment to do so he was able to confirm to the Claimant and his representative that Mr Boalch was in fact at that correct level. The minutes suggest that when the decision was announced it was at that stage that the Claimant said that he was 'not happy' but I cannot agree with the Claimant's assertion that this was an indication that there were other grounds of appeal that had not been considered, because the ground(s) of appeal had been clarified much earlier in that meeting.

28. I found that the Claimant raised only one ground of appeal, and that was dealt with by the Respondent.

29. The outcome of the appeal was later set out in an outcome letter which was sent to the Claimant.

SUBMISSIONS

30. I heard submissions from both parties' representatives and took those into account.

A BRIEF SUMMARY OF THE RELEVANT LAW

31. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.

32. In this case, the reason relied upon by the Respondent is conduct. In the case of British Home Stores v Burchell [1978] IRLR 379 it was decided that the test was whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish that they did believe that the misconduct had occurred; (see Post Office v Foley; Boys and Girls Welfare Society v McDonald). As far as the other two limbs of the test are concerned, these go to the question of reasonableness under section 98(4) of the Act (see Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09). So, the burden of proof is neutral in respect of the second and third questions laid down in Burchell namely whether there were reasonable grounds for the belief and whether there was a reasonable investigation.

33. In Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 it was held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss.

34. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)). It is quite clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable

employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

CONCLUSIONS

35. Returning to the issues that have to be decided, as agreed at the start of the hearing yesterday, the first issue, although really there was no real dispute about that, was the reason for the dismissal, I am satisfied that the reason was conduct and so that means that the test in Burchell is the appropriate test to apply. I considered therefore whether there was a genuine belief that there had been misconduct. I am satisfied that there was no evidence to suggest that Mr Boalch had anything other than a genuine belief that there had been misconduct. Although there had been some reference to him being involved in the previous final written warning to the extent of undertaking some of the investigation, I concluded that it was clear that he had not been involved in the decision about that and it did not taint his ability to make a fair decision.

36. In any event I concluded that there was ample material before him, and indeed the Claimant's own acceptance, that procedures had not been followed in respect of the receipt of, and the need to check, right to work documentation, and so misconduct had taken place.

37. The next issue was to consider whether that belief was based on reasonable grounds following a reasonable investigation. I concluded that the investigation was reasonable in all the circumstances; various managers named by the Claimant were interviewed together with the two colleagues with the right to work documentary difficulties. Although he suggested that he had, I concluded that there was no supporting evidence that the Claimant had asked for additional managers or others to be interviewed and the Respondent had refused for some reason. He was able to respond at two investigation meetings and in addition he was able to put his case to Mr Boalch with the help of his trade union representative; I concluded that there were reasonable grounds for that belief and that it was based upon a reasonable investigation.

38. Turning then to the procedure, was a fair procedure followed? It was the Claimant's suggestion as I have mentioned that Mr Boalch had insufficient authority in order to make the decision to dismiss him but I have concluded that the evidence was against the Claimant on that, as set out above. He also suggested that Mr Polson had failed to listen to his appeal but again the evidence is against him on that and the notes show that both the Claimant and his representative were given the opportunity to put their case and both said that it was in respect of one ground only. I concluded that the procedure was not unfair; the Claimant was aware of the charges against him and the possible outcome; he had representation throughout the process and had a full opportunity to put his case.

39. The next issue was in respect of the band or range of reasonable responses and the question is whether a reasonable employer could have reasonably decided to

dismiss in these circumstances. What the Tribunal considers that it would have done in the circumstances is irrelevant. The Claimant said that the decision fell outside the band of reasonable responses for a number of reasons. Firstly, he said that there was no threat to the Respondent, but I have concluded that there was a breach of immigration rules and the Respondent could have been at risk of legal action had it been discovered by the appropriate authorities that people clearly were working without having the proper documents in place.

40. The Claimant also suggested that the decision fell outside the band of reasonable responses because he continued to work after the incident had taken place. I have considered that and as I have mentioned I was concerned about that early on in the proceedings, but I noted that that had been considered by the Respondent at an early stage and indeed I could see that Mr Boalch himself was aware of that, certainly aware that the Claimant had been working after the incident when he made his decision.

41. The Claimant suggested that two of the managers had agreed with his approach to the two colleagues but I concluded from a reading of the contemporaneous documentation that the interviews conducted during the investigation did not support the Claimant on that. Lastly, the Claimant suggested that no weight was given to his length of service or his clear disciplinary record. I noted that the record was not clear following the final written warning issued in April 2016. It was Mr Boalch's evidence that he had considered that and I was satisfied that he had done so; he explained quite clearly how he had weighed up those matters and indeed he explained how he had weighed up alternative sanctions as well.

42. Taking those matters into account, the question is whether it could be said that a reasonable employer could reasonably have dismissed in these circumstances. The circumstances were that the Claimant had a reasonable length of service with the Respondent during which he had had a lot of training in respect of their policies; he accepted that he knew the policies; and despite that there had been two serious breaches of the immigration Policy with no satisfactory explanation, and the investigation into that did not support the Claimant's assertion in respect of any support allegedly given by other managers to the Claimant's decisions.

43. I have concluded that in those circumstances a reasonable employer might reasonably have decided to dismiss. I do note that the Claimant had had a good record before the events in 2016 and I accept that it was unfortunate that his health had suffered; from what he said in evidence, it appears that he did not tell the Respondent, Mr Boalch and Mr Polson the full extent of his health difficulties, and had he done so, perhaps during the investigation, all of those details could then have been taken into account. However, I have to make a decision based on the circumstances known to the Respondent at the relevant time, and having considered carefully what the Respondent knew, I cannot say that no reasonable employer would have dismissed the Claimant.

44. I concluded that the dismissal was not unfair and the claim must therefore be dismissed.

Employment Judge Wallis
8 May 2017