



EMPLOYMENT TRIBUNALS

Claimant: Mr C Walton

Respondent: Midland Chilled Foods Limited

Heard at: Birmingham

On: 17th & 18th July 2017

Before: Employment Judge Macmillan

Representation

Claimant: In person

Respondent: Mr Howson, Employment Consultant

JUDGMENT

1. The correct name of the respondent is Midland Chilled Foods Limited.
2. The complaint of unfair dismissal succeeds but the claimant contributed to his dismissal by 2/3rds. The respondents will pay compensation to the claimant for unfair dismissal in the total sum of £2,330.56.
3. The complaint of breach of contract succeeds. The respondent will pay damages to the claimant in the sum of £2,442.00.
4. The respondents will reimburse the claimant the issue fee of £250.00 and the hearing fee of £375.00.

REASONS

The issues

1. The respondent in these proceedings has been described prior to the hearing as Midlands Food Group Limited. It is accepted by Mr Howson who appears for the respondents that that is incorrect. By consent the name of the respondent is amended to Midland Chilled Foods Limited.

2. In these proceedings Mr Walton complains of unfair dismissal and breach of contract having been dismissed by his employers without notice after 6½ years service as a driver on 8th February 2017. The respondents admit the dismissal and give us the reason that Mr Walton was guilty of theft of some of their property, being produce which he was expected to deliver to customers from a

vehicle on a regular daily round. Mr Walton accepts a certain amount of wrongdoing on his part. There is no dispute that goods deliberately loaded on to his vehicle by the respondents which were surplus to those which had been ordered did not find their way back to the depot. His explanation is that he failed to check his paperwork as is required by the respondent's procedure, in particular he failed to check what he was delivering to his regular customers and believing that the additional goods were part of that customer's regular order delivered the goods to them by mistake. He accepts that in making these deliveries without checking his paperwork he was guilty of an act of unsatisfactory conduct or misconduct under the respondent's disciplinary code which, because of its nature and the consequences to the respondent, could be reasonably described under the code as serious misconduct. He therefore concedes that should I find that the dismissal for theft was unfair there must be a significant finding of contributory fault on his part.

3. I have heard evidence from Mr Walton on his own behalf, from Mr David Webb, the respondent's van sales manager who conducted the investigation, from Mr Michael Lynch, the General Manager, manufacturing who heard the disciplinary hearing and from Mr Paul Humpage, the financial director who heard the appeal. I must compliment Mr Walton who has represented himself for the way in which he has conducted this hearing.

The law

4. I need to say a little about the law. The right not to be unfairly dismissed is enshrined in s.94 of the Employment Rights Act 1996. The general provisions with regard to fairness are contained in s.98. At subsection (1) it is provided that:-

"It is for the employer to show [that is to prove] the reason or principal reason for the dismissal which in order for the dismissal to be fair must be one which falls 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".

Amongst the reasons which fall within subsection (2) is a reason which relates to the conduct of the employee which is the allegation here.

5. The all important test of reasonableness is set out at subsection (4). This provides:

"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 reasons 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. It is necessary to say a number of things about subsection (4) and the operation of section 98 in general. It is important to understand that in the unfair dismissal context the issue for me is not whether Mr Walton did or did not steal the missing items. It is an investigation of the respondent's conduct and reasoning when determining to dismiss him on that ground. The well known case of **British Home Stores -v- Burchell** [1978] IRLR 379, established all that is

required of an employer in these circumstances is that they genuinely believe the allegation they make against the employee, and having conducted a reasonable enquiry that they hold that belief on reasonable grounds. The burden of proof on the issue of fairness is neutral. As Mr Howson has reminded me, I must not substitute my judgment for that of the employer. The issue for me is was the decision to dismiss Mr Walton one which a reasonable employer could have made on the evidence which was known to the respondents when they took that decision.

7. The approach I must take in connection with the breach of contract claim – the failure to pay notice pay following summary dismissal - is quite different. The claim will succeed unless the respondent can satisfy me on the balance of probabilities that the claimant did in fact steal goods from them. This is because Mr Howson concedes that if they fail in that endeavour it is not open to him to argue that the serious misconduct of which Mr Walton accepts he is guilty in not carrying out procedure and checking his paperwork would not justify dismissal without notice. It is therefore possible for me to come to the conclusion that while the dismissal was unfair the breach of contract claim succeeds.

The facts

8. I now turn to the facts. As I have already said, Mr Walton had been in the employment of the respondents for some 6 years and 7 months by the time he was dismissed. He had a clean disciplinary record. He was regarded as a good time keeper and he seems to have been well liked and much praised by his customers. In short there was nothing at all to arouse suspicions about his conduct until the events which led to his dismissal.

9. Around the end of November or the beginning of December 2016 a customer contacted the respondents to complain of short delivery of five, 5kg bags of pork scratchings. Although Mr Walton insists that it was only one 5kg bag nothing turns on the point. The complaint reached Mr Webb's ears and he checked with the night manager and having done so was satisfied that the missing item - which would have been very bulky - had been properly loaded onto a pallet which was to be placed into Mr Walton's vehicle. Mr Walton had undoubtedly delivered to that customer that day. Mr Walton was not contacted about the missing item. Mr Webb said in evidence that he did not contact him and ask for an explanation because he thought something sinister was going on. But that explanation does not sit very happily with subsequent events. Mr Webb did not consider the possibility that the goods had gone missing after they had been delivered to the customer despite the fact that the customer in question occupies a store in the Birmingham Indoor Market where the delivery was made and it was anything up to an hour after the delivery before the customer checked the invoice and found the goods missing.

10. My reservations about Mr Webb's explanations in connection with the bags of pork scratchings arise because of what happened a few days later when the same customer reported short delivery of pork pies. Two such events in a few days would surely have hardened previous suspicions but apparently they had the reverse effect, because this time Mr Webb did contact Mr Walton while he was still on his round. The pork pies were found in the wrong part of the vehicle, Mr Walton reported their discovery and delivered them to the customer. Mr Webb accepted in evidence that there was nothing sinister about the episode of the pork pies. A little time later that there was a similar episode with a different

customer relating to black puddings. Again, Mr Webb contacted Mr Walton while he was still doing his rounds and again the goods were found in the wrong part of the vehicle and were delivered. Mr Webb again accepted in evidence that there was nothing sinister about the episode of the black puddings. All that having been said, for reasons which may appear to be somewhat obscure in the circumstances, it was decided to mount what I have rather inelegantly characterized in these proceedings as a 'sting' operation.

11. The sting was quite simple. Goods would be loaded onto Mr Walton's vehicle without any supporting paperwork. This was to check whether he was following procedure because if he was he would discover that he had got rogue items on board and he would return them. But if that did not happen then it would seem likely that he was misappropriating the goods. So the plan was to designed to find out whether he was simply a person who cut corners or was a thief. There were four separate occasions when this was done and on each of these occasions, but totally unaware of the fact that the sting operation was taking place, the claimant was accompanied by a Mr Darren Rotton who was a supervisor. Mr Rotton's role here seems principally to have been to learn Mr Walton's route but there is no doubt that he was also actively assisting him deliver the goods. It seems to be common ground that this was a very busy route and the van would be packed with goods to be delivered.

12. The way the sting worked was that the 'pickers' in the depot would be given what appeared to be a perfectly normal invoice to pick goods against. That invoice was then cancelled so what Mr Walton was faced with was a pallet or part pallet of goods for which he had no paperwork. However, with one exception, a large litre bottle of Crucial Burger Mustard, all of the items were ones frequently ordered by his regular customers. On none of the occasions were any goods returned by Mr Walton to the respondent's depot and so, not unnaturally, the respondents felt that their worst suspicions were confirmed. Mr Walton was called to an investigatory meeting on 26th January 2017 held by Mr Webb. He was apparently so taken aback he could offer no explanation as to why surplus items had not been returned. He was shown photographs of the items after they had been packed and he suggested he was being set up. Both the claimant and Mr Rotton, who had been interviewed separately, were then required to attend a disciplinary hearing to face an allegation of theft. It was Mr Webb's view – which he asserted quite forcefully in evidence – that they had to be in it together.

13. The first disciplinary interview was on the 3rd February and was conducted by Mr Lynch who is independent of the delivery department working as he does in manufacturing. Mr Walton had now had time to collect his thoughts and suggested to Mr Lynch that as he knew he wasn't a thief the only possible explanation was that he had delivered the items to his usual customers in the mistaken belief that they were part of that customer's order. Mr Walton had accepted all along that in a significant proportion of deliveries he did not follow company procedure. The procedure required pallets to be checked against invoices when goods were loaded onto the back of the vehicle at the depot but it seems to be accepted by the respondent that this was not done as routinely as it should have been, both because of pressure to get the goods on the road and because sometimes invoices were not available until immediately before departure. The key part of the procedure was the checking of goods off loaded from the vehicle on delivery to customers. They should have been checked against the invoice when being taken from a pallet and put onto the small delivery

trolley and again checked in the presence of the customer. The reasons are self-evident. Mr Rotton's estimation was that Mr Walton only did that on 75% of occasions. Mr Walton estimated a little higher at 80-90% but he has never pretended that there were not a significant number of occasions when no checks were made. His explanation is that he trusted the people he was dealing with. At the respondent's end he trusted the night manager and the pickers and he had come to realize over the years that there were a number of customers he could trust. He only checked the invoices of the ones he did not think he could trust. He concluded his disciplinary interview by saying that the situation had arisen as a result of a mistake by a number of parties.

14. During the interview he gave Mr Lynch a list of the customers he had delivered to over the period in question and asked him to contact them to see if they had received goods they hadn't ordered. But in the meantime on or before 6th February the respondents had been contacted by one of those customers, Café 21, to say that they had had an extra box of bacon delivered to them some days earlier and were asking what to do about it. On 20th January the sting was a 'dummy' order for Café 21 and the goods in the order, apart from one item, were often supplied to that outlet. They included an extra box of bacon for which there was no invoice. In addition there was the barbeque mustard and a large box of 180 eggs, a very bulky item indeed. It is also clear that by the time the disciplinary proceedings concluded, although precisely when is less clear, Mr Walton had alerted the respondent to the whereabouts of the mustard missing from the dummy Café 21 order. He had remembered that he had removed it from the order because it was an obvious error, not being a Café 21 item, and had placed it in the cooler section of his vehicle and forgotten about it.

15. On 8th February Mr Lynch contacted all of the customers on the list. None accepted that they had received additional items, although some were equivocal when saying that they had not, and some accepted that they did not check their invoices. Mr Lynch said in evidence that the respondents no longer delivered eggs to Café 21 because the café had cancelled their order because of high levels of breakages and therefore Mr Walton should have realized that it was not for delivery to Café 21. But his contemporary note of his calls to the customers on Mr Walton's list makes no mention of an order for eggs being cancelled by Café 21, although it does record a very similar observation made by another customer all together. It is possible Mr Lynch's memory is playing tricks on him, but it is possible that his note is incomplete. Mr Walton's evidence was that over the years he had delivered large boxes of eggs to Café 21 from time to time and had no knowledge that they no longer bought eggs from the respondent.

16. On 8th February Mr Lynch was faced with two possibilities. The first was that as per the disciplinary charge, Mr Walton was a thief. The second was that Mr Walton had fallen down on the job by not doing the paperwork checks and as a result goods had been wrongly delivered to customers. Mr Lynch opted for the first possibility. The only evidence available - and Mr Lynch confirmed this without precisely saying so in cross-examination - was that the goods had left the depot without supporting paperwork, they should therefore have come back to the depot but the goods had not come back to the depot. But evidence is simply the starting point - the reason for the first investigatory meeting. There were three competing theories. Mr Webb's view was that this scam could only have worked if Mr Rotton and Mr Walton had been in it together. But Mr Lynch clearly did not go along with that as he was able to conclude that Mr Rotton was not

guilty of theft, only the lesser offence of failing to properly supervise Mr Walton and to exercise his authority when he realized that Mr Walton was not checking his paperwork. Mr Lynch's theory was that the claimant was operating on his own because there had been periods of time when Mr Rotton stayed in the vehicle when goods were being delivered. He believed that Mr Walton either sold the missing goods to the customer in the absence of Mr Rotton for cash which he kept, or left the goods at the customer for later collection. It is not clear whether Mr Lynch was aware of Mr Webb's views or if he was why he disregarded them. The third theory was Mr Walton's which was that the goods had been incorrectly delivered because he had failed to check his paper work and had just assumed that they were part of a regular order.

Discussion and preliminary conclusion: Unfair dismissal.

17. By the time Mr Lynch came to decide to dismiss Mr Walton for theft he knew that Café 21 had contacted the respondents to say that they had had an extra box of bacon delivered on 20th January and he also knew that the mustard which was part of the same consignment, was in Mr Walton's vehicle and was not missing. He dealt with that information in this way- he simply decided that those items had not been stolen and so discounted them but he could not see any reason why the fact that these items had both turned up should have any bearing on his view that the remaining items had been stolen. He also did not seem to be concerned by the possibility that none of the customers who might have had extra, un-invoiced, items delivered to them were likely to own up to that fact nor that at least in the case of the earlier deliveries in the series the customers may genuinely have forgotten. Being in manufacturing rather than delivery he may have been unaware of Mr Webb's opinion that there were certain customer's he wouldn't trust with a barge pole.

18. In my judgment the reasonable employer would not have come to the same conclusion as Mr Lynch. The only one of the three competing theories which had any supporting evidence was Mr Walton's. Mr Lynch's and Mr Webb's theories were based on guess work. Once Mr Walton had had the opportunity to gather his thoughts he had maintained that because he had not checked the paperwork properly and because he had assumed that these were part of the routine orders of his regular customers, he had mistakenly delivered the additional items to those customers. That theory was given at least some support by the contact from Café 21 about the missing box of bacon and further support by the fact that the burger mustard had been removed from the dummy order because it was recognized as a rogue item and left in the van. Where there are three competing theories only one of which has any supporting evidence, in my judgment it is not open to the reasonable employer to go in favour of one of the theories with no supporting evidence particularly where the two theories advanced on the respondent's side by Mr Webb and Mr Lynch are so different as to the rather essential element of how the goods came to be stolen.

19. The unreasonableness of the decision to dismiss was not corrected at the appeal which was heard by Mr Humpage, the finance director. He had had no training in hearing disciplinary appeals and this was the first appeal he had heard. Despite the fact that one of the grounds of appeal was that Mr Walton was not guilty of theft but only of what he described as "a few lapses in checking procedures" Mr Humpage's previously prepared questions for use at the appeal rather suggest that he was starting from the premise that Mr Walton was indeed

guilty of theft. One question reads – “Would you be able to trust someone that admitted to not following checking procedures but also had misappropriated stock?” I find Mr Humpage’s letter dismissing the appeal rather difficult to follow, in particular the second bullet point which reads:

“you claim you are not a thief, yet you have failed to return any excess stock which had been clearly put on your vehicle on the four days in question and was proved on one occasions, when a customer, Café 21 reported a case of bacon over on a delivery, which you say was 5 days later”.

Whatever that sentence is intended to convey it clearly indicates that, like Mr Lynch, Mr Humpage did not think the fact that at least one item from the list had clearly not been stolen cast doubt on the respondent’s theory and supported Mr Walton’s theory that the goods had gone missing because of sloppy procedure on his part.

Conclusion: Unfair dismissal

20. In my judgment the respondent did not have reasonable grounds for preferring their theory that Mr Walton was a thief over Mr Walton’s theory that he had mistakenly delivered the missing items to regular customers because of failure to adhere to the correct procedures. Such evidence as there was would have led the reasonable employer to reject the theft theory. However, that is not the end of the story by any means.

21. Compensation for unfair dismissal falls into two principle components; the basic award and the compensatory award both of which may be reduced in certain circumstances. The basic award falls to be reduced under s.122(2) of the 1996 Act:

‘Where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly’.

Section 123(6) permits the reduction of the compensatory award:

‘Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such a proportion as it consider just and equitable having regard to that finding’.

There are technical differences between those sections and the way in which they operate which need not trouble us.

22. Mr Walton has accepted that he is in breach of the respondent’s disciplinary policy, in particular that part of it covering unsatisfactory conduct and misconduct. It is Section C of the policy. Examples of that kind of conduct are given and at (e) we find ‘unsatisfactory standards or output of work’, and at (i) ‘failure to follow rules and procedures’. Under ‘serious misconduct’ the following appears:

‘Where one of the unsatisfactory conduct or misconduct rules has been broken and if upon investigation it is shown to be due to your extreme carelessness or has a serious or substantial effect upon our operation or reputation you may be issued with a final written warning in the first instance’.

23. Mr Walton accepts, and I think he is right to do so, that his conduct warranted a final written warning under that provision. I do not accept Mr Lynch's premise that even in the absence of theft, summary dismissal or dismissal with notice was justified. This was unsatisfactory conduct or misconduct which warranted a final written warning under the respondent's own rules, and that was the punishment handed out to Mr Rotton despite him already being subject to a written warning and facing a second disciplinary charge arising indirectly from these events which Mr Walton was not facing. The compensation which the respondents will pay to Mr Walton must be reduced to reflect that degree of culpable and blameworthy behaviour, that being the accepted definition of contributory fault, and in my judgment the appropriate measure of that reduction is 2/3rds. So the compensation which Mr Walton will receive for unfair dismissal will be reduced by 2/3rds.

Conclusion: Breach of contract claim

24. The complaint of breach of contract also succeeds. The respondent has failed to satisfy me, on the balance of probabilities, that Mr Walton had dishonestly appropriated the missing goods or been involved in their dishonest appropriation. I should add here for the sake of completeness that had I come to the conclusion that the respondent's decision to dismiss Mr Walton was not unfair I would still have found they had acted in breach of contract in dismissing him without notice because they have not satisfied me on the balance of probabilities that he had as a matter of objective fact purloined the missing items. Damages for breach of contract are not reducible for contributory fault.

Remedy

25. The parties having sought permission to agree compensation, compensation is agreed as follows.

- Damages for breach of contract - £2,442.00
- Basic award of compensation for unfair dismissal - £1,422.63
- Compensatory award - £907.93

The respondents will also pay to the claimant the issue fee of £250.00 and the hearing fee of £375.00.

Employment Judge Macmillan

____ 30th July 2017 _____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

1 August 2017

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FOR THE TRIBUNAL OFFICE