Case Number: 3200150/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Mr P Ashton**

Respondents: **(1) Nicholls & Clarke Limited**
(2) N & C Building Products Limited

Heard at: **East London Hearing Centre**

On: **7 & 8 June 2017**

Before: **Employment Judge O'Brien**

Representation

Claimant: Ms L Millin of Counsel
Respondent: Mr D Bansal, Solicitor

JUDGMENT having been sent to the parties on 13 June 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 By ET1 submitted on 7 February 2017 the Claimant complained of unfair dismissal, wrongful dismissal and also for arrears of holiday pay. In the latter regard, the particulars of claim makes no mention of arrears of holiday pay and in so far as it is necessary that complaint is dismissed upon withdrawal. The Respondent resists the complaints.

2 The Claimant gave evidence on his own behalf, and on behalf of the Respondent the Tribunal heard evidence from: Keith Hall (Commercial Director of Building Products and the investigating officer), Geraint David Cooper (Financial Director, Company Secretary and disciplining officer) and David Forbes (Chief Executive Officer and appeal officer). The Tribunal was provided with an agreed bundle comprising 163 pages and was also provided with a list of legal issues, prepared by the Respondent but in respect of which the Claimant took no issue. Each of the representatives provided me with written submissions at the end of the case which they supplemented with oral submissions.

Facts

3 I found the following facts, resolving any issues of fact on the balance of probabilities.

4 The Claimant was employed by the Respondent from 1 August 2013 until 18 November 2016 when he was summarily dismissed for alleged gross misconduct.

5 The Claimant was employed initially as Trade Counter Sales Assistant until he was moved to the commercial sales office in June 2016 to the plumbing and heating department, an area which the Respondent wished to develop and intended to use the Claimant's skills and experience. The Claimant and his seven colleagues in that department sat at desks which were arranged in clusters of four or six, each with their own phone.

6 The Claimant was well thought of and hard working.

7 In late 2015, orders were process ostensibly for Barnes Construction Limited but which transpired to be fraudulent orders which resulted in loss to the Respondent. Both of the Barnes Construction orders in question were quoted for by the Claimant and one was eventually processed by him. The other was processed by Viv Barham. The investigation into those losses gave no firm leads and so no disciplinary action was taken against anybody.

8 In December 2015, a stock check disclosed a deficiency in stock to the value of approximately £20,000 in missing boilers and associated flu sets.

9 In February 2016, a fraudulent order of approximately £2,400 was stopped by Heidi Smith, Assistant Manager for telesales.

10 In January 2016, Rob Farmer had given a quote for Makita power tools totalling approximately £5,300 (inclusive of VAT) ostensibly to G3 Construction Limited, a customer of the Respondent. That quotation was printed out by the Claimant on 8 September 2016 and again on 23 September 2016.

11 On 29 September 2016, the Claimant passed the name and number of the customer to Mike Roberts together with an order number suggesting that the customer would phone back when mobile reception was better. It transpired that that order number given was for a different order and the Claimant found the correct order number later for Mr Roberts. The customer in fact eventually asked Mr Roberts to fulfil both orders totalling approximately £6,000. This represented 60% of the Respondent's monthly turnover in power tools sales.

12 The order was, however, a fraudulent transaction and the customer refused to pay and the goods were lost to the Respondent.

13 On 4 November 2016, Gary Gingell was informed that a false change of address had been processed in respect of AKS Design Limited, another customer of the Respondent. That notification misnamed the customer as ASK Design Limited but gives the customer number of AKS Design Limited. It also gives contact details for Robert Silverton, including the mobile number 07587 592165.

14 Mr Gingell suspected the Claimant's involvement in the fraud in part because of his connection with the previous Barnes Construction matter. Mr Gingell contacted Mr

Silverton and expected Mr Silverton to call his "inside man", and so followed the Claimant when he saw him leave the sales office to make a telephone call on his mobile phone. He saw the Claimant on his mobile phone and challenged him about the call, and also about his failure to wear a hi vis jacket.

15 Mr Gingell subsequently reported that the Claimant had terminated the call and so could not see the number that the Claimant had called.

16 Mr Gingell and Keith Hall met shortly afterwards with the Claimant. I accept the Claimant's version of what happened at the meeting which is as follows.

> "Gary Gingell began shouting at me aggressively: "What the fuck are you doing?!" I was shocked and told him I did not know what he was talking about. Gary Gingell then shouted: "Don't give me the big bollocks and pretend you don't know why you are here!" Again I calmly replied that "I don't have a clue why I am here" I was then told that: "We can do this the easy route or the hard way."

17 I resolve that apparent issue of fact because Mr Hall recalls Mr Gingell swearing once, and accepted that "industrial language" (my phrase) is not uncommon in the trade and also in the area where the Claimant worked. Moreover, it is evident from the contemporaneous notes that the Claimant was told that Mr Gingell did not have time for any missing about.

18 The Claimant was escorted from his desk and then from the building and his suspension was confirmed by a letter dated 7 November 2016. That letter notifies the Claimant that the Respondent was currently investigating allegations but a number of unauthorised transactions had been processed on the system.

19 The Claimant attended the investigatory meeting that he had been given notice of in that letter and he was asked initially about the Barnes Construction matter and also about an order in respect of a customer named Effectable. However, the meeting concentrated on the G3 order and the AKS change of address. In respect of the G3 order, the Claimant said that he had taken an order from a customer with an order number and passed it to Mike Roberts. He claimed not to have previous knowledge of the customer but when challenged that he had printed the order in question one and two weeks prior at 7.20 and 7.40am respectively he said he could not remember why he had done that. He speculated that the customer had phoned him and that he would have printed the order off in each occasion to discuss the matter.

20 In respect of AKS, the Claimant denied that he had any knowledge about the account. He was challenged that Mr Silverman's number had been phoned twice on 1 November from his phone. He did not know if he had rung and said that anybody could have asked him to do so.

21 Mr Hall considered that the Claimant's explanations were unsatisfactory and that he had a case to answer. The Claimant was therefore invited by a letter dated 11 November 2016 to a disciplinary hearing with Mr Cooper to take place on 16 November 2016. He was notified that it was alleged that he had "knowingly assisted in the theft of company products" and that the company considered this to be gross misconduct. He

was warned that the outcome of the meeting might well be his summary dismissal. Attached or enclosed with the letter were the relevant statements and documentary evidence to be relied upon at the disciplinary hearing.

22 At the disciplinary hearing, the Claimant was asked about the two incidents which formed the focus of the allegations against him. The Claimant could still not remember why he had printed the G3 quote. He assumed that G3 had called and that he had printed the order off in order to discuss it because it was his practice so to do. He said that he used to deal with all products when in the trade centre but was "only allowed to deal with his own teams of products" since moving to the sales office. He said he had passed the order to Mr Roberts when he realised that it was an order for power tools. He could not remember how the customer had got through to him on the two occasions he had printed off the order.

23 In respect of AKS, the Claimant said that he could not remember the calls. He raised the possibility that Ellen O'Hara had been sharing his phone, because hers had been unserviceable. The Claimant challenged Mr Gingell's statement that he had ended the phone call when he saw Mr Gingell. The Claimant did not, however, produce any phone records to show the number that he had called.

24 Mr Cooper investigated when Ms O'Hara's phone had been unserviceable and discovered that that had been 31 October 2016, the day before the day in question.

25 Mr Cooper understood that the allegations were serious but was not satisfied with the claimant's explanations for connection to both incidents of fraud/theft. He concluded that the claimant was involved in those incidents and wrote on 21 November 2016 setting out his findings. In particular, the letter concluded:

> 'After careful consideration I find your explanation unacceptable because in respect of the Makita order you have provided no reasonable explanation as to the reasons you printed the quotes in the first place on two different occasions, not passing the order to the relevant department earlier and then when finally passing the order to the correct department, specifically stating to your colleague not to phone the customer but that they would phone back.
>
> 'In respect of the AKS change of address and subsequent fraudulent order you have again failed to provide a reason, saying you cannot remember as to why you would call this number twice on the day the address change was requested and there is no reason as to why you would phone this number bearing in mind this phone number is now dead.
>
> 'The links between yourself and these two fraudulent orders are suspicious and you have failed to provide any valid explanations. The trust needed between employer and employee has broken down and therefore I find your actions amount to gross misconduct and I have decided therefore to summarily dismiss you from employment. This means that you are not entitled to notice or to payment in lieu of notice. Your date of dismissal is Friday 18 November 2016.'

26 The letter notified the claimant of his right to appeal against dismissal. The claimant did so in writing, raising in particular: the abuse by Mr Gingill; that he was being treated as a scapegoat; that he shouldn't be blamed for the losses arising from the Makita order, having only printed off the quote; and that he had no knowledge of why he might have called the AKS customer contact.

27 The claimant was invited to an appeal hearing with Mr Forbes on 5 December 2016 by letter dated 30 November 2016. A copy of the notes of the disciplinary hearing were attached.

28 Mr Forbes had been aware at the time that Mr Gingill was concerned about fraud and had had his suspicions about the claimant, but did not know the details of the evidence before becoming in the appeal.

29 The Claimant was given an opportunity to make whatever submissions he wanted; however, his appeal was dismissed.

Facts Relevant to Contribution/Wrongful Dismissal

30 The contract made provision for notice of termination. For an employee with the claimant's length of service, the contract provided for 3 weeks' notice.

31 It is uncommon but not unknown for sales staff in the office to use each other's phones; they all have their own dedicated lines at their desks. However, it is likely that someone acting with nefarious intent would use someone else's phone to avoid being traced.

32 The claimant did not stay permanently as his desk. He sometimes went to the trade desk, sometimes to speak to colleagues in the sales office and sometimes, of course, to the toilet.

The Law

Unfair Dismissal

33 Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed.

34 Section 98 ERA 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—*
> *…*

> *(b) relates to the conduct of the employee,*
> *…*
> *(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.*
> …'

35 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

36 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

37 Where the reason for dismissal relates to the employee's conduct, the Tribunal will ordinarily consider whether the employer held a genuine belief in the employee's guilt, reached on reasonable grounds following a reasonable investigation (**British Home Stores Ltd v Burchell [1978] IRLR 379**).

38 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**); the Tribunal must not substitute its own view of what the employer should have done (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17**). The dismissal process must be considered in its entirety. To that end, a defective appeal might in all the circumstances render unfair a dismissal which to that point had fallen within the range of reasonable responses (**West Midlands Co-operative Society v Tipton [1986] AC 536**); alternatively, the appeal might cure a dismissal which to that point had been unfair (**Taylor v OCS Group Ltd [2006] ICR 1602**).

39 Should an employee be unfairly dismissed, the Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA).

40 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that she would have been dismissed in any event, pursuant to s123(1) ERA and the authority of **Polkey v AE Dayton Services Ltd [1987] IRLR 503**.

Wrongful Dismissal

41 An employee is entitled under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 to bring a claim in the Employment Tribunal for damages arising from or outstanding on termination of employment.

42 An employer is entitled to dismiss an employee with no notice or less than the period that the employee's contract provides for only if dismissing in response to a fundamental breach of contract on the part of the employee.

43 Whether misconduct is sufficient to justify summary dismissal is a question of fact; conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment (**Neary v the Dean of Westminster [1999] IRLR 288**).

44 The burden of proving such a fundamental breach of contract lies with the employer.

Conclusions

45 It has been suggested that the Claimant was a scapegoat for the losses suffered by the Respondent through fraud and theft. However, the Claimant was a well-valued employee who had had no problems with the Respondent before the events in question. There is no obvious reason, therefore, why he would be singled out and dismissed on a pretext.

46 Indeed, it is clear that he was dismissed because Mr Cooper believed that he was involved in the theft or fraud perpetrated on the Respondent in respect of the G3 Makita order and the AKS order. No material distinction arises from whether these were instances of fraud or theft; the key issue was that they were a breach of the trust that the Respondent held in the Claimant. I am satisfied, therefore, that the Respondent held a genuine belief in the Claimant's guilt. Moreover, these were matters of conduct, and so the Respondent has proved that it had a potentially fair reason for dismissing the Claimant.

47 The grounds that Mr Cooper held for believing that the Claimant was involved in the theft/fraud comprised the following:

47.1 The Claimant was connected to both of the G3 and the AKS orders.

47.2 The Claimant denied prior knowledge of the G3 order but had printed it off twice only weeks before the fraudulent incident.

47.3 The order was of a significant and therefore memorable size.

47.4 The Claimant claimed to know nothing about the AKS account.

47.5 When challenged about phoning Robert Silverton, he was unable to explain why he had.

47.6 The Claimant did not initially deny phoning Mr Silverton and only later raised the possibility of Ellen O'Hara using his phone.

47.7 He did not suggest that anyone else had used his phone.

47.8 He was unable to remember two calls to the same person on the same day.

48 The Respondent's conclusion the Claimant had been involved in the fraudulent activity/theft was well within the range of those available to a reasonable employer on such grounds.

49 The claimant raised only one line of enquiry, whether Ellen O'Hara might have used his phone, and that was investigated by the Respondent. Even if the Respondent had investigated why the Ironmongery section had not checked the veracity of the orders in question, it would have had no bearing on the claimant's culpability in passing a fraudulent order to the section in the first place. It is not suggested that any other avenue was unexplored in the investigation. I am satisfied, therefore, that the investigation fell within the range of reasonable investigations which might have been conducted in the circumstances.

50 The Respondent having concluded that the Claimant was involved in fraud and/or theft, it cannot realistically be said that dismissal was outside the range of reasonable responses. Furthermore, each of those matters is clearly identified in the employee's handbook as being matters of gross misconduct. In any event, involvement in either or both such matters would inevitably fundamentally damage or destroy trust and confidence.

51 I considered then other matters of unfairness which have been ventilated in this hearing. I am satisfied that, notwithstanding that the decision makers were aware in outline of the allegations involving the Claimant ahead of the time when they became all involved in the process, they kept an open mind when making their respective decisions. It is unsurprising that, in organisation which has only six directors, they all might be aware in outline of such serious matters. I was, however, impressed by the diligence and seriousness with which the decision makers approached their tasks.

52 I do find that Mr Gingell's language towards the Claimant of 4 November was inappropriate, notwithstanding that industrial language may well be used in East End builders' merchants. The important thing, however, is that it did not prejudice the Claimant's case in any material way.

53 In the circumstances, whilst the outcome was harsh, it was nevertheless fair.

54 Turning to the Claimant's claim for wrongful dismissal I remind myself that the burden is on the Respondent to prove that the Claimant was involved in the alleged theft and/or fraud. I remind myself that in civil proceedings, whilst the test is always the balance of probabilities, serious allegations require cogent evidence to satisfy the balance. I find that there very much was a case to answer for the Claimant for the reasons that I

have given above. However, ultimately before me there was no sufficiently cogent evidence upon which I could be satisfied on the balance of probabilities that he indeed had acted fraudulently. Ventilated before me, but unfortunately not before the employer, was the fact that it may well have been possible for an inside man to use the Claimant's phone for his nefarious activities whilst the Claimant was away, perhaps speaking to a colleague or visiting the toilet. I find, therefore, that the Respondent has not established that it was entitled to dismiss the Claimant without notice. It follows that I award the Claimant damages equating to three weeks' net pay.

55 I can see from the Claimant's wage slips that his net monthly pay was £1,676.56. Therefore, his net weekly pay at the time of dismissal was £386.90, and so I award damages of £1,160.70 to be paid without deductions for tax or National Insurance.

Employment Judge O'Brien

14 August 2017