



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr W Edwards**

Respondent: **Perrys Motor Sales Ltd**

Heard at: Ashford Tribunal

On: 9 and 10 March 2017

Before: Employment Judge Freer

Representation

Claimant: In person

Respondent: Mr McNerney, Counsel

REASONS FOR JUDGMENT

1. These are the written reasons for the judgment of the Tribunal sent to the parties on 10 March 2017 that the Claimant's unfair dismissal claim is unsuccessful.
2. These reasons are provided at the request of the Claimant. Oral reasons having been provided at the hearing.
3. This is an unfair dismissal claim pursued by Mr Edwards against Perry's Motor Sales Limited. It is a matter that has been remitted back in full from the Employment Appeal Tribunal. As a consequence I have not referred myself to the previous Employment Tribunal decision and have considered this matter completely afresh.

The law

4. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.
5. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of

- permissible reasons. The Respondent in this case relies upon a reason relating to the Claimant's conduct.
6. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

“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”
 7. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of a reasonable employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).
 8. It is established law that the guidelines contained in **British Home Stores Ltd –v- Burchell** [1980] ICR 303 apply to conduct dismissals, such as in the instant case. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).
 9. It is also established law that the **Burchell** guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).
 10. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.
 11. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR

1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct.

Findings of fact and associated conclusions

12. I have received evidence from Mr Edwards and also Mr Martin Kerry the Group Sales Director and Mr Graham Knell, now Regional Director, on behalf of the Respondent
13. I have been presented with a bundle of documents comprising 303 pages.
14. The Claimant commenced employment in 1992 with a company named Pomphreys, a main Vauxhall dealer, and on 1 September 2013 the business was transferred to the Respondent, which is a large motor trade company that employs some 1500 employees.
15. At the material times the Claimant was employed as a Service Manager.
16. The circumstances of this claim arose from the dismissal of the Claimant in connection with a delayed claim for payment under the Vauxhall Warranty System in respect of a customer vehicle repair.
17. It is not in dispute that the Claimant entered a claim under the Warranty System and in doing so changed the date of repair to one that fell within the 45 day claim period.
18. Addressing first genuine belief, it is my conclusion that the Respondent did genuinely believe in the Claimant's misconduct. That Mr Kerry and Mr Knell, the decision-makers, held a genuine belief in the matters raised was not materially challenged by Mr Edwards. There has been no suggestion of any alternative reason, such as trying to manage the Claimant out of the organisation or cost implications of his continued employment. There has been no evidence of a sham. Therefore, I conclude that the Respondent did genuinely believe Claimant's conduct
19. With regard to procedure, the Claimant was called to an investigation meeting on 19 November 2014 and notes were produced of that meeting. Mr Knight, the Claimant's line manager was also interviewed and notes produced. There was also an email from Ms Sue Newton-Keane, the Respondent's After Sales Auditor, relating to her input into the circumstances.
20. As a result of those matters the Claimant was invited to a disciplinary hearing by letter dated 21 November 2014. The Claimant was provided with the relevant paperwork. No issue was raised at this Tribunal hearing by the Claimant in that respect. The disciplinary charge is set out clearly in the letter, which also warns that the disciplinary issue under review could result in dismissal. The Claimant was given the right to be accompanied.
21. The disciplinary hearing took place on 25 November 2014. Notes were made of that meeting and the Claimant was given an opportunity to correct those

- notes before a decision was made.
22. The Claimant was given a full opportunity to participate in that meeting and confirmed at its conclusion that he had nothing else to add.
 23. At the meeting the Claimant was not accompanied. The request for Mr Knight to accompany the Claimant was reasonably declined by the Respondent on the basis that there may be issues that arose out of that meeting that would relate to him. The Claimant had been notified of this the day before, was offered any other member of staff to accompany him, and confirmed his wish to continue unaccompanied (page 83).
 24. The Claimant's dismissal was conveyed by a letter dated 02 December 2014 (page 105 of the bundle). It is my conclusion that this letter is reasonably detailed and reasonably sets out the reasons for the decision. The Claimant was dismissed on notice and was provided with the right of appeal.
 25. The Claimant appealed by an email dated 7 December 2014, which is at page 107 of the bundle. That letter asks for the Respondent to revisit the matter and Mr Edwards states that "Having given 26 years to the Sittingbourne business I feel I should be given options that may assist me to understand how I have reached this point in my life. My family are devastated with this decision after the support given by them to me during this year for working additional hours for the business which appears now was given in vain. I also ask that consideration on the staffing issues are taken into account as this looks a forgotten issue. I will note that I was promised assistance and help with running the Department I received very little. I hope you will at least allow me to meet with you and discuss the areas of concern and any options to avoid dismissal if only to allow me a better chance to obtain new employment and depart with some dignity".
 26. The Claimant was invited to an appeal hearing by letter dated 09 December 2014 and again was given the right to be accompanied. The Claimant received all the relevant paperwork and again no issue was raised on that point.
 27. The appeal hearing took place on 15 December 2014. Notes were taken and the Claimant had an opportunity to correct those notes. He was given a full opportunity to participate in the hearing and confirmed that there was nothing further that he wished to add.
 28. The appeal outcome was provided in a letter dated 22 December 2014. It is my conclusion that this letter is sufficiently and reasonably detailed for the Claimant to understand the decision made.
 29. The only potential issue relating to procedure is whether Mr Knight should have been called as a witness at the disciplinary hearing, but that was not raised by the Claimant at the time. The Claimant only raised the issue of Mr Knight accompanying him at the disciplinary hearing, but as stated above, that was reasonably declined because there may have been issues that arose out

- of the meeting that needed to be addressed separately by Mr Knight.
30. The evidence of Mr Kerry, accepted by the Tribunal, was that the repair date change issue ultimately did not involve Mr Knight and therefore this was not pursued with him. The Claimant did not request Mr Knight to be questioned at either the disciplinary or the appeal hearing. There is no such reference in the meeting notes.
 31. Having regard to the entire procedure, it is my objective conclusion that overall it fell comfortably within the range of reasonable responses.
 32. With regard to reasonable belief in the misconduct, I agree with Mr McNerney's submission that it is necessary to look at the reason for dismissal and to form a view of the Respondent's reasonable belief at the time of dismissal.
 33. The dismissal letter gives the reason for dismissal as falsifying the date of repair, which had the effect of making the warranty claim fall within the 45 day period when in fact that the repair date had fallen outside that period and this amounted to a fraudulent warranty claim.
 34. Although a disciplinary charge, the Claimant was not dismissed for failing to control his work in progress.
 35. I have been referred to Mr Kerry's witness statement at paragraph 19 where he states that: "I felt Mr Edwards actions in deliberately changing the last worked date on the warranty claim for [the customer] would be considered by Vauxhall to be a serious breach of the warranty process and would put at risk the relationship with the manufacturer which could have affected all our 14 Vauxhall sites not just Sittingbourne".
 36. I accept that the outcome letter does genuinely set out the reason why the Claimant was dismissed.
 37. Therefore, the question is whether the Respondent had a reasonable belief in the Claimant falsifying the date of repair which amounted to a fraudulent warranty claim.
 38. I have referred myself to the notes of the hearing at the disciplinary and appeal meetings. That is important because I have received a good deal of argument during this hearing of various different issues, but I need to base my decision on the material that was reasonably before the decision-makers Mr Kerry and Mr Knell when they made their decisions.
 39. I have carefully read the hearing minutes and have been taken to a number of references in the disciplinary notes by the Respondent.
 40. For example, the notes record at page 89 Mr Kerry states: "The repair date was amended to get the claim through, is that correct?" to which the Claimant responded "Yes".

41. At page 90 Mr Kerry states: "You agree that this is a fraudulent claim? We are telling Vauxhall that the car was last worked on on 20 October not 28 August?" The Claimant: "That wasn't my intention". Mr Kerry: "You agree it was a fraudulent claim?" Claimant: "Yes".
42. At page 91 Mr Kerry stated: "So before you submitted it you knew it wouldn't meet the requirements for a valid claim?" to which the Claimant replied "Yes".
43. At page 92 Mr Kerry stated: "Do you accept that you altered the date that made the claim fraudulent?" to which the Claimant replied "Yes".
44. Also during the disciplinary hearing Mr Edwards stated that: "I thought PGT had run out and the only way to find out the PGT still applied was to submit it". Mr Edwards in the course of this Tribunal hearing argued that he needed to amend the repair date to put the matter through the system to create an invoice to "write-off against policy", which was in essence the Respondent's bad debt account. However, during evidence in the course of the Tribunal hearing it appears that other options were available such as a Department invoice being "written off against policy", although that may have needed authority from Mr Knight the Claimant's line manager. This route was not used. The evidence from the Claimant suggested it had been used in the past for smaller sums of money where authorisation was not required. However, all that is irrelevant to my consideration. What is important is what was argued before Mr Kerry and Mr Knell. The special invoice defence was not argued in any detail in the disciplinary and appeal meetings and certainly the Claimant does not mention that he had deliberately not inputted order numbers to guarantee that the matter would not be paid by Vauxhall.
45. In the investigation process the Claimant said that Ms Sarah Dean told him to put the matter through. However, an e-mail dated 24 November 2014 Ms Newton-Keane confirmed to Ms Carter and Mr Kerry that she had phoned Ms Dean who stated that would not have occurred and that if she had any instructions from Vauxhall they would be confirmed via e-mail and a paper-trail would have been attached to them (see page 82).
46. In the circumstances this was information upon which Respondent could reasonably rely. It is not clear from the investigation notes whether that conversation with Sarah Dean took place before or after the 45 day period expired, but in any event Ms Dean's position is set out in the email and it was reasonable for the respondent to rely on that information.
47. It was also reasonable for the Respondent to conclude the Claimant was not instructed to change the date by Mr Knight, as accepted by the Claimant in evidence.
48. My conclusion is that it was within the range of reasonable responses for Mr Kerry and Mr Knell on the information they had available on balance to believe that the date of the repair was falsified and in the circumstances that amounted to a fraudulent warranty claim.

49. Once I have considered the Respondent held a reasonable belief after a reasonable investigation the next issue is sanction.
50. At the time of the event the Claimant was on a final written warning for which on the face of it appears to be for a similar matter. That final written warning was given on 19 May 2014, less than six months prior to the events in question.
51. The Claimant did not appeal the final written warning and I cannot go behind that decision unless to award it was manifestly inappropriate. There is no evidence before me to show that it was manifestly inappropriate and the Claimants failure to appeal significantly militates against it falling within that description.
52. Therefore, the Respondent was reasonably entitled to take the final written warning into account.
53. The Respondent on my finding of fact considered the mitigating, or potentially mitigating circumstances, such as the Claimant's length of service and staffing issues. In my conclusion it was within the range of reasonable responses for the Respondent to dismiss on notice. It was an option that was reasonably open to it. The decision to dismiss was objectively reasonable.
54. Therefore my overall conclusion is that that in all the circumstances, including the size and administrative resources of the Respondent, equity and the substantial merits of the case, the Respondent acted reasonably in treating the reason for dismissal as sufficient reason for dismissing the Claimant. The dismissal was therefore fair and the claim is unsuccessful.
55. I gave this matter a good deal of consideration and confirmed to Mr Edwards that this is not a finding of guilt by me of the disciplinary charges pursued by the Respondent. That is not the test I am required to apply.
56. On the evidence that I have heard it appears that Mr Edwards is an extremely hard-working and dedicated employee upon whom dismissal has had a very significant effect. The circumstances look like a bad decision made by the Claimant in an effort to reduce the Department work in progress. However my personal view is irrelevant to the overall circumstances and the basis upon which I have to consider this claim.
57. The test is whether dismissal fell within the range of reasonable responses on a balance of probabilities on the material reasonably before the Respondent when making the decision to dismiss. On the evidence I have heard at this hearing I find that it was and therefore the dismissal is fair and the claim is unsuccessful.

Employment Judge Freer
Date: **31 July 2017**