Case No: 2301905/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr Fabian Clarke

Respondent: Iceland Foods Ltd

Heard at: London South **On: 11 August 2017**

Before: Employment Judge Fowell

Representation
Claimant: Mr A Hillman
Respondent: Mr T Perry

JUDGMENT

The claimant was unfairly dismissed.

REASONS

Background

1. The claimant, Mr Clarke, complains of unfair dismissal. He worked as a delivery driver for Iceland Foods Ltd until he was dismissed following an incident with a member of the public. The allegation is that he was abusive to her.

2. The basic facts are not disputed. He attended the home of the customer to make a delivery. The customer was disabled and had a disabled parking space outside his house. He lived next door to a school. It was a busy time of day with school children leaving and being picked up by their parents. The complainant, L, was parked in the customer's disabled parking bay, making it difficult for the claimant to make his delivery. He parked in front of her, on the zigzag lines indicating no parking and carried the goods in from there. It is not clear whether he was blocking her in or whether she was just annoyed by him parking on the zigzag lines, but it is said that a row developed a row in which the customer also took part.

3. An investigation meeting took place, following which the claimant was suspended. He told the investigating officer his new address and was then sent a letter confirming his suspension, but from then on all letters were sent to his old address, so he was not aware that a disciplinary hearing had taken place in his absence. When he rang to check on

progress he was told this by someone in HR and the letters were resent. There was no appeal.

4. I heard evidence from Mr James Pitt, a former Store Manager who has now left the company, and who made the decision to dismiss; Ms Sarah Perry, a member of the HR department; and from the claimant. I also had by a bundle of about 140 pages, much of which related to alternative vacancies. Having heard this evidence and considered it in the round I made the following findings of fact.

5. The claimant's work as a delivery driver began on 5 December 2011. He had no disciplinary issues during his employment and worked long hours over and above his contractual 24 hours per week. At one point he was offered promotion to duty manager but declined because the extra pay did not seem to match the extra responsibility. It is unclear to what extent he was trained formally in dealing with the public but he knew not to get involved in disputes and volunteered the fact that he had been attacked twice, once involving a knife, and had dealt with the situation without aggression before calling the police. He also said that he was involved in training other drivers so that they knew, for example, to stand in front of the vehicle, where they could be filmed on the CCTV. (The footage is recorded on an SD card and can then be uploaded onto the companies Nexus IT system and provided to insurers.)

6. I will describe the procedural steps taken by the company first before going on to look at what actually occurred.

7. A witness, N, contacted Iceland on the day of the incident, Thursday 12 May 2016, at about 5.30 p.m. Since the incident was at school closing time this must have been very shortly afterwards. She said that the driver in front of her (L) and an Iceland delivery driver had had "an altercation". It is not necessary to set out the language she said was used, save to say that it was extremely vulgar on both sides.

8. The next day the complainant herself rang the company and a statement was taken. On her account, she was not bothered that the claimant was parked on the zig zags lines, but a teacher came out and started remonstrating with him about it, telling him to move the van. The driver, she said, thought this order came from her and began to shout back at her. She described their exchange of words, mentioning the same expressions on each side described by N. There was then further shouting, she said she was upset, and the teacher saw her on her way. She then made a formal complaint to the police.

9. The following Monday a call was received from the teacher involved, the Deputy Principal at the school. This told a different story. He said that he saw an Iceland driver and one of the parents having a shouting match, "and there was a lot of effing and blinding coming from both parties". He told the parent to drive away and spoke to the driver, telling him his behaviour was unacceptable. The driver was very agitated but apologised to him.

10. All this information had been received by the end of Monday 16 May 2016. The claimant soon got wind that something was afoot as his colleague,

Asif, asked him if he was going on holiday since his manager wanted someone else to cover his shift.

11. The claimant said nothing about the incident, and was then at work on Thursday 19 May when he was called into what became the day long investigation meeting. This was conducted by an HR manager, Annette Highgate. Asif was there to take notes.

12. The three telephone statements were read to the claimant and his response was that it was all lies: he denied any swearing, but he did admit telling L that she must not have a driving licence. He urged Ms Highgate repeatedly to talk to the customer, whom he said he had spoken to since the incident. She did so, and recorded his version of events. He agreed that he had spoken to the claimant the previous Friday (13 May). He said that L always parks across his drive "and tries to make trouble". He did not see any teacher involved and didn't see any swearing or talking between them. The customer himself was arrested by the police on Monday 16 May over the allegations and then released. He described the woman has a nasty piece of work.

13. Although the claimant says that he asked the company to check CCTV footage of the incident that is not recorded in the notes. By contrast, it is recorded that he asked three times for the company to check with the customer concerned. Given the appropriate level of detail involved in the notes and the fact that Asif was a friend of the claimant – he told me that they had coffee about once a week with a group of others, even after his dismissal – it seems more likely than not that he would have recorded this if said.

14. Ms Highgate considered these four statements and concluded that it was necessary to suspend the claimant, at which point he told her his new address. The company's practice is to use their Nexus system to generate letters automatically. Employees can and are expected to log on and change their details from time to time. The system is not always working however and it is common practice for employees to continue as before, by simply informing their line manager of the new address.

15. Ms Perry explained that there is a separate section or tab on the Nexus system used to create letters and that sometimes in the course of a disciplinary hearing employees do not want such letters sent to their home address, so there is a facility to note on the system that letters should be sent to a different address. That is not the same as updating the address generally and she did not update Nexus. Suspension letters are not yet part of their standard templates and have to be generated manually unlike other letters, which are simply drawn from the Nexus database, so further letters were generated automatically without anyone checking. In short, no one put two and two together and further correspondence continued to be sent to the old address.

16. A disciplinary hearing was arranged with Mr Pitt for 26 May 2016. The claimant did not receive the invitation letter and so did not attend. It did not occur to Mr Pitt that the claimant had not received it. Understandably, he tried to contact the claimant by phone and was unsuccessful, so he adjourned the hearing. The claimant disputes that any such call was

made, but no phone records were produced and it would be odd to adjourn without at least attempting to make contact in this way. I conclude that the claimant simply missed the call. He was invited again to the adjourned hearing with the same result and this time the hearing went ahead. Understandably, Mr Pitt assumed that the claimant had decided not to bother disputing the allegations. Nevertheless, he took steps to satisfy himself that there was a proper basis for dismissal. He did not read the 12 handwritten pages of notes from investigation, but he did read the four witness statements and the two-page typed summary in the investigation report. He based his conclusions largely on the evidence of the Deputy Principal as an obviously impartial witness.

17. He was cross examined closely about his reasoning and confined his answers largely to yes and no. Some confusion may have arisen over his answers. Questions were put to him in rapid succession, but I do not accept that he admitted (as was suggested later) that he believed that the complainant was untruthful.

18. The claimant contacted the company on 24 June. He spoke to someone in the HR department who explained the position and resent the letters. He rang again on 27 June and spoke this time to Ms Perry. She explained that a colleague had resent the letters and that he would need to appeal as soon as possible. He did not do so. In his witness statement he says that he believed from the letters that the time had passed but he made no mention of this conversation. Since there is a contemporaneous record of it however I accept that this advice was given at the time.

19. The claimant subsequently made efforts to find work and received Employment Support Allowance. No P45 was issued by the company so after chasing he was issued with a written statement of his employment details and pay by the payroll department on 19 August 2016. Again this was sent to his old address and he had to get them to send it again to his new address. This is in standard, "to whom it may concern" form, and could be used as a reference, although the claimant did not see it in that light. He has not used it as such and has chosen to be frank with potential employers about the reasons for his dismissal.

20. I heard submission from both sides including a skeleton argument from the claimant. In a nutshell, the claimant's case is that he was not guilty of any wrongdoing and that the process was fundamentally flawed: the respondent says that dismissal was within the range of reasonable responses, despite the lack of a disciplinary hearing, as the investigation was thorough and the facts were substantially known.

Conclusions

21. The starting point, as ever, are the words of the statute 98(4) of the Employment Rights Act 1996:

> "…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.

22. I remind myself of the applicable principles set out in the case of *British Home Stores Ltd v Burchell [1978] ICR 303*.

> "...the tribunal has to consider whether there was a genuine belief on the part of the employer that the employee was guilty of the alleged misconduct, whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation, and whether a reasonable employer would have dismissed the employee for that misconduct."

23. A further important principle, established in a case involving the respondent, *Iceland Frozen Foods Ltd v Jones [1983] ICR 17* is that

> "…in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> …the function of the [Employment Tribunal] … is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

24. Subsequently it was confirmed in the case of *Sainsbury's Supermarkets Ltd. v Hitt [2003] ICR 111,* that:

> "The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

25. There is no dispute that the reason for dismissal was conduct, nor any suggestion that Mr Pitt did not have an honest belief in the claimant's guilt. My focus therefore was on the fairness of the investigation and whether the steps taken were within this range of reasonable responses.

26. The first and obvious point is that the failure to send the invitation letters to the claimant is the fault of the respondent. It was accepted by Ms Perry that changes of address are commonly done by informing a manager, and allowance has been made for the fact that the claimant was suspended. Although it was suggested that the claimant was at fault for not updating Nexus himself, this was not sustainable in view of her evidence, and on any view it is unreasonable to blame the claimant, having told the company of his new address and having received one letter there.

27. This led to the failure to have a disciplinary hearing in his presence, which is a fundamental failure. It hardly needs stating, but that hearing is to give the claimant the opportunity to see all the evidence, consider his response and assemble his own evidence, such as from supporting witnesses. In his witness statement to raise the fact that a friend of his called Bull was in the street at the time and was a witness too. (This is a street on which the

claimant says that he "practically grew up" and knew many of the residents, from making deliveries or otherwise.)

28. This failure to hold a disciplinary hearing is not redeemed, in my view, by the investigation meeting. There was no notice of that meeting. It would have been more appropriate to explain the nature of the allegations to the claimant before he was questioned in any detail about them, and to have provided copies of the statements for him to consider. He would then have had the opportunity to reflect on his actual involvement and come up with other points in his defence, such as the use of CCTV.

29. On that aspect, although I conclude that he did not mention CCTV in the investigation meeting, it is a striking failure by the company. I accept Mr Pitt's evidence that there is no audio facility on these systems. There is no reason why there would be and this is not normal or required in dashcam technology. The claimant disputes this, on the basis that he knew two members of staff who were dismissed on the basis of such footage, which had audio, but there was no supporting evidence for this, and it was unclear how the claimant knew that audio was involved in those proceedings. Be that as it may, it seems to me that any reasonable employer would have checked it. It might not have shown anything, particularly as the van was parked in front of the complainant, but the company had gone to the trouble of fitting these cameras into its vans, and trained drivers on, for example, standing in front of the vehicle in such situations, so it seems to be an obvious failure not to check whether anything could have been seen.

30. Accordingly, I find that there were significant procedural unfairnesses, outside the range of reasonable responses, in failing to look at CCTV, failing to give the appellant advance warning of the evidence he had to meet before interviewing him, and most conspicuously, failing to invite him to the disciplinary hearing.

31. I note too that no thought appears to have been given, once it came to the company's knowledge that he had not received the invitation letter, to inviting him to a disciplinary hearing or an appeal meeting. Ms Perry admitted that she did not even inform Mr Pitt of this fact when it came to light.

32. It is necessary however to go on to consider what actually happened on the limited information available.

33. There seems to be a real possibility here that the complainant was acting unreasonably or provoked the situation, and that the other witness, N, was her friend. Their statements agree closely, but not with the statement of the Deputy Principal. There is also the fact that her complaint to the police was about the customer, not the claimant, whereas the statement does not mention the customer at all. At the very least this is an account which might be regarded with some suspicion. The same cannot be said however to that of the Deputy Principal, and I can only interpret is reference to "effing and blinding" as applying to both sides. I conclude from this that the claimant was involved in a slanging match with this member of the public. That view is supported by his own account in the investigation meeting, with the reference to her not having a driving

licence.

34. The fact that the customer said that they did not engage or talk to each other at all contradicts the claimant's account, and I can only conclude from that that he was attempting to be as supportive as he could. He would have no reason to be supportive of the complainant since she reported him to the police.

35. I note too that although the claimant maintained that he had not done anything wrong, he had been sufficiently concerned to go back to see the customer before anything was said to him at work, and he did not say anything himself. Similarly, the Deputy Principal was sufficiently moved by what happened to take the time to ring Iceland and make them aware of the circumstances. His statement also records that the claimant was very agitated and apologised to him for his behaviour, all of which indicates that things did reach a high pitch.

36. Accordingly it seems overwhelmingly likely that the claimant did resort to abuse towards this member of the public, which was therefore a clear breach of the company's policy, which prohibits "conduct likely to seriously offend customers, suppliers, visitors and colleagues of the company or the detracts from Iceland's good name and reputation, including swearing/aggressive behaviour/vexatious claims". This is listed as an example of gross misconduct.

37. I cannot exclude however the possibility that a lesser sanction might have been imposed. There may well have been a degree of provocation. It may have been a significant degree. The claimant had reasonably long service and an excellent record, all of which may have been taken into account. Mr Pitt said that he gave consideration to a lesser sanction but he bore in mind that there was no evidence of any remorse or that the claimant would adopt a different approach in future. Had he not be put on the spot about matters in the way he was he might however have adopted a more realistic approach.

38. My assessment is that having regard to the fairly extensive fact-finding exercise carried out that it is still 80% likely that a fair process would have led to his dismissal.

39. I make no separate deduction for contributory fault since the two aspects are strongly overlapping on these facts.

40. I also have to consider whether to award an uplift for breach of the ACAS Code of Practice. The failure to hold a disciplinary hearing is so fundamental that 25% might have been appropriate ,but I bear in mind also the claimant's failure to appeal, which was not explained, and reduce this to 15%.

41. I also have to consider how long it should have taken the claimant to find and alternative work. Mr Perry conceded that until he had the reference letter on 19 August he cannot be blamed for any failure and suggested that he would have been able to find a new position within two months of that date. I agree that this is a reasonable conclusion given the evidence in the bundle about the availability of driving jobs. He should not of course

mislead any future employer, but there is no obligation on him to advance the fact that he was dismissed for gross misconduct in circumstances where the company has provided him with a letter confirming the details of his employment, an approach which is very commonly adopted by employers, regardless of the reasons for dismissal. There is little evidence of jobs that the claimant has actually applied for although he too listed many vacancies. In almost every case his online record shows that he applied off line, and so there is no record of those applications being pursued.

42. In my view he should have been able to find alternative employment within 2 further months, i.e. by **19 October 2016**, over four months after dismissal.

Remedy

43. The claimant opted for compensation only, which is assessed by reference to the provisions from s.118 onwards of the Employment Rights Act 1996.

44. After some discussion with the parties, they agreed some relevant figures.

    a. Gross pay, £236.72 p per week.

    b. Net pay, £215 per week.

45. Hence, the Basic Award, based on four years' complete service would amount to £946.88. Applying the 15% ACAS uplift and the 80% deduction (the net effect being to reduce the total to 23%) this net Basic Award is **£217.78**

46. In assessing the Compensatory Award:

    a. Loss over the period of 19 weeks and one day to 19 October 2016 amounts to £4115.71;
    b. Loss of statutory rights is £479;
    c. These total £4,594.71;
    d. Reducing this to 23% by applying the two factors, the net figure is **£1,056.78**.

47. Hence the result is:

    a. Basic Award £217.78
    b. Compensatory Award £1,056.78
    c. Total £1,274.56

48. The protected period for the purposes of the recoupment provisions covers the entire period of the compensatory award.

49. Any fee paid will be recovered from HMCTS as a result of the decision of the Supreme Court in *R. (on the application of UNISON) v Lord Chancellor [2-17] UKSC 51.*

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Employment Judge Fowell

Date: 12 August 2017