



EMPLOYMENT TRIBUNALS

Claimant: Mr L Gomes

Respondent: Smiths News Trading Limited

Heard at: London South

On: 23 January 2017

Before: Employment Judge Freer

Representation

Claimant: Mr I Browne, Representative

Respondent: Mr C Edwards, Counsel

REASONS FOR JUDGMENT

1. These are the written reasons for the Tribunal's judgment, sent to the parties on 26 January 2017 that the Claimant's claim of unfair dismissal was unsuccessful and there be no order as to costs.
2. These reasons are supplied at the request of the Claimant. Oral reasons were given at the hearing.
3. The Tribunal regrets the delay in providing these reasons which has been due to a number of matters.
4. By a claim presented to the employment tribunals on 28 April 2016, the Claimant claimed unfair dismissal.
5. The Respondent resists the claims.
6. The Claimant gave evidence on his own behalf and the Respondent gave evidence through Mr Mark Simmons, House Manager; and Ms Alison Noble, Senior Employee Relations Case Manager.
7. The Tribunal was presented with a bundle of documents agreed by the parties.

A brief statement of the relevant law

8. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.
9. Where it is uncontroversial that an employee has been dismissed, an employer has to show one of the prescribed reasons for dismissal contained in sections 98(1) and (2). It is trite law that the reason for dismissal is a set of facts known to, or beliefs held by, an employer at the time of dismissal, which causes that employer to dismiss the employee. The reason for dismissal does not have to be correctly labelled at the time of dismissal and the employer can rely upon different reasons before an employment tribunal (**Abernethy –v- Mott, Hay and Anderson** [1974] IRLR 213, CA).
10. Also, a Tribunal may properly find that that the reason proffered by the employer is not the real or principal reason, provided it is satisfied on adequate evidence that the reason it selects was the employer’s reason at the time of the dismissal (**McCrory –v- Magee** [1983] IRLR 414, NICA). In addition and in practice, a principal reason may be compounded of several elements which do not necessarily each in themselves constitute several reasons (**Bates Farms and Dairy Ltd –v- Scott** [1976] IRLR 214, EAT).
11. 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”
12. 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).
13. 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).
14. 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 and **Beedell –v- West Ferry Printers** [2000] IRLR 650, EAT).
 15. 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.
 16. 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.

The issues

17. This is an unfair dismissal claim brought by the Claimant against the Respondent. There was a list of issues that had been agreed between the parties.
18. The parties agreed that the reason for dismissal was related to the Claimant's conduct. The **Burchell** guidelines apply.
19. With regard to procedure and reasonable belief, the Claimant contended that (1) The Respondent did not take reasonable steps to investigate the issues of mismanagement or poor working practice raised by the Claimant throughout the disciplinary process and (2) the Respondent did not take reasonable steps to ascertain the motives of the Claimant in regard to his misconduct.
20. The Claimant also argues with regard to sanction that “whilst it is agreed that the Claimant acted improperly, his motives, his immediate honesty when questioned, his prior record and the likelihood of further misconduct meant that the only reasonable response were those of a disciplinary sanction less than dismissal”.

Facts and associated conclusions

21. This case involves the Claimant's dismissal relating to his completion of an overtime form for three hours work on 12 November 2015. Ms Lana Langston, the Deputy Night Manager, had a discussion with the Claimant

- regarding the matter on 15 November 2015. There are notes of that discussion.
22. The Claimant was suspended from work with pay and invited to attend at an investigation meeting with the Croydon Night Manager, Mr Chris Parslow. That meeting took place on 11 December 2015. There are notes of this meeting.
 23. During the investigation the Claimant accepted that he had completed an overtime form for his normal shift and that he had not worked any overtime. The Claimant argued that he had done so not to obtain money, but to highlight that others were being paid for hours not worked. The Claimant accepted that he had not raised his concerns with anyone in management.
 24. The Claimant was invited to attend at a disciplinary hearing on 23 December 2015. That hearing was conducted by Mr Simmons. Notes of the meeting were taken.
 25. The Claimant was dismissed on the ground of gross misconduct. He was informed of this decision verbally and also by a letter dated 30 December 2015.
 26. The Claimant appealed the decision. The appeal hearing took place on 20 January 2016 conducted by Mr Tony Bannister, General Manager of the Slough Group. There are notes of that meeting taken by Ms Noble, which the Tribunal finds are an accurate reflection of the meeting. The Claimant was informed in writing that the appeal had not been upheld. The decision was taken by Mr Bannister and the outcome letter was signed by Ms Noble.
 27. In submissions for the Claimant it was accepted that the facts were not in dispute. There were two main strands of argument advanced by the Claimant, first a lack of investigation into the Claimant's intention relating to the overtime form competition and second, that dismissal was not a fair sanction.
 28. Having regard to the overall circumstances and whether or not there was a fair process, as stated, the Claimant's principal argument is the lack of investigation into Claimant's intention. The Tribunal concludes that was an entirely proper approach by Mr Browne for the Claimant and that all the other material aspects of the process fell comfortably within the range of reasonable responses.
 29. The Tribunal accepts the submissions made on behalf of the Respondent that the Claimant stated his intention during the internal process and questions were also asked of him in that respect by the Respondent during that process. The Claimant had given responses to Ms Langston and the matter was raised in the investigation hearing at pages 52, 63 and 64 of the bundle, at the disciplinary hearing at pages 68 and 69 of the bundle, and generally in more detail during the appeal process.

30. The Tribunal finds that on balance that the Respondent weighed and balanced these responses by the Claimant when reaching its decisions.
31. The Claimant did not offer names or examples of individuals involved in any other alleged similar circumstances, particularly during the appeal stage.
32. Therefore, the Tribunal concludes on balance that the Respondent did investigate the Claimant's intention, the Claimant had explained his position and the Respondent had reasonably taken it into account.
33. The Claimant had an opportunity to raise issues over having sight of the completed overtime form. The Tribunal finds that it was not raised by the Claimant during the internal process that he had not seen it. It is a short form. The Claimant accepted in evidence that he had filled in that type of form, or one similar, "hundreds of times" and it was not disputed that he filled in the form on this occasion. The Tribunal finds that if it was a material matter the Claimant would have raised having a lack of a copy the with the Respondent, but he did not. Therefore, on balance the Tribunal concludes that the Claimant did receive a copy from the Respondent.
34. The Tribunal also accepts on balance that Ms Noble did not unduly affect the decisions independently made by Mr Simmons and Mr Bannister. She gave general HR advice that did not influence the decisions.
35. The Claimant had long 16 years' service and an unblemished record. It was a serious accusation made during the disciplinary process. However, the Tribunal finds that the investigation and process as a whole was reasonable given those circumstances and having particular regard to the decision in **A - v- B and Roldan**.
36. Therefore, overall the Tribunal concludes the process fell within the range of reasonable responses and objectively considered was fair in all the circumstances, including the size and administrative resources of the employer's undertaking.
37. With regard to belief in the conduct, Mr Simmons took a view of the material before him as set out in his witness statement at paragraph 26. That account was not materially challenged by the Claimant in cross-examination. It states: "I did not accept the Laurente's explanation that he had submitted the overtime form to make a point about the work that people in other Departments were doing. He knew that if he had concerns he should have raised these with his manager but he had not ever done so. I also did not accept that he was intending to inform his manager that he had not worked the hours set out in the overtime form. He had time to do this but hadn't taken steps to bring it to anyone's attention to Lara raised it with him. I found his comment that he was "playing a game with the management team" very concerning".
38. It is the conclusion of the Tribunal that this belief was reasonably held in the circumstances on the material before Mr Simmons. Indeed on two occasions

- in this Tribunal hearing when the Claimant was asked when he would have informed the Respondent that he had incorrectly completed the form, he could not provide an answer. His answer had "lapsed from my mind". That is consistent with the fact that the Claimant had a number of days to inform management and failed to do so.
39. It is the Tribunal's conclusion that it was within the range of reasonable responses for Mr Simmons on the material before him to believe that the Claimant was not intending to inform management.
 40. With regard to sanction, the Respondent considered alternatives to dismissal and also considered the Claimant's mitigation, which of course included his long service and service record. However, the Respondent considered ultimately that trust and confidence had evaporated. This was an objectively reasonable conclusion available to the Respondent.
 41. A finding of gross misconduct was, in the Tribunal's conclusion, consistent with the Respondent's disciplinary procedure.
 42. It is the Tribunal's view that given the length of service and the Claimant's work history, dismissal may perhaps be considered by some as being harsh. However, the Tribunal cannot substitute any view for that of an objective reasonable employer and the Tribunal concludes that dismissal was within the range of reasonable sanctions open to the employer on this occasion on the material before Respondent.
 43. The Tribunal concludes that the sanction of dismissal was within the range of reasonable responses and despite Mr Browne's valuable representation for the Claimant, the unfair dismissal claim is unsuccessful.
 44. The Respondent applied for its costs on the ground that the Claimant's bringing or conduct of his claim was unreasonable. The Tribunal reminded itself of the well-established main principles that an order for costs is the exception rather than the rule and costs do not follow the event see (**Gee -v- Shell UK Ltd** [2003] IRLR, 82, CA). Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms. (See **Marler -v- Robertson** [1974] ICR 72, NIRC).
 45. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered.
 46. The Respondent pointed to a Calderbank letter sent to the Claimant in advance of the hearing. The Tribunal was referred to the case of **Kopel -v- Safeway Stores plc** [2003] All ER (D) 05 (Sep), which in the Tribunal's conclusion confirms it is a matter that it may take into account, but is not determinative.

47. Given the Claimant's length of service and unblemished work records it is the Tribunal's conclusion that it was not unreasonable him to argue this matter at a full hearing and therefore there is not order as to costs.

Employment Judge Freer
Date: 11 October 2017