



EMPLOYMENT TRIBUNALS

Claimant: Mr L Murray

Respondent: Alpha LSG Limited

HELD AT: Manchester

ON: 1 and 2 November 2017

BEFORE: Employment Judge Ross

REPRESENTATION:

Claimant: Mr B Norman of Counsel

Respondent: Mr W Ho, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair dismissed is not well founded and does not succeed.

REASONS

1. The claimant was employed by the respondent as a bar packer. His employment was terminated without notice on 28 February 2017. The claimant appealed but his appeal was unsuccessful and he brought a claim to this Tribunal.

The Issues

2. The issues for the Tribunal are:

- (1) What was the reason for dismissal? The respondent relied on conduct.
- (2) Was the dismissal fair or unfair within the meaning of section 98(4) of the Employment Rights Act 1996 (having regard to the reason shown by the employer)? In answering this question

the Tribunal considered whether the respondent had a genuine belief based on reasonable grounds following a reasonable belief of the employees conduct.

- (3) Was the dismissal procedurally fair and was dismissal within the band of reasonable responses of a reasonable employer of this size and undertaking? The Tribunal reminded itself it must not substitute its own view for that of a reasonable employer of this size and undertaking.
- (4) If the claimant was unfairly dismissed, how do the principles in **Polkey v A E Dayton Services** affect the case?
- (5) Should there be a finding of contributory fault?

The Facts

3. The respondent is a company providing catering retail logistics services from facilities located at airports throughout the United Kingdom. The claimant worked within a bonded warehouse and was responsible for locating, stocking and stripping down bars and duty free trolleys which were going onto and being returned from aircrafts belonging to various airlines. The claimant was responsible for checking the specific issuance and returns against an inventory and transferring stock back to storage areas. The claimant was based at the bonded warehouse in Manchester close to Manchester Airport.

4. It is not disputed that in April 2016 the claimant was suspended following an allegation of specific activity involving the theft/loss of tobacco products. The police were informed and an investigation commenced within the company. The claimant was suspended. He was interviewed by a Unit Manager on 6 May 2016 (see pages 96-102). During the course of that investigation meeting in relation to the allegation of misappropriation of company stock, potential theft, including cigarettes, the claimant was asked, "Any drivers who work locally – who drive maroon estate cars – do you know any?" and the claimant replied "no, nothing".

5. On 7 June 2016 at a disciplinary hearing in answer to charges "that on Friday 8 April at approximately 6.00am you were involved in the misappropriation of company stock including cigarettes and tobacco potentially amounting to theft" the disciplinary officer, Teresa Jones, stated, "I have concluded that there is no case to answer". The claimant's suspension was ended and he returned to work, although he was moved to a different area and then worked in Belfast for the company for a number of months.

6. The claimant told the Employment Tribunal that in April 2016 he went voluntarily to the police station. The police told him to "live his life as normal" and they would be in touch if the matter was proceeding by way of a charge and summons to court.

7. By 23 December 2016 the police had informed the respondent that the claimant and another employee of the respondent had been summonsed to attend court (see page 105). The respondent sought further information about the charge

and was informed that the summons was for conspiracy to steal in respect of the respondent. They were also told, "There is a third suspect, the driver, who has also received a summons". The respondent asked, "Is there evidence to suggest the driver and our employees know each other?". The reply was, "without going into the specifics of the case the fact that all three have been summons [sic] for conspiracy shows evidence of association between them".

8. On 17 January 2017, the claimant said he received a note through his door from the police asking him to contact them. (There was some inconsistency in the claimant's evidence as to whether the police told him at that stage what it was about. In his statement, the claimant said that when he went in to see the police on 24 January 2017 that was the first time he was told he was being given a court summons to answer a charge of conspiring to steal tobacco products from the respondent. However his evidence to the Tribunal suggested that he may have been aware of this after he had spoken to the police on 17 January).

9. The claimant's evidence is that the police told him that they would inform the respondent direct and therefore he did not think it was necessary to tell the respondent personally.

10. There is no dispute that the claimant was charged on 24 January 2017. A copy of the charge is at pages 106-107. On 26 January 2017 the police confirmed that both employees and the third suspect had been summonsed to Manchester Magistrates Court for the offence of conspiring to steal tobacco products belonging to the respondent.

11. On 27 January 2017, the respondent suspended the claimant (see pages 111-112). Suspension was made by telephone on 27 January 2017 and confirmed in writing. The allegations were:

- (1) The claimant had been summonsed to attend court to answer a charge of conspiring to steal tobacco products from his employer and had failed to inform the company of this.
- (2) That he had failed to provide full and true information associated to a previous formal process.

12. The respondent interviewed the claimant. The respondent also interviewed Mr Thomas, Bond Manager, who said he had made a statement to the police but was told to keep it confidential. He said he referred to "three individuals, 2 x Alpha and one that they referred to as the driver". He also stated, "As a result police conducted forensic tests to prove communication between". He also said, "Mid September- email confirmed forensic evidence was back and communication was established between the three". When asked specifically if anyone said Liam had communication with third person he replied, "No specifics but had evidence to carry to CPS". (Crown Prosecution Service).

13. The claimant was invited to a disciplinary hearing by a letter of 24 February 2017. Attached to the letter was an investigation overview report completed by Teresa Jones (see pages 123-126); the Alpha LSG disciplinary policy; a suspension and invitation to investigation letter dated 27 January 2017 (pages 111-112) of ;

minutes of the investigation meeting with the claimant on 1 February 2017 (pages 113-115); email exchange with DS Alex Wilde on 23 December 2016 (pages 104 and 106); email from PC Mark Atkinson 26 January 2017 (page 108); statement from John Thomas 7 February 2017 (pages 116-119) and investigation notes from 6 May 2016 (pages 96-102 – the previous disciplinary investigation).

14. The disciplinary hearing took place on 28 February 2017. The notes are at pages 127-137. The precise allegations before the claimant in the disciplinary letter of 24 February 2017 were:

- (1) That you have been summonsed to attend court to answer a charge of conspiring to steal tobacco products from Alpha LSG (your employer) and have failed to inform the company of this.
- (2) That we have been informed by the police that you are associated with a third party implicated in the charges despite you advising us previously that you are not associated with this third party, thus giving us reason to believe that you failed to provide full and true information associated to a previous formal process.
- (3) That your actions have potentially caused a fundamental breach of trust and confidence the company has in you as an employee.

15. At the end of the meeting the claimant, following an adjournment, was given the outcome, which was to summarily dismiss. A letter confirming the decision was sent to the claimant on 21 March 2017 (pages 146-147). The claimant appealed (see letter dated 6 March 2017) on the basis that not informing the company of his summons (allegation 1), he was advised by PC Atkinson that the police would inform the company. He said he had never been in this situation before and did what was instructed by the police. On count 2, there was no proof he knew the third party and he totally denied knowing the third party.

16. The claimant was invited to a formal appeal hearing (see pages 149-150) and this took place on 20 March 2017 (see pages 151-157). The claimant's appeal was unsuccessful and his dismissal was upheld (see outcome letter pages 158-159).

17. There is no dispute that at the time of the claimant's dismissal he had an unblemished disciplinary record and had been employed by the company since 2010 initially on a seasonal basis and from 18 April 2011 in his position at the time of dismissal.

18. There is no dispute that the criminal charges against the claimant were subsequently dropped and he continues to hold a clean record with no convictions.

The Law

19. The relevant law is at section 95 and section 98(4) of the Employment Rights Act 1996. The principles long established in the cases of **British Home Stores Limited v Burchell [1980] ICR 303** are relevant as is **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**. The claimant's representative also referred me to **Basildon Academies v Mr E Amadi and Mr R Fox UKEAT/0342/14**.

Application of Law to Facts

20. I turned to consider the first issue: what is the reason for dismissal? The reason relied upon by the respondent in this case is conduct. There is no dispute that the failure to inform the company that he had been summonsed to attend court to answer a charge of conspiring to steal tobacco products from the company was potentially a matter of conduct as was the allegation of failing to provide full and true information associated to a previous formal process.

21. I therefore turned to the second question: was the dismissal fair or unfair within the meaning of section 98(4) of the Employment Rights act 1996? I remind myself of the guidance in **Turner v East Midlands Trains [2012] EWCA Civ 1470** and quoting Mr Justice Arnold in **British Home Stores v Burchell [1980] ICR 303**:

“In applying that subsection (98(4)) the Employment Tribunal must decide in the reasonableness of the employer’s decision to dismiss for the ‘real reason’. That involves consideration, at least in misconduct cases, of three aspects of the employer’s conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is ‘yes’ the Employment Tribunal must then decide on the reasonableness of the response of the employer.”

22. I therefore turned to consider whether in relation to the first allegation the respondent held a genuine belief based on reasonable grounds following a reasonable investigation. I find they did. The claimant admitted that he had not informed the employer that he had been summonsed to attend court on a charge of conspiring to steal from them.

23. I turned to the second allegation: that “we have been informed by the police that you are associated with a third party implicated in the charges despite you advising us previously that you are not associated with this third party, thus giving us reason to believe that you failed to provide full and true information associated to a previous formal process”.

24. I find that the dismissing officer, Mr Irons, was a careful and conscientious witness. He made concessions when necessary.

25. I find Mr Irons’ grounds for this belief was the information supplied to the respondent by the police at page 104 of the bundle and in particular being informed that the charge was “conspiracy to steal in respect of Alpha and there is a third suspect, the ‘driver’, who has also received a summons”. In answer to a specific question, “Is there evidence to suggest the driver and our employees know each other?” the reply is “without going into the specifics of the case the fact that all three have been summons [sic] for conspiracy shows evidence of an association between them”.

26. Mr Irons relied on the confirmation document at page 108 confirming “both employees and a third suspect have been summonsed to Manchester Magistrates Court on 1 March for the offence of conspiring to steal tobacco products belonging to Alpha LSG”. The letter goes on to state, “The decision was made by the Crown Prosecution Service based upon the evidence provided by Chris Tate (“CT”) and John Thomas (“JT”), CCTV, suspect interviews and mobile phone examinations”.

27. I find Mr Irons relied on evidence from Mr Thomas in the investigation meeting that he had liaised with PC Atkinson and had provided a statement. He had been “advised three individuals, 2 x Alpha and one that they referred to as the ‘driver’ had handed in phones. At least two others had handed in false phones. Only said that Alan was one of them”. He said, “As a result police conducted forensic tests to prove communication between”. He also said, “In mid September an email confirmed forensic evidence was back and communication was established between the three”. When Mr Thomas was asked specifically “Anyone said Liam had communication with the third person” Mr Thomas said, “No specifics but had evidence to carry to CPS”,

28. I find Mr Irons noted the claimant, when investigated originally had denied knowing a driver of a maroon estate car, “Any drivers who work locally who drive maroon estate cars, do you know any?” and he replied, “No, nothing” (page 100). At the investigatory meeting in 2017 it was put to the claimant, “Communications from police said you know third suspect but in previous investigations you said you didn’t. Why didn’t you tell us that?”. The claimant said, “Don’t know him”. In the disciplinary hearing the claimant was asked “what about allegation 2” and he replied “all the way through don’t know third party involved. No evidence I know the third person. Don’t know him”. The claimant was asked, “The police email says you know the third party”. The claimant said, “You can contact the police”.

29. In his witness statement the claimant sought to suggest that he had invited Mr Irons to consider his file of papers relating to his police case. He did not state that at the Tribunal hearing. I find that he did not offer his papers to Mr Irons at the disciplinary hearing. I find he did bring them with him. I find he told his employer, “can’t show court papers” (see page 130). Although the claimant disputed the accuracy of the disciplinary minutes I note he has signed them at the relevant time and accordingly where there is a conflict between the claimant's evidence and the disciplinary minutes I prefer those minutes.

30. The claimant's representative suggested there was a distinction between being “associated” with a third person and “knowing” the third person.

31. When cross examined Mr Irons said he relied on the summons and the police evidence. This is also what he said at the dismissal hearing and in his letter dismissing the claimant. He relied on the evidence of Mr Thomas and the charge of conspiracy made by the police. To conspire means to make secret plans jointly to commit an unlawful act. He relied on the police email which showed evidence of association to make a finding that the three individuals-the Alpha employees which included the claimant and the third party driver knew each other.

32. The question for the Tribunal is: was this information reasonable grounds for a belief that that the claimant was “associated with a third party implicated in the

charges despite you advising us previously that you are not associated with this third party”? I find that it is. It is not for me to substitute my own view. It is whether a reasonable employer of this size and undertaking could have relied on these grounds, namely the information from the police that a matter was proceeding to charge in relation to a conspiracy. I find that Mr Irons had reasonable grounds for his belief that the claimant was associated with the 3rd party based on the police information.

33. I find he reasonably relied on the evidence from the investigatory hearing to find that the claimant had said he did not know the third party driver. This evidence was fortified in the claimant’s evidence at the disciplinary hearing. When specifically asked at the disciplinary hearing about allegation 2 in terms of whether or not he knew the third party the claimant said “don’t know 3rd party involved “ and “No evidence I know 3rd party” and did not comment on the association point. Later he said “not changed anything”.

34. I find this amounts to reasonable grounds for a reasonable employer to find that the claimant was associated with a 3rd party and by denying previously he knew the third party, the respondent reasonably believed the claimant had informed them he was not associated with the third party.

35. I turn to the last question, which is whether the respondent conducted a reasonable investigation. I find that they did. It is not for me to substitute my own view. They asked the claimant for his version of events. They interviewed Mr Thomas who had liaised with the police. I find both the claimant and the respondent were restricted about communicating the detail of information available because of the ongoing police investigation. The claimant accepts that and it is confirmed by Mr Thomas. In the circumstances the employer conducted a reasonable investigation.

36. I turn to the next issue: was the dismissal procedurally fair? Once again, it is not for me to substitute my own view. The claimant had an opportunity to attend an investigatory meeting, a disciplinary hearing and an appeal hearing.

37. At this point I consider the evidence of Mr Gallagher, the appeal officer. He was a less impressive witness than Mr Irons. At one point he appears to have conflated the earlier investigatory hearing, where the respondent found no case to answer on a suspicion of theft, with the appeal against dismissal he was hearing. See the appeal hearing minutes at p.157 where he stated “Trying to see the mitigation, this is very much about theft from this company.” His answers in cross examination clarified that this was background and given this was a case where the earlier investigatory meeting had relevance in the sense that it was what was said in that meeting which the respondent relied upon as being untruthful, I find that explicable.

38. Further the letter dismissing the appeal gives a clear explanation as to the reasons why the appeal is rejected.

39. I turn to the band of reasonable responses. I remind myself it is not for me to substitute my own view. I must consider whether an employer of this size and undertaking could have dismissed the claimant.

40. It was undisputed that there was no contractual obligation on the claimant to disclose to the employer that he had been charged with a criminal offence that he had been stealing from them. Furthermore, given that the claimant was alleged to have stolen from his employer it is inevitable they would have found out about the police charge eventually in any event.

41. However, I turn to the nature of the undertaking. The claimant worked in a bonded warehouse where trust was crucial. This is reflected in the fact that it was essential that employees did not have a criminal record and the claimant accepted that. It was important that the respondent was able to trust the claimant given the nature of his job working with bonded products. A concern that the claimant had not been open with the respondent about a charge from the police that he was stealing from them goes to the heart of the employment relationship.

42. I find that the respondent when considering the penalty in relation to the second charge had found the claimant had not been truthful. A concern that the claimant had not been truthful goes to the heart of the employment contract.

43. I am satisfied that the dismissing officer did give consideration to other penalties. I find he took into account the claimant's clean record and service. I find he dismissed the claimant because given the nature of the claimant's role working with cigarettes, alcohol and other products in a bonded warehouse, trust in the claimant this workplace was absolutely crucial. Accordingly, I find given the nature of the respondent's undertaking and the claimant's role within it, dismissal was within the band of reasonable responses of a reasonable employer in relation to the allegations found against him.

44. For these reasons the claimant's claim does not succeed.

Employment Judge Ross

Date 27 November 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
29 November 2017

FOR THE TRIBUNAL OFFICE