



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Kumar

v

**MSG Corporate Services Ltd
T/A Domino's Pizza**

Heard at: Norwich

On: 20, 21 & 22 February 2018

Before: Employment Judge Postle

Appearances

For the Claimant: Mrs R Mehto, Wife.

For the Respondent: Mrs H Winstone, Counsel.

JUDGMENT

1. The claimant was not unfairly dismissed.

REASONS

1. The claimant brings a claim to the tribunal on the grounds that he was unfairly dismissed, in particular he advances arguments that the allegations against him were not clear, the allegations were not proven, the reasons for dismissal were not clear and it seems to be advanced today that the sanction of dismissal was too harsh.
2. In this tribunal we have heard evidence on behalf of the respondent from; Mr Xhermali who conducted the investigation and is an operations director with the respondent, Miss Slater, HR manager with the respondent who conducted the disciplinary and Mr Grewal a director who conducted the appeal – all giving their evidence through prepared witness statements. The claimant gave evidence and also produced a witness statement from a former employee, Mr Asif Siddiqui who was unable to attend during the course of the first two days of the hearing, both those witness statements are typed. The tribunal also has the benefit of a bundle of documents consisting of 191 pages.

Findings of fact

3. The facts of this case show the claimant was employed with the respondent from 1 September 2014. He was employed as an area manager which meant he was responsible for overseeing the operations and supporting managers, a responsible position within the respondent's organisation covering a number of Domino's Pizza stores in the Huntingdon area. The claimant's statement of main terms and conditions of employment were signed by him on 1 September 2014. The claimant's employment contract included obligations relating to his confidentiality, his duty to obey all lawful orders and directions given to him and a requirement to faithfully and diligently perform his duties. The respondent treats confidentiality extremely important given the nature of their business and the competitive world that they are in.
4. The respondent has an employee handbook which includes additional obligations in respect of confidentiality and other responsibilities. The respondent also has an IT policy which we see at page 47 and at 54. That policy makes it clear "never share your password with anyone, colleagues or members of the public" and at 58 of that policy document there is an acknowledgement that the claimant has read the policy and understood the content and confirms that he will follow the policy and acknowledges that if he is found to be in breach of this policy disciplinary action will be taken.
5. As an area manager the claimant was given an extranet password which gave him access to extensive historical and current data in respect of all the stores that he was responsible for. That would give him access to a large amount of the respondent's confidential and commercially sensitive information. In early November 2016 the respondent employed a David Parker in the role of operations cost control analysis whose job was to review labour statistics for all stores both historically and in real time. The purpose of this was to support store managers, area managers and regional managers in their management of labour in the store.
6. In or around January 2017 the respondents started to trial, a driver GPS system in the Huntingdon store whereby orders were tracked electronically, and one of the reasons why the Huntingdon store was chosen was Mr Xhemali (operations director) was concerned that the store he had suspicions that they were cheating the service and wanted to see how much if any the delivery on time statistics would drop once the GPS system was introduced.
7. In or around early February 2017 the respondent received a number of informal verbal complaints from employees at the Huntingdon store. Serious allegations were made primarily against the assistant manager Asif Siddiqui, particularly that he was behaving in an aggressive manner towards staff and that he was cheating statistics, in other words he was altering service and delivery times so the stores performance appeared better than it actually was.

8. On 9 February 2017 Mr Xhemali attended the Huntingdon store to conduct investigations into the various complaints which had been received. He interviewed a number of staff and we see those interviews at pages 107-122, and during these investigatory meetings allegations came out about the claimant, that in fact he was aware of what was happening in the store and was failing to take any action.
9. Mr Xhemali invited the claimant to attend an investigatory meeting, this occurred on 9 February 2017 and notes of that are page 121. At the meeting the claimant admitted to being aware of some of the concerns regarding the assistant manager's behaviour, the claimant also admitted that he had seen Mr Siddiqui clock himself in as a driver when he wasn't out on deliveries. The claimant claimed that he told Mr Siddiqui to stop doing this, he also admitted giving Mr Siddiqui his external login password which was in breach of the company's IT policy. He claimed that the reason he had done so was so that Mr Siddiqui could see the stores statistics when he wasn't in the store. The claimant admitted to Mr Xhemali that he knew this was wrong.
10. Also on 9 February 2017 Mr Xhemali conducted investigatory meeting with Mr Siddiqui whilst originally denying the allegations of his aggressive behaviour he did admit to cheating the service figures, he refused to transfer to another store whilst the issue was being investigated and resigned from his employment with immediate effect without incurring any disciplinary proceedings.
11. The store manager of Huntingdon, Danielle Reeder was also interviewed, this time by a regional manager with the claimant in attendance, this occurred on 11 February 2017, the notes of that meeting start at page 124. She admitted to cheating the service figures and said:

“admitted to clocking out deliveries on Mr Siddiqui's name and was aware of it, the reasons she gave was the respondent's set high target, they cannot be met without cheating. 90% of the delivery on target is not an ideal target”
12. Disciplinary procedure was commenced by the respondent against Mrs Reeder but like Mr Siddiqui she resigned from her employment before the process could be concluded.
13. After finishing the investigation Mr Xhemali concluded that there was a case in respect of the allegations against the claimant to be answered. The claimant was on 15 February 2017 invited to a disciplinary hearing (pages 127-128), in that letter the allegations were set out, in particular:

“it is alleged that you had become aware and allowed a practice of service manipulation at the Huntingdon store despite service manipulation amounting to falsification of company records and a clear breach of company procedure you have failed to report this to the HR department and/or operations team. Particularly you admitted to being aware that Asif (Mr Siddiqui) was clocking out deliveries under his name, furthermore during our investigations you admitted to

providing the assistant manager Asif Siddiqui with your personal extranet password”.

14. The above letter went on to point out the claimant’s duty of confidentiality and reference to disclosure of information. The letter provided the claimant with a copy of his investigatory meeting notes of 9 February 2017, copy of service statistics for the Huntingdon store for 2016-2017 and a copy of the company’s disciplinary, dismissal and gross misconduct policy. The letter advised the claimant of his right to be accompanied. The letter also advised the claimant that if the allegations were proven given the fact that they were serious and if they are found to be gross misconduct, the disciplinary process could lead to the termination of his employment without notice or pay in lieu.
15. The disciplinary hearing took place on 27 February 2017. In attendance conducting the hearing was Miss Slater, HR manager and a note taker Mr Cunningham, the claimant who chose to attend the meeting unaccompanied. That meeting lasted between 1-1.5 hours.
16. At the outset of that meeting Miss Slater set out clearly what the allegations were (page 145) and what the claimant had admitted to in the investigatory meeting.
17. In relation to Mr Siddiqui’s clocking out deliveries when in fact he was not on deliveries the claimant appears to change his story and suggests that Mr Siddiqui was actually doing deliveries and could drive for the company. The issue of the claimant raising at the investigatory meeting that cheating doesn’t go on when he was in store and the issue of Mr Siddiqui clocking out deliveries in his name and not being on the road was canvassed in some detail. The claimant had opportunities to deal with that allegation.
18. Miss Slater then went on to deal with the claimant providing his extranet password to Mr Siddiqui. The claimant maintained it was for a short period only, his intentions were not wrong and that the reason now he had provided it to Mr Siddiqui was for the analysis of labour notwithstanding that the company had now employed Mr Parker to deal with it. The meeting was extensive and the claimant had every opportunity to state his case.
19. Miss Slater considered the matter before giving an immediate decision and on 3 March 2017 communicated her decision to the claimant over the phone and confirmed her reasoning in a detailed letter of 3 March 2017 (pages 153-154). Miss Slater concluded, given the allegations that she did not find the claimant’s explanation satisfactory, in particular, the rationale for allowing an assistant manager and not a store manager access to the extranet. Miss Slater was also of the view that claimant was aware or turned a blind eye to what was going on with the stores performance on DOT (Delivery On Target) particularly as there was a massive drop following the GPS trial. The claimant was dismissed, he was informed of his right of appeal.

20. The claimant lodged an appeal (page 158) citing a number of new factors. The appeal was conducted by Mr Grewal the operations director on 16 March 2017, a man upon which the claimant respected. That clearly was a thorough appeal and dealt with each and every aspect the claimant has raised in his appeal letter notwithstanding that the original purpose of the appeal hearing appears to be a review of the sanction.
21. Following the appeal Mr Grewal turned down the claimant's appeal and concluded in a very detailed letter (page 174):

“It is clear to me that in your position of area manager you were either aware and/or involved in the practice of service manipulation at the store or that in your position of area manager you failed to identify this was happening and take appropriate action into dealing with it. You have also confirmed that you willingly handed out your extranet password to an assistant manager Asif Siddiqui giving him access to confidential business data that was only available to you in your capacity as area manager and that by doing so you have risked the security and confidentiality of this confidential data. Therefore I am satisfied that the conduct in question warranted the termination of your employment due to gross misconduct.”

22. It is also for the avoidance of doubt clear to the tribunal that Mr Grewal had no involvement in the dismissal process and only came in at the appeal stage.

The law

23. Law is set out in the Employment Rights Act 1996, particularly s.98. It is for the employer to show the principle reason for dismissal and it must fall within the list of potentially fair reasons set out in s.98(2). If the reason for dismissal is established the tribunal must then go on to consider whether the dismissal was fair or unfair depending on the circumstances including the size and administrative resources of the respondent and whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal, s.98(4).
24. There is a well trodden case which deals with the principles laid down in dismissal such as this which relate to conduct and that is; Did the employer have a reasonable belief in the fact of the misconduct? Was that belief based upon reasonable grounds? Was as much investigation as was reasonable carried out in all the circumstances? The tribunal reminds itself that it is not for the tribunal to substitute its opinion of how it might have gone about the investigation and dismissal had we been the employer. It is, what did that employer do at the time with the information available to them. The tribunal must also then decide whether the decision to dismiss falls within the range of reasonable responses open to that employer, and that function is to determine whether in the particular circumstances of this case the decision to dismiss fell within that band which a reasonable employer might have adopted. If the dismissal falls

within the band the dismissal is fair, if the dismissal falls outside that band it is unfair.

Conclusions

25. It is clear in this case that the potentially fair reason to dismiss is conduct. The tribunal then asked itself; Did the employer have reasonable belief in the fact of the misconduct? Well what we have here even if there was some doubt about the cheating of statistics is an admission by the claimant that he willingly without just cause whatever he may think gave his password which contains confidential data to an assistant manager and, then supplying two different reasons as to why he had given that password which is in breach of the company's IT policy. Furthermore, the dismissing officer Miss Slater was satisfied on the balance of probability that there was cheating with the delivery on time statistics, whether it be Mrs Reeder the store manager, Mr Siddiqui the assistant manager but the claimant as the area manager should have been on top of it and checked the position, if even was unsure. Looking at the statistics before the GPS trial was conducted. Furthermore, at the investigation stage he admitted Mr Siddiqui was clocking in when not on deliveries. Looking at the statistics before the GPS trial was conducted. The claimant should have looked carefully at the delivery on top statistics, given after the trial they dropped by such a large percentage. So it is clear that Miss Slater would have had reasonable belief in the fact of the misconduct that was based on reasonable grounds.
26. Was there a reasonable investigation? Such investigations have to be reasonable, they do not have to be a counsel of perfection, clearly here such investigation, as was necessary was reasonable given what was said by the employees and admissions made by the claimant and Mrs Reeder.
27. Turning to the specific issues that the claimant raises as his arguments that the dismissal was unfair, if one looks at the investigatory discussion it is clear the claimant by any objective standard would have known the allegations against him. Not only at that stage but when it comes to the invitation to the disciplinary if there was any doubt, those allegations are clearly set out in the letter of 15 February 2017 (at page 127). There is no doubt what the allegations are and again explained by Miss Slater at the outset of the disciplinary hearing. The second limb of the claimant's argument that the allegations were not proved, that is a basic misunderstanding of employment law. The respondents are not looking at the criminal burden where they have to prove beyond all reasonable doubt that some misconduct has occurred, they have to prove the civil burden on the balance of probabilities, namely back to British Homes Stores v Burchell did they have a reasonable belief based on reasonable grounds – they clearly did.
28. Turning then to the final limb of fairness; Does the sanction of dismissal fall within the range of a reasonable response open to the employer? It is not for the tribunal to substitute their view and say we would have done

this or would have done that, it is whether this employer with the facts known to them at the time they took the decision to dismiss could honestly say that the sanction of dismissal was a reasonable sanction clearly on the facts, that was open to this employer. In those circumstances the decision to dismiss the claimant was fair in all the circumstances.

Employment Judge Postle

Date: 8 March 2018

Sent to the parties on:

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For the Tribunal Office