Case Number: 3400516/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Chojak	**v**	**Hilton Foods UK Limited**

Heard at: Cambridge **On:** 15 & 16 February 2018

Before: Employment Judge Cassel

Appearances
For the Claimant: Ms Wisniewska, HR Advisor.
For the Respondent: Ms Coyne, Counsel.

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed by the respondent and his claim of unfair dismissal is dismissed.

2. The claim for breach of contract is dismissed on withdrawal.

RESERVED REASONS

1. In his claim to the employment tribunal the claimant complains of unfair dismissal from his position as forklift truck driver with the respondent. There is also a claim for breach of contract in relation to notice pay.

2. The claims are resisted by the respondent and in the response the respondent accepts that notice pay is outstanding. The parties agree that this was paid before the hearing took place.

3. The claim was listed for hearing on 15 February 2018 for two days. On the first day Ms Wisniewska, who appeared for the claimant, confirmed that the outstanding notice pay had been received and there was no outstanding claim for unpaid wages. In those circumstances and having heard from both parties, I dismissed the claim of breach of contract on withdrawal.

4. Ms Wisniewska raised a preliminary issue and stated that it had come to her attention today in conversations with one of the witnesses, Mr Motak, that he had had similar, what were described as "difficulties" with the respondent. The claimant had been dismissed for persistent lateness and it had come to her attention that Mr Motak had, if anything, a worse history of lateness but a different sanction had been applied to him and he had not been dismissed, whereas the claimant had been. She stated that she wished to amend the details of claim and add a further part to the claim of inequality of treatment citing Mr Motak as a comparator.

5. Ms Wisniewska made two applications; first to amend the claim to include this detail and second to agree to an adjournment to enable the respondent to answer this additional allegation.

6. I sought further detail from Ms Wisniewska and she confirmed her knowledge at that stage was sketchy and I put the case back for her to consider the matter further and for Ms Coyne, who appeared for the respondent, to take instructions.

7. After a brief adjournment Ms Wisniewska renewed her applications which were resisted by Ms Coyne who among her submissions stated that the balance of hardship should be considered following Selkent Bus Company Limited v Moore [1996] ICR 836 EAT, and the balance of hardship and injustice be considered. She submitted that the nature of the amendment was such that it was fundamental and would necessitate an adjournment for the respondent who had thoroughly prepared the case on the basis of the claim in the claim form and that the timing and manner of the application had to be borne in mind. The first trial date had been the 15 September 2017 and had been adjourned because of the non-availability of Mr Lambert, and Ms Wisniewska having been instructed throughout should have taken reasonable steps to become aware earlier of this, what is now presented as an entirely new issue. Ms Coyne submitted that supplemental statements had been taken from the claimant's witnesses and a discussion with them must have taken place with Ms Wisniewska. She submitted that it would be unfair and prejudicial, and had been left far too late and even at this stage no relevant statements had been taken or documentation had been produced.

8. In refusing the application for amendment and adjournment I noted that the original claim had been submitted on 30 May 2017 and the claimant had been represented by the same representative throughout. The basis of the claim was that a previous warning for misconduct should be ignored and the outcome of dismissal fell outside the band of reasonable responses. The proposed amendment put the claim on an entirely different basis citing a comparator's treatment as evidence of unfair treatment. I considered Selkent and found that the nature of the amendment is fundamental and puts the claim before the tribunal on an entirely different basis. Time limits as such do not apply as the application was for an amendment of an existing claim, but the timing and manner of application was of considerable concern. The claim had been first listed in September, relisted for two days

starting today, witness statements had been exchanged two weeks ago when the claimant's representative had an opportunity, should she so consider it appropriate, to make further enquiries and had done so to some extent by the taking and submission of supplemental statements. I concluded that to allow the amendment would put the respondent to substantial disadvantage. Even at this stage the amendment of the claim was entirely speculative as no statements had been taken nor documentary evidence presented. I bore in mind the overriding objective within the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and undertook a balancing exercise and concluded that the amendment and adjournment should be refused.

9. I directed that the trial should proceed as listed.

Evidence

10. I heard evidence from Mr Adrian Lambert, dry goods manager.

11. The claimant.

12. Mr Wojciech Motak, warehouse operative.

13. Mr Damian Skowronski, warehouse operative.

14. I also had a bundle of documents comprising 51 pages and a skeleton argument on behalf of the claimant and written submissions on behalf of the claimant.

Findings of fact

15. I make the following findings of fact based on the balance of probabilities having considered those documents to which my attention was drawn.

    15.1 The claimant first started working for the respondent as an agency worker in April 2013, but started as an operative as an employee for the respondent on 6 April 2015. He was continuously employed until 7 April 2017.

    15.2 The respondent is part of the Hilton Food Group and operates from a site in Huntingdon, among other places, where there are over 1000 employees. It is a meat packing plant and supplies meat to one of the group's customers.

    15.3 The claimant was employed as a forklift truck driver and worked over the course of an eight week shift rotation pattern. He was provided with terms and conditions of employment which were produced at pages 20-24 of the bundle of documents. There was also a disciplinary process and procedure incorporated into the contract of employment and the formal process was exhibited at pages 25-29.

15.4 Mr Lambert gave evidence that timekeeping was critical to the department that he managed, the dry goods department. He explained in some detail that the meat packing operation was highly mechanised and 600,000 packs of meat are produced each day from the three factories that he and his staff are required to service. There were 38 staff operating on Mr Lambert's shift, one of whom was the claimant.

15.5 Used on the site is something which was called a time management system or TMS. There was a process whereby a member of staff coming onto or leaving the site was required to use an identification card and then a thumb print to clock in and to clock out. Mr Lambert stated that he clocked in every day using the same procedure and never had a problem with the system, and the first complaint that he had received as to the operation of the system was from the claimant.

15.6 In any event on 21 October 2016 the claimant was called to a disciplinary hearing chaired by Mr Lambert. The matter which was under consideration was a breach of health and safety. The claimant had, it was suggested, loaded pallets in a way on the forklift which caused a health and safety risk. During the hearing the claimant accepted that he realised that this was dangerous and he was given a final written warning which was valid for 12 months. He was told of the right of appeal but did not exercise that right.

15.7 It came to Mr Lambert's attention that the claimant had been late on a number of occasions. Pausing there, both Mr Motak and Mr Skowronski gave evidence that the TMS system was inherently unreliable for accurately recording time. Mr Skowronski clarified his evidence that he had reached that conclusion by comparing the time displayed on an internal computer to that displayed on the TMS system. There was no reference to other time recording equipment such as a reliable watch or clock. I bear in mind that the belief that they both expressed was genuine but I accept Mr Lambert's evidence that this was something of which he was not aware at the time he took the relevant decision. I conclude for the purposes of these proceedings it is not necessary to make a finding, nor indeed on the basis of the evidence presented to me am I able to make a finding as to the accuracy of the TMS system.

15.8 In any event there was an informal meeting on 6 December 2016. The claimant did not dispute that he had been late and accepted that he was persistently late. As far as Mr Lambert was concerned he made it clear to the claimant that although on that occasion he had taken no formal disciplinary action, any repetition could lead to disciplinary proceedings. He expressed the hope that by having that informal conversation the claimant's punctuality would improve.

15.9 He noted that the claimant continued to have periods of lateness and an investigation meeting was held on 21 March 2017. Five instances of lateness were specifically referred to and the claimant accepted two instances although alleged that the clock was showing the wrong time and denied three.

15.10 A decision was taken to initiate the disciplinary procedure and a letter to him was sent dated 28 March 2017 in which he was told that he was to attend a disciplinary hearing on 7 April 2017, that he had a right to be accompanied, that the meeting was in relation to his persistent lateness and that he faced a disciplinary sanction including dismissal.

15.11 The claimant attended, and for the first time raised concerns that he was suffering from anxiety and couldn't sleep. Although there was a medical report in existence he did not bring that report to the meeting. Mr Lambert having considered the evidence did not believe the claimant as on previous occasions he had mentioned traffic as being the reason for lateness or simply oversleeping, and he considered the evidence that he had available. He stated in evidence that he had considered giving a final written warning but decided to dismiss the claimant.

15.12 The claimant was told of his right of appeal but did not exercise that right. The claimant was paid notice pay, which was subsequently increased to the correct amount. The effective date of termination was the 7 April 2017.

Submissions

16. Ms Coyne submitted that the issues were in reality quite straight forward. It was in her submission a dismissal that started with an enquiry into a contractual breach specified in the respondent's hand book, which the claimant would have realised was serious as he was subject to a final written warning. The processes that were followed were those described in the disciplinary procedure and at the dismissal meeting he was dealt with for matters which he had in part admitted. Dismissal fell within a range of reasonable responses. He had not exercised his right of appeal, but in any event there were no procedural irregularities.

17. Ms Wisniewska relied on her skeleton argument and referred to it extensively. Without wishing to do disservice to a lengthy and helpful skeleton argument she submitted that the investigation was inadequate, that the existing warning should not have led inevitably to dismissal as was the case in this claim. She submitted that the respondent had acted unreasonably in treating minor time keeping breaches as being sufficient to warrant dismissal

18. At the end of the submissions I announced that my decision was reserved which I give herewith with reasons.

Conclusions

19. S.98 of the Employment Rights Act 1996 is in the following terms:

> "**Section 98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), 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.
>
> (5) . . . . . .

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."

20. It is settled law that the leading case in misconduct cases is British Home Stores Ltd v Burchell.[1980]ICR303

21. In Sheffield Health and Social Care NHS Foundation Trust v Crabtree [2009] UKEAT, HHJ Peter Clarke made the following comment at paragraph 14:

> "It might be thought that the Burchell test as stated by Arnold J must be literally applied in conduct unfair dismissal cases. That would be a misunderstanding. The first question raised by Arnold J "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions "reasonable grounds for the belief based on a reasonable investigation" go to the question of reasonableness under s.98(4) of the Employment Rights Act 1996 and there the burden is neutral, "to combine all three questions as going to the reason for dismissal is wrong".

22. I bear in mind the comments made in Boys and Girls Welfare Society v McDonald [1996] IRLR 129 by HHJ Peter Clarke regarding the lack of a need for further investigation when the signal offence is admitted. In the present case the claimant has admitted acts of misconduct by being late on occasion. There is no need for further investigation by the respondent into the **commission** of the offences although the circumstances surrounding the offence needs to be considered by a reasonable employer.

23. Mr Lambert considered the various explanations put forward by the claimant on each of the occasions at which he had spoken to him and concluded at the disciplinary hearing that he simply did not believe him when he claimed anxiety or poor sleep. There was no medical evidence presented to him and there was nothing unreasonable about the manner in which Mr Lambert approached the issue and his conclusion of misconduct is hardly surprising. There was no procedural irregularity. The claimant had the opportunity of being accompanied, knew the nature of the alleged misconduct and the potential outcome.

24. As far as sanction is concerned the reasonable responses test was set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT by Browne-Wilkinson P. It is not for a tribunal to substitute its own judgment for the

appropriate sanction. The question is whether dismissal fell within a range of reasonable responses available to the respondent. I have no doubt that it did, given all the circumstances and for these reasons I dismiss the claim and the hearing set aside for remedy, if required, is vacated.

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Employment Judge Cassel

Date: ……15 March 2018

Sent to the parties on: ..15 March 2018..

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For the Tribunal Office