



EMPLOYMENT TRIBUNALS

Claimant: Mr N Bird

Respondent: Stenigot Estate Company

Heard at: Lincoln

On: Wednesday, 21 March 2018
Employment Judge Blackwell (Sitting Alone)

Before:

Representation

Claimant: Mr T Perry, Counsel

Respondent: Mr M Williams, Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.

RESERVED REASONS

1. Mr T Perry of Counsel represented Mr Bird and he called Mr Bird to give evidence on his own behalf. Mr M Williams also of Counsel represented the Respondents, and he called Ms Andrea Littlewood an HR Practitioner, Mr Tony Marsden also an HR Practitioner, and Mr D Dennis the Managing Director of the Respondents. There was an agreed bundle and references are to page numbers in that bundle.

Issues and The Law

2. Mr Bird brings a single claim of unfair dismissal. It is common ground that he was summarily dismissed on 23rd June 2017. The letter of dismissal which was written by Mr Marsden sets out a number of conduct issues.
3. As a matter of Law it is for the employer to prove one of the potentially fair reasons set out in Section 98(1) or Subsection (2) of the Employment Rights Act 1996. In this case the Respondent relies upon conduct and if such potentially fair reason is proved, then it is for the Tribunal to apply to that potentially fair reason the statutory test of fairness set out in Subsection (4) of Section 98:

"In any other case 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."

4. In addition to Statute Law, both Counsel in their written submissions have correctly referred me to the well-known case of *BHS v Burchell* [1980] ICR 303, which holds as follows:
 - (a) The Respondent must prove that it had a genuine belief in the misconduct complained of;
 - (b) That the Respondent must have had in its mind at the time of dismissal reasonable grounds to sustain that belief and;
 - (c) At that time the Respondent had carried out as much investigation as was reasonable in all the circumstances
5. As to (b) and (c) the burden of proof is neutral and it is common ground that the well-known test of the band of reasonable responses applies not only to the dismissal itself, but also to the process which brought about the dismissal.
6. The range of reasonable responses test is perhaps best formulated in the decision of Browne-Wilkinson P in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439. I have in mind all 5 elements set out in that Judgment, and in particular "the starting point should always be the words of Section 98 themselves".
7. In summary the Respondents dismissed Mr Bird for the following reasons:
 - (1) Failure to carry out a reasonable order given by a manager during working hours and serious disregard to duties;
 - (2) Serious breaches of the health and safety standards;
 - (3) Serious breaches of duty of care in ensuring the health, safety and welfare of the sheep;
 - (4) Conduct likely to damage the reputation of the company."
8. Mr Bird's claim of unfair dismissal is based upon a number of points summarised in paragraph 15 of the claim form received by the Tribunal on 29 September 2017. They are allegations concerning both the substance of the dismissal and the procedure which led up to it. Perhaps the most significant is that at paragraph b:

"The Claimant was informed by Mr Dennis in early April 2017 that he would be dismissed for gross misconduct, rendering the subsequent process a sham given that it was a pre-meditated decision;'

Findings of Fact

9. Mr Bird began employment with the Respondent on 15th October 2015 and was employed as a Stockman. His contract of employment is at pages 57 to 60. There is no job description, however Mr Dennis wrote to Mr Bird on 19th August 2014 after interviewing Mr Bird, and said:

"There is after all no issue with who is the main shepherd since we are now back to looking for an assistant (the other man's wife did not want to leave their area) and I do not propose to employ this person without referring to you.'
10. The Respondents are an agricultural concern, having an estate of 3,000 acres with 10 employees carrying out livestock arable and horticultural functions. There are some 1,000 ewes, and 100 cows plus followers. There were 10 employees in total. Mr Dennis's evidence which was not challenged was that the following were legal requirements for the Respondents:
 - i) Keep a record of all livestock births;
 - ii) Keep a record of all livestock deaths;

- iii) Keep a record of all livestock incinerated on the estate, as per the incinerator regulations from the Animal & Plant Health Agency; and
 - iv) Complete all ARAMS 1 forms for movement of sheep off the Estate.
11. In November 2016 there were of the order of 500 lambs on the Estate. It is common ground that by March 2017 there were only 112 left. Mr Dennis's evidence was that he went on holiday in November 2016 for three weeks, and upon his return asked Mr Bird repeatedly to give him livestock counts and, in particular, the number of lambs that had been lost. The failure to give an answer to these requests was one of the acts of misconduct which led to Mr Bird's dismissal. In the event in March 2017 Mr Dennis counted the lambs himself, and concluded there were only approximately 115. It took him 10 minutes. It is common ground that of the order of 400 lambs were lost between November 2016 and March 2017.
12. On 5th April 2017 Mr Dennis met Mr Bird with Mr Drinkel (the Estates Agent), and Mr Drinkel's notes are at pages 85 and 86. Mr Dennis is recorded as raising the issue of the failure to count the lambs and the substantial losses. He also highlighted the importance of recording numbers with the statutory health record, the issue of the disposal of carcasses was also discussed. Mr Dennis is then recorded as follows:
- "DMD suggested that it would be best for all concerned for NB to leave his employ voluntarily ASAP, with his reputation remaining intact — as far as everyone else is concerned. The alternative would be for DMD to initiate dismissal procedures for gross negligence of duty."
13. Mr Dennis then wrote to Mr Bird a hand-written letter which appears at pages 87 and 88. The final paragraph of that letter reads as follows:
- "To conclude, I believe the best outcome for all concerned, is for you to hand in your notice, or I will have little choice but to initiate formal dismissal procedures, and surely neither of us wants all of this exposing."
14. The following day Mr Bird raised a written grievance which we see at page 89.
15. Mr Dennis then took legal advice. As a consequence, the Estate employed outside HR Consultants to conduct both the grievance processes and formal investigation into Mr Bird's conduct. The appointment and terms of reference to the consultants appears not to have been set out in writing. Ms Littlewood an HR Practitioner was instructed by Mr Dennis to specifically deal with the grievance, and she chaired a grievance meeting with Mr Bird on 1st May 2017. On 9th May she wrote to Mr Bird (see pages 113 to 115) setting out her conclusions on the grievance and informing Mr Bird that his grievance was unsuccessful. Ms Littlewood was later to reappear because she dealt with Mr Bird's appeal into his dismissal.
16. Contemporaneously a Miss Hudson also an independent HR Advisor was carrying out an investigation. Mr Bird having been suspended from his duties pending such investigation on full pay. Ms Hudson also had the role of dealing with Mr Bird's appeal against Ms Littlewood's grievance outcome. The appeal against the grievance finding was dismissed.
17. Ms Hudson's investigation report is dated 8th June 2017 and begins at page 162 concluding at 175. She recommended that a formal disciplinary process be instituted against Mr Bird. She interviewed Mr Bird and Mr Dennis, also the Estates Manager Mr Corrigan, and Ms Gravells who ran the administration side of the Estate. At page 171 she lists the extensive documentary evidence that she took into account including a number of lengthy emails from Mr Bird.
18. As a consequence of Ms Hudson's recommendation, Mr Bird was invited on 8th June 2017 to attend a disciplinary meeting to be held on 16th June. The letter is at

pages 181 to 183. 13 allegations of misconduct were put and Mr Bird was provided with Ms Hudson's investigation report and supporting documents.

19. The disciplinary hearing was conducted by Mr Marsden, another HR Consultant, and the notes of that meeting are at pages 184 to 201 . The notes are an accurate account of the very lengthy and thorough process. In fact, the meeting of the 16th June went on for the best part of the day and was adjourned until 10:00 am on Monday 19th June.
20. No decision was taken on the 19th June, and Mr Marsden then set out his decision in a letter of the 23rd June 2017 at pages 202 to 209. His decision was that Mr Bird is summarily dismissed.
21. Mr Bird appealed the decision to dismiss by letter of 24th June. One of the grounds of appeal is again the point that the decision to dismiss was predetermined by reason of the conduct of Mr Dennis, and in particular his letter of the 7th April 2017. He also appeals on the ground that Mr Corrigan did not have authority to give him instructions, and further that as matter of fact no such instruction was given.
22. The appeal hearing was conducted by Ms Littlewood on Friday 7th July 2017, and the notes are at pages 219 to 223. Again, the notes are not disputed and they reveal a thorough examination of the decision to dismiss. Ms Littlewood dismissed the appeal by letter of 1 5th July at pages 224 to 227.

Conclusions

23. I will deal first with Mr Bird's contention that because Mr Dennis had in effect dismissed him during the meeting with Mr Drinkel on 5th April, and as confirmed in Mr Dennis's letter of 7th April, no subsequent decision however so taken could be fair. Although Mr Bird's employer as a matter of Law is Stenigot Estate Company, in reality Mr Dennis was the employer. I do not think that he misspoke on 5th April or miswrote on 7th April. In my view Mr Dennis had concluded on 5th April that Mr Bird should be dismissed.
24. It is apparent that he then took legal advice and unsurprisingly a formal investigation was begun using HR Consultants. I accept their evidence that they acted independently. In particular, I accept Mr Marsden's evidence that had he concluded that there was no case to answer he would have done so notwithstanding having seen Mr Drinkel's notes and Mr Dennis's letter of 7th April. Ms Littlewood gave the same evidence in relation to her hearing of the appeal against the dismissal, and again I accept that she would have overturned the decision to dismiss had she believed she had grounds to do so based upon her professional expertise and the evidence.
25. Whether Mr Dennis would have accepted a decision that meant Mr Bird remaining in employment is another matter, but it is hypothetical.
26. Turning now to the requirement that the Respondent prove a potentially fair reason for dismissal, there is overwhelming evidence to support that contention. Allied to that question is the question posited by Burchell namely whether they had a genuine belief in the misconduct complained of. Again the evidence is clear both Mr Marsden's and Ms Littlewood's evidence was to the effect that they believed Mr Bird had committed the conduct complaint of.
27. Looking then at that conduct, it is summarised into four headings by Mr Marsden in his dismissal letter. The first of which is as follows:
 - 1) Failure to carry out a reasonable order given by a manaaer during working hours and serious disregard of duties

28. This allegation refers to Mr Bird's failure between late November 2016 and March 2017 to provide a count of the surviving lambs. Mr Marsden had before him statements by Mr Dennis, Mr Corrigan and Ms Gravells, all to the effect that Mr Bird had been instructed by both Mr Dennis and Mr Corrigan to provide a count. There was also evidence principally from Mr Dennis that no such count had been provided. Against that Mr Bird denied that any such instruction had been given and that Mr Corrigan and Ms Gravells was simply protecting their own positions. There is no allegation that further investigation was required. Thus, in my view Mr Marsden was entitled to come to the view that Mr Bird had been repeatedly asked to provide a count of the lambs and had failed to do so.

2) Serious breaches of health and safety standards

3) Serious breaches of duty of care in ensuring the health, safety and welfare of the sheep

29. It appears to me that these two allegations are inextricably linked. In summary the allegations relate to failures to keep the record of the living lambs, the deaths of lambs, and the number of carcasses incinerated. There is also the general allegation that Mr Bird failed to take due care of the lambs in his charge which led to the very high rate of losses.

30. There is no doubt on the evidence provided to Mr Marsden that a Mr Willerton, a general farmworker, carried out much of the day-to-day care of the lambs. Both during the disciplinary process and his evidence before the Tribunal Mr Bird's response seems to have been one or a combination of the following:

(a) It was Mr Willerton's responsibility;

(b) There was no time, I was too busy because we were understaffed;

(c) I could not raise issues with Mr Dennis because he was a difficult man to deal with.

31. As to Mr Willerton and Mr Bird and their relative responsibilities, it was clear to Mr Marsden that Mr Bird was the man with overall responsibility for all the livestock including the lambs notwithstanding that he had assistance from Mr Willerton. In my view on the evidence before him, Mr Marsden was entitled to come to that conclusion.

32. Again, in regard to Mr Willerton, Mr Perry criticises the investigation and disciplinary process for not interviewing Mr Willerton. The reason put forward was that during the relevant period Mr Willerton was absent from work and suffering from a mental illness and was for at least some of the time hospitalised because of that mental illness.

33. Another criticism of the investigation was that the vet was not contacted in order to clarify whether the pneumonia or clostridial disease was the cause of the high death rate amongst the lambs. Mr Dennis's evidence unchallenged by the Claimant was that the poor pasture he found the lambs on, on his return from holiday in November 2017, is a direct cause of clostridial disease. It is clear from the evidence before Mr Marsden that whether or not he had been instructed to do so, Mr Bird had not kept count of the lambs even when vaccinating them. He also admitted fiddling the incineration records because the incinerator did not reach the required temperatures. There was also clear evidence by way of photographs that carcasses of lambs were being stored inappropriately and in clear breach of Legislation and Mr Bird accepted that he knew that that was so.

34. Again, it appears to me that there was abundant evidence before Mr Marsden to support those alleged breaches. As to the allegations of a failure to make reasonable investigations, Mr Willerton was clearly not in a fit state to be

interviewed and there was sufficient evidence available for Mr Marsden to come to the conclusion that it was more likely than not that clostridial disease was the main factor behind the loss of lambs.

4) Conduct likely to damage the reputation of the company.

35. This appears to be no more than saying that had the information about the failure to comply with statutory recording both of deaths and births and of incineration come to light, the company's reputation would have been damaged. Clearly if there had been a prosecution, that would have been so, and upon the evidence before Mr Marsden, there was a clear risk of such a prosecution. Had the photographs of the lamb carcasses stored as they are (shown at page 54) come to public attention, again there would have been damage to the Estate's reputation and probably a prosecution.

It follows from the above that in my view the Burchell tests are all met.

36. The next matter to consider therefore is whether or not the sanction of dismissal was fair having regard to both Subsection (4) of 98, and the test of the band of reasonable responses. Mr Perry criticises the decision in a number of ways. Firstly he states that no lesser sanction appears to have been considered. He also criticises the failure of the Respondents to take disciplinary action against Mr Willerton. As to that latter complaint, there is clear evidence that Mr Willerton was in no fit state to have disciplinary procedures taken against him. Further Mr Dennis's evidence which is supported not only by the documentary evidence but also by Mr Bird's own evidence about his competence and expertise, was that Mr Bird was the man responsible for the welfare of the lambs and it was a responsibility that there was abundant evidence that he had not discharged.
37. Given the seriousness of the conduct it seems to me that the decision to dismiss falls well within the band of reasonable responses. The failure to keep statutory records which Mr Bird largely admitted would have been sufficient upon its own to fall within the band of reasonable responses to dismiss as would the reported failure to obey a direct instruction to provide a count of the lambs. It is clear that Mr Bird disobeyed that instruction to hide the extent of the loss. I therefore conclude that the decision to dismiss was fair and it follows therefore that the claim of unfair dismissal fails and is dismissed.

Contributory Fault

38. Because I have found that Mr Bird was fairly dismissed it is not necessary for me to deal with this point - however, since it was argued, my conclusion would have been that Mr Bird's culpable and blameworthy conduct did lead to his dismissal.
39. As to the degree of that contribution I have noted above the responses that Mr Bird gave both during the disciplinary process and in evidence before this Tribunal. It is clear on his own evidence that Mr Bird is a stockman of considerable experience and expertise. There is overwhelming evidence that he failed to obey direct instructions from Mr Dennis to give a count of the live lambs. There is also clear evidence that he failed to keep records that statute required. At no stage was Mr Bird prepared to accept any responsibility. In my view nothing exemplifies Mr Bird's approach more than the sarcastic statement he makes in his letter of appeal of the 24th June 2017, in which he says:

"I acknowledge that it is conceivable that some of my decisions and judgement calls may have had a less beneficial effect on one or more of the stakeholders. For example, may have decided that staying to tend to a seriously ill, life-threatened sheep lamb or even beast rather than filling in some document which may have been more administratively convenient for the Estate, was where my limited resources were better placed."

40. I would have included had it been necessary to do so that the level of Mr Bird's contributory fault was 100%.

Employment Judge Blackwell

Date 3rd May 2018

RESERVED JUDGMENT & REASONS SENT
TO THE PARTIES ON

2nd June 2018

FOR EMPLOYMENT TRIBUNALS