



EMPLOYMENT TRIBUNALS

Claimant: Mr T S Bendle
Respondent: British Gas Services Limited
Heard at: Reading **On: 15 February 2019**
Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: In person
For the Respondent: Ms T Burton (Counsel)

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and wrongful dismissal are not well founded and are dismissed.

REASONS

1. In a claim form presented on the 6 April 2018 the claimant complained that he was unfairly dismissed and that he was wrongfully dismissed. The respondent denied the claimant's complaints.
2. I have had to determine whether the claimant was dismissed for a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1996 (ERA). The respondent relies on conduct. Whether the claimant's dismissal was fair having regard to section 98(4) ERA; whether the procedure followed by the respondent was fair; whether the decision to dismiss the claimant was within the range of responses of a reasonable employer; if the dismissal was procedurally unfair whether any *Polkey* reduction should be made; if the claimant was unfairly dismissed whether the claimant contributed to his dismissal.
3. The claimant gave evidence in support of his own case. The respondent relied on the evidence of Phillip Cox, Barrie Powell and Edward Zgorzelski. All the witnesses produced written statements which were taken as their evidence in chief. The parties provided me with an agreed trial bundle. From these sources I made the following findings of fact.

4. The claimant was employed by the respondent from 7 July 2014 as a Heating Sales Advisor. The claimant was a field based employee visiting customers in their homes and processing sales of items such as boilers.
5. When completing a sale, the claimant had access to a number of discount codes or refunds that he could provide to customers in appropriate circumstances. This included a 'Friend and Family' discount. The respondent restricts the usage of this discount to three times a year per employee.
6. The respondent checks that discounts and promotions are applied correctly by a weekly compliance report on discount usage. The report flags up sales where there is a possible error in the discount applied.
7. The respondent has monthly governance meetings at which Area Managers meet with a member of the compliance team, the national complaints manager, and the national performance manager. At these meetings they review the anomalies identified by the compliance report and agree what action, if any, is required to deal with an error. Action taken may range from providing additional training, an informal conversation that is recorded, or a disciplinary investigation.
8. In October 2017 the claimant appeared on the monthly compliance report in respect for a number of anomalies in discount usage. It was of concern that one of the anomalies reported related to a discount applied to a boiler sold to the claimant's father. The possibility of misconduct was considered to warrant further investigation. The area managers agreed that the matter should be referred for disciplinary investigation.
9. In cases where there is misuse of discount the sanction imposed against Heating Sales Advisors, depending on the circumstances, have varied from final written warning to dismissal.
10. The claimant was invited to attend an investigation in respect of five allegations. The claimant who states that he quoted over 1000 jobs per year and sold over 400 boilers a year was not concerned.
11. The claimant's case was investigated by Huw Davies who prepared an investigation report in which he concluded that there was sufficient evidence to suggest a case to answer concerning two allegations. These were an allegation that the claimant has issued a refund to a family member that they were not entitled to and that he has misused friends and family discount.
12. Following the investigation meeting the claimant continued to work until the disciplinary hearing.
13. The claimant was invited to attend a disciplinary hearing on the 5 December 2017. The claimant was informed that the purpose of the hearing was to consider an allegation of gross misconduct. The claimant was informed about the nature of the allegations against him; the claimant

was provided with a summary of the findings from the investigation, including details of the allegations, witness statements and other documents. The claimant was informed that if he was found guilty of gross misconduct he may be dismissed without notice or pay in lieu of notice. The claimant was informed of his right to be accompanied at the hearing.

14. At the hearing the claimant was accompanied by his trade union representative, the disciplinary chair of panel was Barrie Powell, Paul Hubbard was on the panel, also present were Huw Davies who was the investigating officer and a note taker Shayne Butterworth.
15. During the hearing the claimant, in answer to the allegation that he had issued a refund to a family member that they were not entitled, to stated that he had set up a 'HomeCare' policy for his father, that his father received a visit from an engineer, he thought that this would have been a breakdown visit which could have cost his father a £99 diagnostic charge so he gave his father a refund. The claimant accepted that he had not checked that the refund was due to his father. The claimant later changed is account and stated that the £89 discount had been given because his father's partner had requested £99 refund.
16. In respect of the allegation that the claimant had misused friends and family discount. The claimant had used a colleague's payroll number to apply for the friends and family discount. The claimant stated that he did not understand the process and that his manager had encouraged the use of other employees' discounts in this way; the claimant later stated that he used the discounts for the benefit of the customers. The claimant stated that he was not aware of the correct process.
17. During an adjournment in the disciplinary hearing Barrie Powell contacted Phillip Cox to query the sales process when using discounts so as to understand if the claimant's actions could have been a simple error.
18. Barrie Powel came to the conclusion that the claimant had committed theft from the respondent and fraud that amounted to gross misconduct. Barrie Powell explains that the claimant's change of "story", the claimant had changed his account three times during the investigation and disciplinary process, confirmed his thought that the claimant acted with intent in processing the refund for his father rather than it being a training issue as suggested by the claimant. The claimant had been the one who set up the HomeCare policy for his father and Barrie Powell did not believe that the claimant had not known that only a £10 payment, which was later repaid when the policy was cancelled, had been made under the policy. Barrie Powell did not believe that the claimant could be genuinely mistaken about his father being entitled to refund.
19. Barrie Powel concluded that there had been a breakdown in trust in the claimant as an employee. Although Barrie Powell did not consider that the misuse of friends and family discount was serious enough to justify

dismissal, he was satisfied that the claimant had misused the friends and family discount. This demonstrated a pattern of behaviour where the claimant was misusing refunds and discounts for his own personal gain. Barrie Powell did not accept the claimants claims that he did not understand the processes, he had been employed by the respondent for three years and had received training and company briefings.

20. Barrie Powell stated that because he considered what the correct sanction was and came to the conclusion that as the claimant had committed theft against the company he had no alternative but to dismiss the claimant: he felt he could not impose a lesser sanction even after taking into account the claimant's good performance during his employment with the respondent. The claimant was dismissed with immediate effect. The decision to dismiss the claimant was confirmed in a letter to the claimant on 11 December 2017.
21. The claimant appealed the decision to dismiss in a letter dated the 15 December. British gas policy states that the appeal is to be heard within 10 days. The appeal hearing was arranged to take place on 19 January 2018. The claimant was accompanied by his union representative. The appeal was to be heard by Edward Zgorzelski, Head of Field operations. Edward Zgorzelski was provided with an appeal pack containing the notes of the investigation meeting with the claimant, additional enquiries made by the investigation manager, the disciplinary policy and the British Gas Standards of Conduct. Edward Zgorzelski reviewed the notes of the disciplinary hearing and the dismissal letter.
22. Edward Zgorzelski asked that Carl Vaughan who is a sales manager attend the appeal hearing to assist him with any sales specific aspects to the allegations against the claimant.
23. The claimant produced a number of anonymised statements of support. Edward Zgorzelski began the appeal by informing the claimant that he was going to adjourn the appeal to allow the claimant time to provide the names of the individuals who had provided statements and ask then if they would be prepared to be interviewed by Edward Zgorzelski about their statements. The meeting was adjourned, and the claimant provided the names and contact details of those who made statements in support.
24. The claimant's union representative wrote to Edward Zgorzelski asking that Carl Vaughan be replaced because he did not feel that he was independent. Edward Zgorzelski refused to do so because he considered that Carl Vaughan had not directly managed the claimant and had no professional knowledge of the claimant. Edward Zgorzelski reviewed the all statements the claimant had provided: the statements were complimentary of the claimant and described him as a high performing and helpful colleague. The statements did not relate to the specific allegations faced by the claimant and Edward Zgorzelski states that he did not feel that he could attach much weight to them statements provided.

25. The claimant also provided Edward Zgorzelski with a statement from his father. Edward Zgorzelski says of the statement: "I found this statement to be troubling as it showed that Scott was not refunding money because he believed his father (or his father's partner) was genuinely entitled to receive it".
26. The appeal hearing initially to be reconvened on 2 March 2018, but the claimant informed the respondent that he was now not available on that day and it was rearranged for 9 March 2018. The claimant was accompanied by his union representative and Carl Vaughan sat with Edward Zgorzelski as part of the appeal panel. Edward Zgorzelski explained the reason for the presence of Carl Vaughan. Edward Zgorzelski discussed with the claimant the points raised in the appeal. Edward Zgorzelski told the claimant that he accepted the statements that had been provided in support of the claimant and accepted that the claimant was supportive a supportive colleague and valuable member of the team.
27. During the appeal the claimant stated that he provided the £89 refund to his father to avoid a customer complaint. Edward Zgorzelski considered that this was a change in the claimant's account and that the claimant had changed his account several times about this. At the end of the meeting Edward Zgorzelski took time over the weekend to consider his decision.
28. Edward Zgorzelski concluded that the £89 refund to the claimant's father was the serious allegation. Had the misuse of the family and friends discount been the only allegation it would have resulted in Edward Zgorzelski giving the claimant a final written warning and an instruction to follow the process. The claimant had failed to follow the friends and family discount process and had used his colleagues' discount on two occasions without his knowledge after using it twice with his knowledge.
29. Edward Zgorzelski considered that the £89 to the claimant's father was a fraud, the refund was applied inappropriately and with intent. Edward Zgorzelski considered that the claimant had been dishonest in his conduct and had defrauded the respondent, there had been a serious loss of trust which could not be repaired. The decision to dismiss the claimant had been appropriate and it was not too harsh.
30. Edward Zgorzelski rejected the claimant's assertion that he had never intended to defraud the respondent; he did not accept the claimant's assertion that he had not been properly trained on how to apply the discount. The claimant's record and his service as a good heating sales advisor who supported his colleagues did not undo the loss of trust flowing from the allegations which he believed to be true. Edward Zgorzelski upheld the decision to dismiss the claimant.

31. The claimant points out that other people who are employed by the respondent have done what he has done and they remain in its employment.
32. The claimant gave evidence that his father needed boiler. *"There was mention of a £99 call out charge for trying to repair the Boiler to which they were quoted £1100 for repair. I knew that if a customer pays a 1 off repair that I can refund £89 which is what I did."* The claimant does not say in his evidence that he thought that his father was entitled to the refund.
33. The claimant gave a description of the friends and family discount scheme. I did not find his account clear. The claimant spoke of buddy system and stated that his buddy was a colleague Martin. Between them the claimant says that they had 6 friends and family discounts available for use. The claimant states that he used his family and friends discount for his father.
34. An employee has the right not to be unfairly dismissed by his employer.
35. Section 98 of the Employment Rights Act 1996 ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show (a) the reason (or, if there was more than one, the principal reason) for the dismissal, and (b) that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.
36. Where an employer has shown a potentially fair reason 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.
37. The Respondent must show that it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case.
38. It is not necessary that the tribunal itself would have shared the same view of those circumstances.
39. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting its own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair". The

burden is neutral at this stage: the tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

40. I have considered the guidance given in *Hadjiannou v Coral Casinos Limited* [19181] IRLR 352 that an argument by a dismissed employee that the treatment he received was not on a par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances. Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked or at least will not be dealt with by sanction of dismissal. Secondly, there may be cases where evidence made in relation to other cases supports an inference that the purported reason stated by employers is not the real or genuine reason for dismissal. Thirdly, evidence as to decision made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.
41. In considering wrongful dismissal I am required to decide whether the misconduct actually occurred. In wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily.
42. An employer may dismiss summarily if the employee is in breach of contract and that breach is repudiatory - that is where the employee "abandons and altogether refuses to perform" the contract: where the employee does an act of gross misconduct.
43. What was the reason for dismissal? The evidence of Barrie Powell was that he believed that the claimant had committed theft and fraud against the respondent by refunding money to his father that he was not owed. The claimant's actions had resulted in a breakdown of trust and therefore Barrie Powell dismissed the claimant. There was no plausible contest to this. The reason for the claimant's dismissal was conduct.
44. Did the respondent have reasonable grounds upon which to sustain the belief in the claimant's misconduct? The respondent found that the claimant had set the 'HomeCare' policy for his father. Only a £10 payment that was refunded was made on the account. The claimant had not checked that a refund was due to his father. The claimant changed his account and stated that the £89 discount had been given because his father's partner had requested a refund. The claimant had changed his account three times during the investigation and disciplinary process. During the appeal the claimant stated that he provided the £89 refund to his father to avoid a customer complaint. This was another change in the

claimant's account. The respondent had a reasonable belief that the claimant was guilty of the misconduct.

45. At the stage which it formed the belief on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances of the case? Huw Davies carried out an investigation which included interviewing the claimant. The claimant's colleague Martin was interviewed. The transcript of the claimant's telephone call to home care had been obtained. The payment records were investigated. Three of the original five allegations were not pursued further after the investigation stage. The claimant was invited to a disciplinary hearing and given an appeal at which he was given the opportunity to put his case in answer to the allegations. The investigation was reasonable in the circumstances.
46. Did the decision to dismiss the claimant fall within a band of reasonable responses which a reasonable employer might have adopted? The claimant was considered to have been guilty of theft from his employer in making the refund to his father. The respondent did not consider that the breach of the friends and family policy warranted dismissal and as a stand-alone charge would have merited a final written warning. This less serious charge was also proved. The problems that arose were not considered to arise from a training issue.
47. The claimant argued that there was an inconsistency in the way that he was treated compared to other employees of British gas who had been guilty of the same or similar conduct and not dismissed. The evidence presented showed that other employees had been dismissed for breach of the friends and family discount and for misuse of other discounts. There was no evidence of a truly parallel case which allowed me to conclude that there had been an inconsistency of treatment in the claimant's case.
48. The procedure followed by the respondent was in my view fair. The respondent's procedure complied with the guidance provided in the ACAS Code of Practice. There was a delay in dealing with the appeal, however, the claimant has not set out any basis for concluding that this has resulted in unfairness. The delay in setting up the initial appeal meeting was not serious although it was outside the respondent's procedural time lines. The adjournment of the appeal was intended to be in the claimant's interest so that his statements could be given proper consideration. The resumed appeal hearing was also delayed, but this was, in part, due to the unavailability of the claimant. I am not satisfied that such delay as there was unfair. Other than the delay in dealing with the appeal the respondent complied with the ACAS Code of Practice in dealing with the claimant's case.
49. I have had an opportunity to consider the claimant's explanation for the refund to his father. The claimant set up the HomeCare policy and must have known that only £10 was paid in respect of the policy, the claimant

could not have thought that his father was entitled to a £89 refund based on this. The claimant has given different explanations for why the refund was made. There are real differences in the various versions that the claimant has given. I am satisfied that the claimant knew that his father was not entitled to a discount. The claimant committed a repudiatory breach of contract and the respondent was entitled to dismiss the claimant without notice.

50. The claimant's complaints of unfair dismissal and wrongful dismissal are not well founded and are dismissed.

Employment Judge Gumbiti-Zimuto

Date: 29 March 2019

5 April 2019

Sent to the parties on:

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For the Tribunals Office