EMPLOYMENT TRIBUNALS

Claimant: Mr R Bienkowski

Respondent: KPFF Limited

HELD AT: Liverpool **ON:** 7 March 2019

BEFORE: Employment Judge Holbrook

REPRESENTATION:

Claimant: In person
Respondent: Mr N Davis, Director

JUDGMENT having been sent to the parties on 12 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. Mr Robert Bienkowski has made a claim for unfair dismissal against his former employer, KPFF Limited. Whilst Mr Bienkowski's ET1 claim form indicated a wish to make an additional claim – for a statutory redundancy payment – it is apparent from the minute of a case management discussion (which was held some months prior to the final hearing) that Mr Bienkowski's complaint is limited to the alleged unfairness of his dismissal for gross misconduct.

2. On 7 March 2019, I heard oral witness evidence from Mr Bienkowski and from Mr Davis, a director of the respondent company. The Tribunal was also provided with a small amount of documentary evidence, in the form of separate bundles that had been prepared by each party.

3. Mr Bienkowski was assisted during the final hearing by a Polish language interpreter.

FACTS

4. The primary facts which have given rise to these proceedings can be summarised as follows. However, for ease of presentation, additional facts are referred to in the Conclusions section of these reasons.

5. Mr Bienkowski was employed as a packer in the respondent's frozen food factory. His employment began in February 2015 and ended on 17 July 2018 when he was summarily dismissed for gross misconduct.

6. Mr Bienkowski was provided with written terms and conditions of employment at the outset of his employment. It is clear from these terms and conditions that Mr Bienkowski was engaged under a 'zero hours' contract of employment, under which he was not obliged to accept offers of work but, once he had accepted such an offer, he was required to carry out the work he had agreed to do. In practice, Mr Bienkowski worked full-time, for 40 hours per week over a five-day working pattern. Mr Bienkowski's written terms and conditions of employment did not expressly prohibit him from undertaking other work, but they did require him to abide by the respondent's disciplinary rules.

7. The respondent has a formal disciplinary policy. This distinguishes between acts which the respondent regards as 'misconduct' and acts which it regards as 'gross misconduct'. The policy gives examples of conduct which would be regarded as gross misconduct, and these examples include engaging in any other employment whilst absent from work. The respondent maintains that the claimant was provided with a copy of its disciplinary policy at the start of his employment, but Mr Bienkowski disputes this.

8. Mr Bienkowski was absent from work from late 2016 onwards, having been medically certified as unfit for work by reason of arthritis. He did not return to work for the respondent prior to his dismissal in July 2018.

9. Mr Bienkowski had no contractual entitlement to receive sick pay from the respondent. Initially, he relied upon state benefits to support himself during his sickness absence. However, when those benefits expired (around March 2017), he obtained alternative work (for a different employer) as a pizza delivery driver. He then worked regularly, for between 30 and 40 hours each week, delivering pizzas. Mr Bienkowski says that he had been advised to take such work by his Jobcentre adviser.

10. Mr Bienkowski also maintains that he notified the respondent that he was undertaking alternative work. He says that he did so by providing the respondent's office staff with a copy of a letter from Liverpool City Council which sought information to support a claim he had made for housing benefit. That letter mentioned the name of the other organisation for which Mr Bienkowski was working, and it also referred to him as working on a self-employed basis. The respondent appears to have no record of having received that letter, however, and it is clear that Mr Bienkowski made no explicit attempt to alert his managers to the fact that he was working elsewhere whilst he was signed-off from the respondent's employ because of ill-health.

11. On 19 April 2018, the respondent wrote to Mr Bienkowski inviting him to attend a meeting to review his ongoing long-term absence. In fact, two meetings took place: on 30 April and 5 June 2018. The respondent maintains that it was not until the second of these meetings that Mr Bienkowski disclosed the fact that he was undertaking alternative work. He was subsequently invited to attend a disciplinary hearing to consider this matter, and that hearing took place on 17 July 2018.

12. At that disciplinary hearing (which was chaired by Mrs Elaine Stevens), Mr Bienkowski again confirmed that he had been working as a self-employed pizza delivery driver. As a consequence, Mrs Stevens decided to dismiss Mr Bienkowski because she considered this to be an act of gross misconduct. The dismissal was confirmed by Mrs Stevens in a letter the same day, and Mr Bienkowski's subsequent appeal against his dismissal was ultimately unsuccessful.

LAW

13. For the purposes of the statutory provisions relating to unfair dismissal (set out in Part X of the Employment Rights Act 1996), a dismissal will be unfair if it is not for a reason which is potentially fair. Misconduct is a potentially fair reason for dismissal.

14. Section 98 of the 1996 Act places the burden upon the respondent to show that the reason, or if more than one the principal reason, for dismissing the claimant was a potentially fair reason. If the Tribunal is satisfied that the reason for dismissal was indeed a potentially fair one, then it must go on to consider whether the dismissal was fair or unfair having regard to the reason for it, and this will depend on whether in all the circumstances, including the size and administrative resources of the employer's undertaking, the respondent acted reasonably or unreasonably in treating the reason as sufficient for dismissing the claimant. The burden of proof at this stage is neutral as between the parties, and the Tribunal must determine the question in accordance with equity and the substantial merits of the case.

15. In cases concerning conduct dismissals it is well established following the principles laid down in **British Home Stores Limited v Burchell** that, to be satisfied that an employee was validly dismissed for misconduct, the Tribunal must be satisfied that the employer believed the employee was guilty of the misconduct in question; that it had in mind reasonable grounds upon which to sustain that belief; and, at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. If the Tribunal is satisfied on each of these matters then it must find the dismissal to have been fair if dismissal for the misconduct in question falls within the range of responses which a reasonable employer could make in the same circumstances.

CONCLUSIONS

16. Mr Bienkowski's case is that his dismissal was unfair because the respondent did not have the contractual right to dismiss him for undertaking alternative work as a pizza delivery driver. He also says it is unfair because the respondent had known he was doing this alternative work for more than a year by the time it decided to dismiss him.

17. I have no doubt that the reason why Mrs Stevens decided to dismiss Mr Bienkowski was indeed the fact that he had been working elsewhere during his lengthy period of certificated sickness absence from the respondent. Mr Bienkowski had admitted to doing so and the matter clearly required little, if any, further investigation by the respondent. I am also satisfied that the dismissal followed a disciplinary process which was carried out properly and fairly. The question, then, is whether a reasonable employer could have decided to dismiss Mr Bienkowski in these circumstances.

18. Mr Bienkowski says that, because he had been unaware of the contents of the respondent's disciplinary policy, the respondent had no contractual right to require him to abstain from working for anyone else during the currency of his employment by the respondent. He argues that the respondent therefore acted unreasonably by dismissing him for that reason.

19. In fact, I am satisfied that Mr Bienkowski probably was provided with a copy of the disciplinary policy at the outset of his employment. In any event, however, I consider that the pertinent question differs from that addressed by the claimant's argument. That question is not just whether a reasonable employer could have dismissed Mr Bienkowski for working for someone else during the currency of his principal employment, but rather whether it could have dismissed him for doing so at a time when he was absent from work (i.e., absent from work with the dismissing employer) by reason of ill-health. In my judgment, a reasonable employer could have decided to dismiss Mr Bienkowski in such circumstances unless he had its consent to carry out that other work. I am satisfied that Mr Bienkowski did not obtain such consent from the respondent in the present case.

20. I accept that Mr Bienkowski probably did hand in to the respondent's office staff the letter from Liverpool City Council mentioned in paragraph 10 above. However, having looked carefully at that letter, I do not consider it sufficient to have put the respondent on notice about the nature and extent of the other work Mr Bienkowski was doing. The respondent certainly did not sanction him carrying out such work while off sick and it is clear from his managers' reaction at the meeting on 5 June 2018 that they had not previously known what Mr Bienkowski was doing.

21. I therefore conclude that it was open to the respondent as a reasonable employer to treat the claimant's actions as gross misconduct and to summarily dismiss him for this reason.

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Employment Judge Holbrook
Date 3 April 2019

REASONS SENT TO THE PARTIES ON

5 April 2019

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