Case Number: 3202294/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr Gordon Stoton**

Respondent: **Timpson Limited**

Heard at: **East London Hearing Centre**

On: **27 February 2019**

Before: **Employment Judge M Warren**

Representation

Claimant: In person

Respondent: Mr Hamilton-Fisher, HR Director

JUDGMENT having been sent to the parties on 11 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1 In this matter Mr Stoton complains of unfair dismissal.

Evidence before me

2 I have had before me today five witness statements: that is a written statement from Mr Stoton himself and then statements from his manager Mr Partlow, the person appointed to investigate disciplinary allegations Mr Myatt, the dismissing officer Mr Hubbard and the appeal officer, Mr Shuttleworth. I heard evidence from all five of those individuals.

3 I also had before me a paginated bundle of documents run into page number 409. I was not required to add any documents to that bundle.

4 During a break at the outset of the case, I read the witness statements and read or

looked at in my discretion, the documents referred to therein.

Law

5 Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was 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."*

6 We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.

7 If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

8 The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

9 We should look at the overall fairness of the process and not be distracted by questions such as whether an appeal is a rehearing or a review, see Taylor v OCS [2006] IRLR 613.

10 In this case, the Respondents say that Mr Soton was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular

contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

11 Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account. One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) to which I have had regard.

The Facts

12 The Respondent has 2,050 branches of shoe repair and locksmith outlets and 5,700 employees. It employs 64 locksmiths, who are managed by local area managers.

13 Mr Stoton, whose employment began on 20 June 2016, was a mobile locksmith. He was managed latterly from July 2017, by Mr Partlow.

14 Sadly, on 9 March 2018 Mr Soton suffered bereavement in the death of his father.

15 There had been ongoing over a period of time, issues between Mr Stoton and somebody at the Respondent's call centre called Mr Robinson. Mr Partlow, on becoming Mr Soton's manager, sought to explore those issues and proposed a meeting in the call centre at Manchester between Mr Robinson and Mr Stoton but unfortunately, that did not happen.

16 On 12 April 2018 there was an email exchange between Mr Robinson and Mr Stoton, (page 54 of the bundle) which I have to quote in full. Mr Stoton's email to Mr Robertson reads:

> *"I bury my father in 3 days time. I suggest you back off right now! Ignorant cocky little upstart! I have had it with you Robinson. The quote was attended. I took photos of the locks which are not warehouse stock. I cc'd in Nick Parkinson and Preston to ID and price them. It is now up to you lot to sort the labour and pricing to quote. Speak to Tim Westaway.*
>
> *I couldn't give a monkeys who you have told, email the Pope for all I care. You silly little boy with your playground mentality! If Manchester wasn't so far away I would deal with this with you face-to-face. Now jog on boy."*

17 Mr Robinson submitted a grievance in relation to that email.

18 On 13 April 2018, Mr Stoton commenced a period of compassionate leave because of the death of his father.

19 On 17 April 2018, the day before Mr Soton was to go back to work, there was a text exchange between Mr Stoton and Mr Partlow. Mr Partlow was trying to arrange a meeting first thing the following morning to discuss the above quoted email, although he

did not reveal that was the purpose of the meeting. Mr Partlow's ambition was to speak to Mr Stoton before he had any dealings with the call centre. In short, Mr Stoton declined the suggestion of a meeting, saying that he was busy.

20 Having been unable to arrange a meeting informally, Mr Partlow adopted a more formal approach and by a letter dated 18 April 2018, invited Mr Soton to attend a meeting with him at a particular location on 24 April. The purpose of the meeting was not revealed.

21 A couple of days later, independent of these matters, someone with the Respondent discovered that Mr Stoton had failed to bank some takings. That was on or about 20 April 2018.

22 The meeting with Mr Partlow took place on 24 April 2018. During the course of that meeting, Mr Stoton gave Mr Partlow reason to think that he was recording their conversation. They discussed Mr Stoton's email to Mr Robinson and the question of late banking. Subsequently, Mr Partlow complained about the way that Mr Stoton had behaved toward him during the meeting. At page 70 there is an email of 24 April to a Louise Plevin, (in HR) in which he refers to Mr Stoton's being angry and aggressive. He said that he had to threaten him with suspension before they started, because he was so aggressive. He refers to being asked by Mr Stoton what it would take to get himself suspended. He said that he had been made to feel that Mr Stoton might hit him. Subsequent to that contemporaneous note of what Mr Partlow says happened, on 26 April he raised a formal complaint about Mr Stoton's behaviour, (page 72) in which he refers to Mr Stoton's aggressive attitude and nature by reference to the meeting of 24th. There are other matters mentioned. He refers to Mr Stoton as being fired up, raising his voice and jabbing his finger at him. He refers to Mr Stoton leaning over and flicking his tie badge, saying to him, *"you think you are God almighty, you lot are all the same".* He wrote that it was an hour long meeting which was very difficult and twice having to threaten Mr Stoton with suspension if he did not calm down. He referred to an incident shortly after the meeting was concluded, when Mr Stoton went over to Mr Partlow sitting in his car, knocked on the window and when Mr Partlow opened the window, Mr Stoton leaned in and said, *"what does it take to get suspended?"*. Mr Partlow writes, *"I actually thought he was going to hit me*". Subsequent to that, on 26 April, Mr Stoton was suspended, confirmed in a letter of that date copied at page 73.

23 On 30 April 2018, Mr Stoton was invited to an investigatory meeting, (page 76). The invitation letter makes it clear that the charges to be investigated are harming or injuring colleagues namely as set out in an email to Scott Robinson and in his behaviour towards Mr Partlow and then secondly, failing to bank cash in accordance with company procedures, that is in week ending 22 March 2018 in the sum of £206.40 and the week ending 29 March 2018 in the sum of £72.00.

24 Mr Stoton attended an investigatory meeting with Security Manager Mr Myatt on 8 May 2018. The notes of that meeting are at page 83. At the conclusion of the meeting, Mr Stoton indicated that he wished to raise a grievance against Mr Robinson and Mr Partlow. The Respondent picked up on that and subsequently dealt with it.

25 Mr Myatt interviewed Mr Partlow on 15 May 2018, (the notes are at page 152).

26 Mr Stoton had a meeting with Area Manager, Mr Forman on 17 May 2018, to discuss his grievance. Mr Forman provided an outcome to the grievance on 23 May, a copy of the letter is at page 136. The grievance was not upheld.

27 Also on 23 May 2018, the Respondent invited Mr Stoton to attend a disciplinary hearing. The invitation letter is at page 169. It sets out again, the matters of which Mr Stoton was accused, including aggressive and threatening behaviour firstly, in the email to Mr Robinson on 12 April and then secondly, his behaviour towards Mr Partlow. The third allegation is breach of company procedures by failing to bank cash in respect of the two weeks previously mentioned.

28 The disciplinary hearing was scheduled to take place on 31 May 2018, but it was postponed as Mr Stoton had appealed the outcome of his grievance. The grievance appeal hearing was on 14 June and the outcome provided on 18 June, which affirmed the original grievance outcome.

29 Thus, the disciplinary hearing finally took place on 27 June 2018, chaired by Area Manager Mr Hubbard. Minutes of that meeting are at page 262. Mr Hubbard had before him the information gathered by Mr Myatt. Mr Hubbard decided that the appropriate outcome was dismissal. This was set out in a letter dated 2 July copied at page 276. It is an odd letter, in that Mr Hubbard is not the author. Ms Plevin of HR writes on behalf of the decision maker. Excerpts from that letter included the following:

> *"Mr Hubbard concluded that your actions constituted serious acts of gross misconduct, having considered all the available evidence, including that provided by you during the hearing, and your service of 2 years; your previous disciplinary record, which included a Letter of Concern for conduct; your attitude and conduct throughout the process; and whether any other sanction was appropriate rather than dismissal."*

The author confirmed on behalf of Mr Hubbard his conclusion that Mr Stoton had on two separate occasions displayed aggressive and threatening behaviour towards a colleague and towards a senior manager, which he regarded as a pattern of behaviour. He referred to Mr Stoton as having admitted to making an improper comment to Mr Partlow, referring to thinking he was like Lord God Almighty and, "you lot are all the same". He concludes that Mr Stoton's behaviour during the meeting was aggressive and threatening, that he had reached out and flicked Mr Partlow's badge and had approached Mr Partlow's car in a threatening manner. Mitigating circumstances are said to have been considered, including of course, Mr Soton's bereavement, but Mr Hubbard did not consider that an excuse for his overall behaviour.

30 With regard to the failure to bank cash, Mr Hubbard records that Mr Stoton acknowledged that he had failed to bank cash and that he had not informed relevant colleagues that the banking was going to be late, in accordance with the company's procedures. Mr Stoton had accepted that he had acted in breach of procedure and that he was responsible for that. The writer then goes on to say,

> *"…Mr Hubbard unfortunately could not see any remorse for your behaviour or your acceptance of the part you played in the breakdown of the relationships, nor the*

want or responsibility to rebuild the professional relationship required to move forward. Mr Hubbard believes that whilst you admitted to both charges you appear unwilling to take responsibility for your actions..."

31 On 3 July 2018, Mr Stoton appealed against his dismissal. He was invited to attend an appeal hearing on 17 July. The appeal officer was to be Head of Group Security, Mr Shuttleworth. There followed an exchange of correspondence which in summary, amounted to Mr Stoton asking if he could take a companion to the hearing. He was told he could, subject to that companion meeting the usual requirements, which are that person be either an employee or a trade union representative. Upon learning those criteria, Mr Stoton decided that he could not take his chosen companion, who was a member of the Norfolk and Suffolk NHS Trust Wellbeing Organisation. He then sought to explore other ways of dealing with his appeal, the upshot of which was he provided a full detailed written appeal statement dated 20 July, (copied at page 312). Mr Shuttleworth then went on to consider the appeal, without holding a meeting with Mr Stoton. He reviewed all the papers that had been provided to him arising out of the disciplinary process and he considered Mr Stoton's written appeal. He decided to uphold the decision to dismiss. The letter of outcome dated 10 August, is at page 317. He endorses Mr Hubbard's conclusion to dismiss on the grounds of gross misconduct, saying the decision was correct and that he would have arrived at the same outcome himself. He refers to the mitigating circumstances, including the bereavement, but notes that Mr Stoton had subsequently presented himself as fit for work and had returned to work.

32 In terms of Mr Stoton's submission that dismissal was too severe a penalty, Mr Shuttleworth sets out his thoughts that there were two acts of threatening behaviour towards fellow colleagues and that the business cannot avoid or ignore that two colleagues felt threatened. He notes that Mr Stoton appeared to show no remorse for his actions. Also, that he had failed to bank in accordance with company procedures, which showed a lack of respect for the company rules and he expressed concerns as to how Mr Stoton might react if a customer became upset with him.

Conclusions

33 It is accepted that the reason for dismissal was the potentially fair reason of conduct. It seems to me that a fair procedure has been followed with one concern, which I will come back to and that is that Mr Robinson was not interviewed, either in the grievance or the disciplinary process. Mr Stoton's argument was clearly that he had been provoked to write the email he had, by the history of his dealings with Mr Robinson. Apart from that, a thorough procedure was followed and of course, the Respondents had the email which speaks for itself. It had Mr Partlow's statement as to what had happened in his interview with Mr Stoton. What had happened was disputed, but Mr Partlow had been interviewed by the investigating officer. The Respondent also had the allegations relating to banking, which Mr Stoton accepted.

34 Having heard evidence from Mr Hubbard, I find that he genuinely believed that Mr Stoton was guilty of the misconduct alleged and I find that he was entitled to reach that conclusion.

35 So, then the Respondents passed the first test, but that is not an end to it. I have to consider whether the decision to dismiss was within the range of reasonable responses.

This is not about whether or not I would have dismissed, it is about whether the decision to dismiss was a reasonable decision a reasonable employer might have made.

36 The Respondent is a cash handling business; the managers of its shops and its mobile locksmiths take cash off its customers. The Respondent has to be able to trust its employees to bank the money they take. Failing to do so for two weeks, when he acknowledged there was no good reason for not doing so and that he had been able to do so, in breach of the Respondent's procedures is, it seems to me, of itself gross misconduct for which a decision to dismiss would have been within the range of reasonable responses.

37 As for the email to Mr Robinson, it speaks for itself. It is dreadful. Regardless of the history between Mr Robinson and Mr Stoton, it is an appalling email for one employee to send to another. It is sad that even now, Mr Stoton does not appear to recognise just how awful that email is. No one should be subjected to such treatment. The Respondent has a duty of care to its employees to protect them from such treatment. The dismissal on that alone is most certainly within the range of reasonable responses.

38 With regard to Mr Stoton's alleged behaviour towards Mr Partlow, for my part I noted it emerged from Mr Stoton's evidence that Mr Partlow thought that the meeting was being recorded. It therefore seems to me intrinsically unlikely that Mr Partlow would then make a false allegation about the way that meeting went. But it is not about what I think, it is about what information Mr Hubbard and Mr Shuttleworth had before them and what they thought and whether they were entitled to think what they did. They had Mr Partlow's account of what happened, corroborated by contemporaneous notes; one email immediately afterwards and one a couple of days afterwards. He was interviewed and he gave a consistent account. They are entitled to conclude that Mr Partlow was telling the truth and they did in my view genuinely do so. So that too alone, would be gross misconduct which would have brought a dismissal within the range of reasonable responses.

39 For these reasons, Mr Stoton's claim fails and is dismissed.

Employment Judge M Warren

12 April 2019