EMPLOYMENT TRIBUNALS

Claimant: Mr M V Patel

Respondent: Mr K Patel t/a Red Bank Service Station

Heard at: Manchester **On:** 26 and 27 February 2019

Before: Employment Judge Humble

REPRESENTATION:

Claimant: Mr H Ibraheem, Solicitor
Respondent: Mr Y Lunat, Solicitor

JUDGMENT having been sent to the parties on 11 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

The Hearing

1. The hearing took place on 26 and 27 February 2019. The claimant was represented by Mr Ibraheem, solicitor, and he gave evidence on his own behalf. The respondent was represented by Mr Lunat, solicitor, and evidence was given by the respondent, Mr Kasim Patel, by his son, Mr Jameel Mohammed, and his brother, Mr Usman Patel.

2. There was an agreed bundle of documents which extended to 76 pages. Evidence in chief was taken as read based on written witness statements provided by the parties. An interpreter was present who assisted the claimant by translating the evidence and the discussions within the proceedings to Gurjarati, and assisted the tribunal by translating the claimant's oral evidence from Gurjarati to English.

3. The evidence and closing submissions were concluded on the afternoon of 26 February 2019. The Judgment and reasons were given orally on the morning of 27 February 2019. After Judgment on liability the tribunal directed that there would be a short adjournment during which the parties would have an opportunity to seek to reach agreement on a figure for remedy. The parties agreed on the figure of

£3512.42. There followed an application for costs made on behalf of the respondent which was dealt with by the tribunal after a brief period of consideration.

4. The written judgment was promulgated on 11 March 2019. These written reasons are provided in response to a subsequent written request made by the claimant.

The Issues

5. The claimant brought a claim for unfair dismissal and the issues were identified at the outset of the hearing as follows:

5.1 Whether the claimant was dismissed. The respondent denied that there had been a dismissal, contending that the claimant resigned.

5.2 If there was a dismissal, whether the respondent was able to show a potentially fair reason for the dismissal in accordance with Section 98(1) and (2) Employment Rights Act 1996. In this case the respondent relied upon conduct as the potentially fair reason for dismissal. If the respondent could show that the dismissal was for a potentially fair reason, the tribunal would go on to assess whether the respondent acted reasonably under section 98(4) ERA 1996 having particular regard to:

5.2.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

5.2.2 whether the respondent followed a fair procedure having regard to the ACAS Code of Practice; and

5.2.3 whether the decision to dismiss was within the band of reasonable responses of a reasonable employer.

5.3 If the claimant was unfairly dismissed, whether any award should be reduced for contributory fault and/or by way of a Polkey reduction.

6. The claimant also brought claims for holiday pay under the Working Time Regulations 1998 and by way of an unauthorised deduction from wages.

The Law

7. The tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*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 sub-section (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."

Then by sub-section (2):

"*A reason falls within this sub section if it:*

b) relates to the conduct of the employee…"

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (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."

8. In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

9. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance (which addresses the reason for dismissal) and does not do so on the second and third limbs where the burden is neutral.

10. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

"*It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

11. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA.

12. The tribunal must take in to account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987]

IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to that principle is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

13. The tribunal should also give consideration as to whether, if the dismissal is procedurally unfair, the employee contributed to his own dismissal. If so, to what extent did he contribute to his dismissal to reduce the level of any compensation to which he would otherwise be entitled having regard to the principles in Nelson v BBC (No.2) [1979] IRLR 346, CA.

14. The test for a breach of contract claim is quite different. The burden is on the respondent to show on a balance of probabilities, relying not only on matters known to it at the time but if necessary on after acquired evidence, that the conduct of the claimant was such as to fundamentally repudiate the contract of employment.

Findings of Fact

The employment tribunal made the following findings of fact on the balance of probabilities (the tribunal made findings of fact only on those matters which were material to the issues to be determined and not upon all the evidence placed before it):

15. Kasim Patel ("the respondent") is the owner of a service station based on Cheetham Hill Road, Manchester, known as Red Bank Service Station ("the service station"). Mustak Valli Patel ("the claimant") is the cousin of the respondent and he commenced work at the service station in 2002. He was employed as a cashier and service station assistant, operating the cash register and undertaking general duties in the store. He worked from Monday to Friday, 30 hours each week.

The Unfair Dismissal Claim

16. The unfair dismissal claim turns upon two very different versions of events. The claimant's version is that he completed his shift at 2.00pm on Friday 1 June 2018 and, whilst he was on his way home, he received a telephone call from the respondent who said he was not to come in to work on Monday. He asked why, to which the respondent said it was due to a customer complaint and then hung up. When the claimant arrived home the respondent had already spoken to the claimant's wife and informed her in terms that he had been dismissed. A P45 was issued a few days later with a leaving date of 3 June 2018. It was not clear on the claimant's evidence when he received that document.

17. The claimant denies various allegations of misconduct which were made by the respondent within these proceedings. The only reason the claimant could offer for his dismissal was that there was a property dispute ongoing within the family. The dispute was between the respondent's brother and the claimant's uncle, details were sketchy but it appeared to relate to the demolition of a toilet or an extension to a building in India which had occurred several months or years earlier. This did not present as a plausible reason for the respondent dismissing the claimant after 16

years' service, not least because the claimant admitted that the respondent had never mentioned the property dispute to him. The dispute did not directly concern either of them and was never the source of any argument or disagreement between the claimant and the respondent.

18. The respondent's case in essence was that the claimant was not dismissed at all but that he was invited to a disciplinary hearing for reasons of misconduct, which followed from a pattern of misconduct and erratic behaviour by the claimant during his employment. It was said he failed to attend the disciplinary hearing, ripping up an invitation letter which was handed to him by the respondent's son, Mr Jamil Mohammed, at the claimant's home. It was said that the claimant told Mr Mohammed that he had another job at the same time that he ripped up the disciplinary invite, and that therefore the claimant resigned by way of his words and actions.

19. One of the difficulties in this case was that three of the four witnesses, including the claimant, were poor witnesses who lacked credibility. Significant parts of their evidence simply did not add up. The one exception was Mr Usman Patel, the respondent's brother, who was an impressive witness and answered questions put to him directly and with precision. The tribunal accepted his evidence that on 24 May 2018 he attended the service station and found the claimant under the influence of drugs. There was a strong smell of marijuana, the claimant was the only person there and Mr Usman Patel believed that the claimant was intoxicated. He telephoned the respondent to advise him of the situation and later, at the respondent's request, sent a letter to describe what he saw. That letter was produced at page 34 of the bundle and the tribunal accepted the veracity of the letter and the accuracy of its content.

20. The respondent's case initially, as set out in its response form, was that there were incidents involving the claimant on 24 and 25 May 2018 but that he attended work the following week. On 1 June, the respondent attended the service station to find the claimant in a heated exchange with a customer. The respondent said that he calmed the situation and, after the customer had left, he walked into the back office where he said there was a strong smell of marijuana. He said that he later called the claimant by telephone to advise him that he was suspended pending a disciplinary hearing.

21. By the time of the tribunal hearing the respondent's case had substantially changed from this earlier version of events. In oral evidence the respondent said that the heated exchange involving the claimant and a customer had taken place on 24 May. The respondent said that he attended the service station following the telephone call from Mr Usman Patel on that date to find the claimant in a heated exchange with a customer. He challenged the claimant as to whether he had been smoking marijuana and the claimant was rude and abusive toward him in response. The respondent said it was later that afternoon, 24 May 2018, that he told the claimant by telephone that he was suspended and that he should not attend work the following Monday pending a disciplinary hearing. The respondent said that his son, Mr Jamil Mohammed then took a letter to the claimant, the letter was dated 28 May 2018 and was reproduced at pages 36-37 of the bundle. It invited the claimant to a disciplinary hearing to take place on 1 June 2018. Mr Mohammed's evidence was that when he took the letter to the claimant's house and handed it to him the claimant

became aggressive, told him to “piss off” and said words to the effect that he already had another job and asked for his P45. The claimant then slammed the door and ripped up the letter.

22. The respondent’s oral evidence was that, at the same time that that the letter inviting the claimant to a disciplinary hearing was handed to him, a document (produced at page 35) was also given to him. This document again states “third warning regarding gross misconduct e.g. drug abuse on site – date 28 May 2018” and is purported to be signed by the claimant, Mr Mohammed and the respondent. The respondent said that the claimant signed that document in Mr Mohammed’s presence who then returned it to the respondent. Mr Mohammed however gave no evidence to that effect at all, it was not contained in his witness statement and did not feature in his oral evidence.

23. The respondent further gave evidence that he sent Mr Mohammed to the claimant's house on a second occasion, this time with a P45 and a further document (at page 38), which was substantially the same as the document at page 35 and again purported to issue the claimant with a “third warning regarding gross misconduct”, the only difference being that this letter was dated 5 June 2018. Again, this was allegedly signed by the claimant, and returned to the respondent by Mr Mohammed. This made no sense at all since firstly on the respondent’s evidence the claimant had already signed to confirm that he had received a warning for the same alleged gross misconduct offence; secondly, his employment had terminated on 3 June and there was no reason at all for him to sign to confirm receipt of a gross misconduct warning post-termination, nor indeed for the respondent to issue it. Thirdly, Mr Mohammed made no mention of a second visit to the claimant's house at any point, it was not mentioned in his evidence, in the response form or anywhere else in the respondent’s evidence.

24. The tribunal therefore concluded that there was no letter was issued on 28 May 2018 inviting the claimant to a disciplinary hearing. The respondent’s evidence on these points simply did not add up. The tribunal held that the claimant did not sign the documents at pages 35-38 and the tribunal could only conclude that these were produced by the respondent at a later date in an attempt to support its case.

25. On the balance of probabilities, the tribunal found that the claimant was under the influence of marijuana on 24 May 2018, this was witnessed by Mr Usman Patel and supported by a letter of 27 May (page 34). This was not the first time the claimant had been found in that condition; it had also occurred several years earlier. The claimant was not a model employee, there was evidence that the claimant had been aggressive towards at least one customer. This was an incident from August 2017 (documented at page 31A in the bundle), which pertained to a complaint made by a customer to Volero, the fuel provider to the service station, about the claimant’s aggressive behaviour. On that occasion it should be noted that the respondent defended the claimant’s actions, no doubt seeking to protect its own reputation.

26. The tribunal found that, after the incident on 24 May 2018 when the claimant was found to be intoxicated, the claimant did attend work the following week. On the balance of probabilities, the tribunal held that there was a further incident on Friday 1 June 2018 when the claimant had an altercation with a customer and the respondent. The respondent at this point was exasperated with the claimant and,

while the claimant was on his way home, he spoke with both the claimant and subsequently his wife. It was not clear on any of the evidence what exactly was said but in essence, the respondent informed the claimant that he was not to return to work the following week. There was no suggestion at that point that it was a suspension. The respondent terminated the claimant's employment, which was confirmed when a P45 was issued a few days later (page 39A) with a leaving date of 3 June 2018. The reason for the claimant's dismissal was therefore conduct, which is a potentially fair reason for the purposes of sections 98(1) and (2) of the Employment Rights Act 1996. The respondent, however, failed to act reasonably under section 98(4) of the Act. There was no semblance of any fair procedure and it follows that the claimant was unfairly dismissed.

27. The claimant did, however, contribute to his own dismissal to a substantial degree. On 24 May he was under the influence of drugs on a site where health and safety were paramount, and he was subsequently argumentative with a customer and the respondent. The tribunal therefore determined that a 50% reduction should be made for contributory fault.

28. The tribunal were not convinced by the Polkey argument advanced on behalf of the respondent. It was significant that the claimant had previously smoked marijuana on the site and previously been aggressive towards customers and, on those occasions the respondent had chosen not to dismiss him. Another rather unusual aspect of this case was that on the respondent's own evidence, albeit that evidence was not accepted, he had decided not to dismiss the claimant but to give him "a second chance" and issue him with a "gross misconduct warning". It is rather difficult for a respondent to argue on the one hand that it chose not to dismiss and, on the other, that if it had followed a fair procedure it would have dismissed. For those reasons the tribunal held that no Polkey reduction should be made.

Breach of Contract

29. In respect of the breach of contract claim the legal test is different. It is for the respondent to show that the claimant's conduct was such as to fundamental repudiate the contract. The tribunal found that was the claimant's actions did repudiate the contract, in particular being under the influence on drugs on a health and safety sensitive site amounted to a fundamental repudiation of the contract. Accordingly, that claim does not succeed.

Holiday Pay Claim

30. Turning to the holiday pay claim, the tribunal had some difficulty in determining this claim. The claimant's case was that he had not taken any holiday at all in 16 years of service. He was claiming his full entitlement to annual leave for that period. He relied on payslips which did not itemise holidays as evidence that no holiday pay was given; these payslips were provided for the period March to June 2018. The respondent's case was that holidays were given when requested and provided that reasonable notice was given. They did not appear on the payslips because the employees worked fixed hours and received a flat rate of pay irrespective of whether they were at work or on annual leave. The respondent relied upon handwritten holiday records, at pages 29 and 29A of the bundle, which he said he filled out to keep a record of holiday entitlement. These showed that the claimant

had taken 23 days' holiday in 2017, with the holiday year ending on 30 April, and five days in May 2018.

31. One of the difficulties for the tribunal was the lack of evidence relating to the holiday pay claim. Although the claimant was seeking compensation in the region of £38,000 in respect of alleged unpaid holiday, which made up the main bulk of the value of the claims, his witness evidence on the issue was very brief, being confined to two paragraphs of his statement. The claimant had previously made an application relating to disclosure of documents which, on the face of it, may have assisted in determining the holiday entitlement claim but that application was not pursued on the morning of the hearing, the claimant's representative indicating that the claimant believed he had sufficient evidence to proceed.

32. The claimant's case in respect of holidays did not appear plausible to the tribunal. He said that he had requested holiday when he commenced employment in 2002 and it was refused and he did not request them again until "about 4 to 5 years ago", in other words about 12 years after he first made a request, when he said they were again declined. His evidence shifted slightly when he suggested that he may have requested them on further occasions but his initial evidence was that he did not otherwise complain or mention holidays. Further, he could not say whether any of his colleagues, of whom there were about six, took holidays or not. He had apparently never discussed the issue with them despite working alongside some of them for many years. There were no other records in respect of holidays, and the tribunal reminded itself that the burden was on the claimant to prove his case.

33. Having assessed all the surrounding circumstances the tribunal held that the documents at pages 29 and 29A were a valid record of the claimant's holidays. Although the tribunal did not accept the veracity of other documents relied upon by the respondent, these holiday records appeared to be credible. The records of 2017 showed that only 23 days were taken by the claimant and, if that document had been concocted it would presumably have shown the 28 statutory days had been taken. The document also fitted with the respondent's evidence that the claimant took two weeks' holiday at Christmas because his partner and children celebrated Christmas. Further, if documents had been concocted as suggested by the claimant, then they could have been readily produced from earlier years. The respondent's case was that these were the only documents that had been retained. It was also significant that, having initially said he had no leave at all, the claimant accepted in cross examination that he had taken some time off following the death of his father several years earlier, albeit the length of that leave and whether or not it was paid was disputed. This was a small business with only six or seven employees and holidays were given on an ad hoc basis when requested. Mr Mohammed generally provided cover when people were on leave and in effect he operated as a cover worker for other staff.

34. On the balance of probabilities, and on the basis of the evidence before it, the tribunal accepted that the claimant did take holidays during the course of his employment and there was not any annual leave owed to him save for a five day shortfall from 2017. That holiday year ended on 30 April 2018 and the claimant notified ACAS of his claims on 31 August 2018. It was therefore outside the three-month time limit for a claim under the Working Time Regulations, which should be brought within three months of the end of the leave year, and in respect of an

unauthorised deduction from wages claim since there were no deductions established for the 2018 leave year and the earlier deductions were outside the three month time limit. There was no application to extend time and therefore the tribunal had no jurisdiction to determine that claim. Accordingly, the holiday pay claim fails and is dismissed.

Conclusion and Remedy

35. The tribunal therefore held that the claimant was unfairly dismissed, with a 50% reduction for contributory fault. The breach of contract and holiday pay claims were dismissed.

36. Having given oral judgment on liability and contributory fault, the tribunal allowed the parties a brief period in which to seek to reach agreement upon a figure for remedy. The parties reached agreement upon a figure of £3512.42. The respondent was therefore ordered to pay the claimant the sum of £3512.42.

Costs Application

37. Having concluded the case in respect of liability and remedy, the respondent made an application for costs based on alleged unreasonable behaviour on the part of the claimant. It transpired that the respondent had made various offers to settle the claim. Firstly, on 17 December 2018 with an offer of £3,000; then an offer of £5,000 made on 21 February 2019; £7,500 on 25 February 2019; and finally, an offer of £10,000 which was made on the morning of the hearing. All of these offers were rejected by the claimant. The respondent's submission was that the claimant acted unreasonably under section 76(1)(a) in rejecting those offers and further, in respect of the holiday pay claim, it had no reasonable prospect of success under section 76(1)(b).

38. After a brief period of consideration, the tribunal rejected the respondent's application for costs. In respect of unreasonable conduct, firstly the respondent did not come to the table with clean hands given the finding that it had produced documentation after the event to support its case. Secondly, there are generally two objectives to every claim: one of is an award of compensation and the second is a declaration in favour of the complainant. The claimant succeeded in the unfair dismissal case, and it does not follow that a claimant who has rejected an offer higher than the compensation awarded at hearing should be liable to a respondent in costs. In this case, whilst with the benefit of hindsight the offer of £10,000 was a good one, it is quite possible that another tribunal might have taken a different view in respect of the holiday pay claim and, if the claimant's evidence had been taken at face value then, subject to submissions upon the statutory two year limitation on holiday pay claims and the effect of King v Sash Windows, the value of the claim could have substantially exceeded the £10,000 on offer.

39. Accordingly, the respondent's application for costs was dismissed.

Employment Judge Humble

Date 28th April 2019

REASONS SENT TO THE PARTIES ON

29 April 2019

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FOR THE TRIBUNAL OFFICE

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