



EMPLOYMENT TRIBUNALS

Claimant: Miss A Gorzala

Respondent: J Z Flowers International Limited

HELD AT: Hull

ON: 25 February 2019 and
15 April 2019

BEFORE: Employment Judge Keevash

REPRESENTATION:

Claimant: Mr P Morgan, Counsel
Respondent: Miss J Wilson-Theaker,
Counsel

JUDGMENT having been sent to the parties on 24 April 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

Background

1. By her claim forms the Claimant complained that she was unfairly dismissed and that the Respondent acted in breach of her contract of employment when failing to give her proper notice or make a payment in lieu of such notice. By its response the Respondent contended that it dismissed by reason of the Claimant's conduct and that it acted reasonably in treating such reason as a

sufficient reason for dismissal. It also resisted the complaint of breach of contract.

Hearing

2. At the hearing the Claimant gave evidence on her own behalf. Michael Wilkinson, trade union regional officer, gave evidence on her behalf. Victoria Routledge, site manager, and Chelsea Horberry, HR manager, gave evidence on behalf of the Respondent. The Employment Judge also considered a bundle of documents.

Facts

3. The Employment Judge found the following facts proved on the balance of probabilities.
4. On 20 September 2014 the Claimant was employed by the Respondent as a production operative. The Respondent is a leading producer of floral bouquets for UK retailers.
5. On 24 May 2018 Ms Fomina, production supervisor, met the Claimant in order to discuss an issue of concern. Ms Fomina had noticed a large bouquet of flowers that did not match the label that was on the outer sleeve containing the flowers. Notes of that meeting were signed by the Claimant and Ms Fomina. Following that meeting an investigation was carried out by Ms Rose, HR advisor. Ms Rose produced an investigation report after interviewing Ms Fomina the line leader, two cover charge hands, an HR administrator and the Claimant.
6. By a letter dated 15 June 2018 Ms Rose invited the Claimant to a disciplinary hearing. She set out the points that needed to be discussed, namely gross misconduct and theft or fraud - knowingly making up a flower bunch with the intent to defraud the company.
7. On 20 June 2018 Ms Rose viewed CCTV evidence of the incident.
8. On 27 June 2018 the Claimant attended a disciplinary hearing which was conducted by Ms Routledge. The Claimant was accompanied by Mr Wilkinson.
9. By an email dated 29 June 2018 Ms Routledge informed Ms Barley about her decision and set out some grounds for it. That email was copied to Ms Horberry.
10. By a letter dated 2 July 2018 Ms Routledge informed the Claimant that she had decided to dismiss her summarily.
11. By an email dated 4 July 2018 the Claimant informed Ms Horberry that she wished to appeal.
12. By a letter dated 24 July 2018 Ms Horberry invited the Claimant to attend an appeal hearing and she set out a summary of the grounds of appeal.
13. On 7 August 2018 the Claimant attended an appeal hearing which was conducted by Ms Horberry and she was accompanied by Mr Wilkinson.

14. By a letter of the same date 7 August 2018 Ms Horberry informed the Claimant that the appeal had been unsuccessful.

15. At the material time the Respondent's handbook provided as follows:-

"...

OTHER BENEFITS

...

B) STAFF PURCHASE FACILITIES

You are permitted to buy goods for your own use from us at discounted prices. All such purchases must be ordered and paid for in the HR department, and you must obtain a receipt before leaving the premises as proof of payment ...

E) RULES COVERING GROSS MISCONDUCT

Occurrences of gross misconduct are very rare because the penalty is dismissal without notice and without any previous warning being issued. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a breach of fundamental contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. Examples of offences that will normally be deemed as gross misconduct serious instances:-

a. Theft or fraud;

...

CAPABILITY/DISCIPLINARY APPEAL PROCEDURE

...

5. If you are appealing on the grounds that you have committed the offence then your appeal may take the form of a complete re-hearing and re-appraisal of all matters so that the person who conducts the appeal can make an independent decision before deciding to grant or refuse the appeal..."

Law

16. The relevant law is set out in Sections 98(1), (2) and (4) of the Employment Rights Act 1996 ("the 1996 Act").

Submissions

17. Mr Morgan made oral submissions on behalf of the Claimant. He referred to **A v B** [2003] IRLR 405. Miss Wilson-Theaker made oral submissions on behalf of the Respondent and she referred to **Anglian Home Improvements Ltd v Kelly** [2005] ICR 242 CA and **Hadjoannou v Coral Casinos** [1981] IRLR 352 EAT.

Discussion

Unfair dismissal complaint

What was the reason for the dismissal?

18. The Respondent contended that the reason for the dismissal related to the Claimant's conduct. The Claimant did not advance any other reason for the dismissal. The Employment Judge accepted the evidence of the Respondent witnesses on this issue. He found and decided that the dismissal did relate to the Claimant's conduct.
19. The Employment Judge decided that the correct approach was to follow the EAT guidelines set out in **British Home Stores Ltd v Burchell**. He had to determine whether (a) the decision makers had an honest belief that the Claimant had done something wrong; (b) that belief was based on reasonable grounds and (c) that belief was reached after the Respondent had conducted such investigation as was reasonable in the circumstances.

Honest belief

20. The Employment Judge accepted the evidence of Ms Routledge and Ms Horberry who were truthful and credible witnesses. He found that they did have an honest belief that the Claimant had done something wrong.

Reasonable grounds and reasonable investigation

21. The Employment Judge found and decided that the Respondent had reasonable grounds for their belief and that this belief had been reached after a reasonable investigation had been conducted. Mr Morgan criticised the investigation on the basis that the Respondent failed to investigate the Claimant's assertion that everyone else did what the Claimant had done and that she thought it was acceptable conduct. Among other matters he relied on **A v B**. The Employment Judge rejected that argument. The Claimant did not provide any information other than her bare assertion which was repeated on several occasions that everyone did what she had done. The Claimant was represented by Mr Wilkinson throughout the disciplinary process. He attended the disciplinary hearing and the appeal hearing. At no time did he or the Claimant request that the Respondent investigate this matter any further. No names of any actual or potential witnesses were given. In the circumstances the Employment Judge accepted Ms Wilson-Theaker's submission that it was hard to see how the Respondent could have investigated that bare assertion. The investigation was reasonable.
22. The Employment Judge found and decided that the Respondent was entitled to disbelieve the Claimant and to conclude that she knowingly and deliberately took the £2.09 sleeve and inserted more expensive roses in order to obtain a financial advantage. In reaching that conclusion he kept in mind that the Claimant was aware that the CCTV would show what she was doing; she took the flowers to HR; she paid for them; she left the flowers outside HR and she

seemingly made no effort to hide the flowers or to obscure the price on the sleeve. She said that she believed it was acceptable to do this because others did the same.

23. On the other hand, the Claimant's explanations in the investigation meeting and the disciplinary and appeal hearings were not convincing. In the disciplinary hearing she explained that she had believed that all the flowers were the same. Ms Routledge was sceptical about this explanation because this was obviously not the case (as verified by the photographs in the Bundle). The Claimant was also unable to provide a convincing explanation for why she moved to another line in the warehouse to assemble the flowers which she bought. Also, she did not apologise for her conduct which she said was an innocent mistake on her part. At the appeal hearing the Claimant repeated her explanation that she had believed all the flowers were the same. Ms Horberry did not accept that explanation.
24. The Employment Judge found that the reasons given by the decision makers were properly thought out, logical and plausible. In his judgment the Respondent was entitled to reject the Claimant's contention that she had made a mistake.

The appeal hearing

25. The Employment Judge found and decided that the Respondent was entitled to conduct an appeal hearing which was not a full re-hearing. The handbook was permissive not prescriptive on this matter. In any event the Claimant was represented by Mr Wilkinson who at no time before or during the appeal hearing requested a re-hearing. The Employment Judge did have some concern about the email dated 29 June 2018 which was sent by Ms Routledge to Ms Horberry. It was neither copied to the Claimant nor to Mr Wilkinson. During the Hearing the Respondent witnesses agreed that this was not best practice. The Employment Judge considered that by sending that email the Respondent ran a risk that Ms Horberry could have been compromised
26. During the course of his submissions Mr Morgan accepted that the email did no more than set out what was in the letter of dismissal. He did not rely upon it as a ground of unfairness. The Employment Judge accepted Ms Horberry's evidence and found that she was not compromised by reading the email. In the circumstances the Employment Judge found and decided that the email did not otherwise convert what was a fair dismissal into an unfair dismissal.

Comparators

27. The Employment Judge understood that treatment of other employees in similar circumstances was relevant in certain limited circumstances (see **Hadjioannou**). However, none of them applied in the instant case. He accepted Miss Wilson-Theaker's submission that there were no truly parallel circumstances in cases of fraud and dishonesty within the Respondent's organisation. Mr Morgan submitted that employees involved in breaching company policy by smoking while at work were appropriate comparators. The

Employment Judge rejected that submission because different policies were involved and the circumstance were not truly parallel. The Employment Judge found that there was no evidence to support the contention that the Claimant had been led to believe that she would not be dismissed for her conduct.

Band of reasonable responses

28. The Employment Judge reminded himself that he was not able to substitute his own view for that of the Respondent. He found and decided that the decision to dismiss the Claimant summarily was within the band of reasonable responses. The Respondent genuinely believed that the Claimant had committed an act of gross misconduct which amounted to theft or fraud. In those circumstances there was no doubt that summary dismissal was within the band of reasonable responses open to it. Accordingly, the Employment Judge found and decided that the Respondent acted reasonably in treating the reason of conduct as a sufficient reason for dismissal having regard to all the factors set out in section 98(4) of the 1996 Act. The dismissal was therefore fair and the complaint failed.

Breach of contract complaint

29. The issue under this head of complaint was whether the Claimant's conduct was so serious as to warrant dismissal without notice. The Employment Judge found that on the balance of probabilities the Claimant did commit an act of misconduct. It was clear that she did put more expensive roses in a cheaper sleeve and that she ought to have realised that there was a difference in size and quality between the respective roses. The photographs which were in the bundle revealed that difference immediately. The Claimant was an experienced worker and at the very least it appeared that she was taking advantage of the laxity in the Respondent's procedures.
30. In the Employment's Judge's judgment, the Respondent had established on the balance of probabilities that there was misconduct on the part of the Claimant. Was it so serious that it warranted dismissal without notice? Or was it less serious so that the Claimant was entitled to be dismissed with notice or given a payment in lieu of notice? After careful consideration the Employment Judge found and decided that this was sufficiently serious to warrant dismissal without notice. It must have been clear to the Claimant that she was paying significantly less than the system and procedure would permit. At the very least she acted in a wilful manner disregarding the Respondent's processes which were designed to ensure that an employee would pay a fair price for the items. In reaching that conclusion he emphasised that he had not concluded that the Claimant acted with intent to defraud in order to gain a pecuniary advantage from the Respondent.

31. Accordingly, the Employment Judge decided that this complaint failed.

Employment Judge Keevash

21 May 2019

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.