Case Number: 3328153/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr TP Maziarz	**v**	Travis Perkins Trading Company Limited

Heard at: Cambridge **On:** 16 & 17 May 2019

Before: Employment Judge Bloom

Members: Mr R Allan and Mr T Chinnery

Appearances
For the Claimant: Mrs B Pawlik, Solicitor.
For the Respondent: Mrs R Dawson, Solicitor.

Interpreter: Ms Beata Teresa Kramarz – Language: Polish.

JUDGMENT

1. The unanimous judgment of the employment tribunal is that the claimant's claim of unfair dismissal fails and is therefore dismissed.

2. The claimant's claim of race discrimination is withdrawn and upon withdrawal by the claimant is consequently dismissed.

REASONS

1. The claimant was represented by a solicitor, Mrs Pawlik. He gave evidence before the tribunal on oath. The respondent was represented by their in-house solicitor, Mrs Dawson. We heard three witnesses give evidence on behalf of the respondent namely Mr John Turton who at the time of these events was employed as a warehouse line manager; Mr Tony Stonebridge who at the material time was employed by the respondent as its operations manager and who took the decision to terminate the claimant's employment; and from Mr Callum Hancock who at the time was employed as an assistant general manager. Mr Hancock conducted the appeal against the dismissal. All three of those witnesses gave evidence on oath. All the witnesses including the claimant provided witness statements and our attention was drawn throughout the proceedings to the content of a joint bundle of documents consisting of

some 123 pages. We have considered all of the relevant documents in reaching our judgment.

2. The claimant brought two claims before the employment tribunal namely a claim of unfair dismissal, and a second claim of racial discrimination. During the course of both representatives making their closing submissions before the employment tribunal, Mrs Pawlik on behalf of the claimant took instructions from him and having done so informed the employment tribunal that he wished to withdraw his claim for racial discrimination. On that basis the claim of racial discrimination is dismissed.

3. In determining a claim of unfair dismissal, the burden of proof is first on the respondent to show, on the balance of probabilities, that the reason for the employee's dismissal was one of a number of potentially fair reasons set out in s.98(2) Employment Rights Act 1996. One of the those potentially fair reasons is set out in s.98(2)(b) of the 1996 Act, namely that the reason for the dismissal relates to the conduct of the employee. If the respondent shows that the reason for dismissal was a potentially fair reason then we as the employment tribunal must go on to determine whether or not the dismissal was fair or unfair regarding the criteria set out in s.98(4) of the 1996 Act.

4. This case involves an employee namely the claimant who was dismissed in respect of an allegation of gross misconduct. We remind ourselves that the well stated principles set out in the case of British Homes Stores Ltd v Burchell [1978] ICR 303. In essence, this means that it is for the respondent to show that it believed in the claimant's guilt in respect of the alleged offence; that that belief was reasonable; and that that conclusion followed a fair investigation in all the circumstances. We remind ourselves that the test of reasonableness in relation to dismissals in such cases is that of a reasonable employer and we remind ourselves that it is not for us as the employment tribunal to substitute our view for that of a reasonable employer in determining the reason or fairness of that dismissal.

5. The facts of this case are fairly straight forward. The claimant was employed by the respondent as a warehouse operative at its distribution centre. His employment commenced on 4 August 2014. He was summarily dismissed with effect from 1 June 2017.

6. The claimant's terms and conditions of employment made him subject to various rules of the respondent. Relevant rules to these proceedings were the respondent's "security rules" set out in paragraph 16 of the claimant's contract of employment. They state inter alia – "Your attention is brought to the following rules concerning security. You are reminded that it is a term and condition of your employment that you observe these rules and any additions or amendments at all times." Sub paragraph 9 of clause 16 of the contract states – "the company reserves the right to require any employee to be searched on the company premises. This includes any hand baggage being carried as well as vehicles on or having just entered or left the company premises." Within the respondent's disciplinary rules

is a list of offences that could lead to any employee being dismissed on the grounds of gross misconduct. One such example is "refusing to obey a reasonable instruction". The claimant did not dispute and admitted in evidence he was subject to those rules as we have quoted here.

7. The security rules at the distribution centre are particularly sensitive due to the fact that the respondent has experience theft of property over a period of time. For that reason, in late 2016 they introduced a new security system. This involved each and every employee who was leaving the premises going through a security system. Searches are conducted on a random basis of employees leaving. All employees are required to press a button on leaving the security area. Having done so, if a light shows as green the employee is allowed to carry on and leave the premises without further challenge. However, if a red light is shown the employee is obliged to stop and to then be subject to a search of himself and his property by security staff. No exceptions to this rule are permitted – the rule applies to all employees of whatever nature and whatever seniority. We conclude that from the system being introduced at the end of 2016 until the date of the alleged offence on 11 May 2017 the claimant must have gone through that procedure in-excess of 100 times.

8. On 11 May 2017 at the end of the shift the claimant was going through the security system together with his colleagues who would have exceeded over 100 employees at that time. The claimant's version of events differs from that of the respondent's. The respondent's case is provided by two witnesses who were in the security area at the time the claimant was leaving. One was Mr Carl Palmer a warehouse operative and the other was a Mr Jason Mills who held the position of seconded buddy – warehouse operative at the time. Both provided statements as part of the subsequent investigation process. Mr Palmer signed a statement stating that when the claimant was going through the security process the red light flashed. As a result, he was obliged to stop and then be searched. Mr Mills according to Mr Palmer called the claimant back on two occasions. The claimant despite this did not stop, he turned round and laughed at Mr Mills and left the building. Mr Mills gave a statement stating that as the claimant approached the security system the button flashed red and that despite calling him back the claimant continued to leave the building. He also said that in doing so the claimant turned round, smiled at him and left the premises. We accept that neither Mr Mills nor Mr Palmer could have been expected to chase after the claimant at that time. As we have stated though there were at least another 100 employees "checking out" through the security area at the same time and they had to be managed appropriately which meant that neither Mr Mills nor Mr Palmer could leave the scene. In a second statement given to management Mr Mills stated that the claimant had in fact pushed the security button on two occasions. The first occasion it went green but he pressed it again and on doing so it went red and at that point the claimant walked off and left the building.

9. The claimant in his recollection of the events stated throughout and to us that he acknowledged he was subjected to the disciplinary rules of the respondent and the requirements to comply with its security procedures. He acknowledged throughout the internal proceedings with the respondent and to us that if a red light shows he is obliged to stop and subsequently be searched by the security staff. However, he went on to state both to the respondent and to ourselves that if a green light first showed even though a subsequent light was shown to be red there was no obligation on him to do so. This is an explanation which we do not find acceptable and we do not believe exonerated the claimant from his obligation to stop whenever a red light is shown. We accept the evidence of the respondent that even though a red light might not be shown on the first occasion the button is pressed if it shows up on second or subsequent intervals there is always the obligation on the employee to stop and be subjected to a search. This is regardless of whether or not any security staff call out after the employee asking to stop. The obligation is always on the employee to comply with the security procedures. We do not find it therefore important to come to any conclusion as to whether or not Mr Mills actually called out to the claimant asking him to stop. The obligation was on the claimant to stop once the red light had shown.

10. The next few working days were not working days for the claimant, but he was at work on 15 May 2017 and was interviewed by his line manager Mr Payne. We saw notes of that interview in the bundle. In it the claimant admitted that the second time he pushed the button the light showed as red. He did not answer a question when put to him by Mr Payne that he had walked out without stopping despite being requested to do so and did not respond to the question that in doing so he had smiled at the security staff. In answer to a question from Mr Payne – "the last time you pressed the button you got a red which meant you should have been checked, do you accept this?". The claimant replied "yes".

11. The claimant was subsequently suspended on full pay pending a disciplinary hearing. He was advised of his suspension by letter dated 16 May 2017. The reason for that suspension namely – "refusing to obey a reasonable instruction (failure to stop for security check)" was set out in the letter and he was warned that a potential result of the subsequent disciplinary hearing might result in his dismissal.

12. The disciplinary hearing was originally arranged to take place before Mr Turton on 22 May 2017. However, at the commencement of the meeting the claimant (who was accompanied by his brother) stated that he had not received the letter of instruction or the notes of the investigation process and Mr Turton as a result had no hesitation in agreeing to adjourn the disciplinary hearing to another day. By letter dated 25 May 2017 it was re-arranged to 29 May 2017. Mr Turton was not available to hear the matter on 29 May 2019 and as a result Mr Stonebridge conducted the disciplinary hearing. The disciplinary hearing in fact took place at various intervals on 29 May, 30 May and 31 May 2017. We have read and taken note of the minutes. The claimant's understanding of English is poor but

we accept he did not object to the conduct of the disciplinary hearings and he was able to understand the nature of them as a result of his brother who accompanied him translating English into the Polish language and vice versa throughout the hearings. During the disciplinary hearings the claimant accepted that the red light had shown the second time he pushed the button. He admitted that when the red light was shown it meant he was subject to a search. When asked to comment on the allegation he replied, "it was really stupid and I am very sorry for this situation".

13. Mr Stonebridge adjourned the disciplinary proceedings to consider his decision. After giving the matter due thought, the hearing was re-convened on 1 June 2017. Mr Stonebridge had taken the decision to summarily terminate the claimant's employment as a result of the offence of gross misconduct namely not following the company rules regarding security procedures. The specific reason being given that despite a red light being shown the claimant did not stop and subject himself to a search and carried on leaving the premises. Mr Stonebridge's decision was confirmed in a letter to the claimant dated 6 June 2017. The claimant was given and subsequently exercised his right to appeal against that decision. His appeal took place before Mr Hancock on 10 July 2017. Again, the claimant was accompanied by his brother who translated on his behalf. We have read the notes of the appeal hearing. The claimant did not put forward any further explanation in addition to those explanations put forward during the course of the disciplinary process. Mr Hancock concluded that whether or not the red light was shown the first time the claimant hit the button or the second time he should have followed the relevant process i.e. he should have stopped and subjected himself to a search by the security staff. He concluded that in failing to follow the company rules the claimant had committed the offence of gross misconduct and he consequently rejected the claimant's appeal.

Conclusions

14. As stated we conclude that the reason for the claimant's dismissal was one relating to conduct and as a result was a potentially fair reason for dismissal. The allegation of conduct was clearly expressed throughout namely that the claimant on 11 May 2017 had failed to follow the company security rules namely when a red light showed on the security system as he left the premises he should have stopped and agreed to subject himself to a security search. The obligation for the claimant to stop at that process was regardless of whether or not he was either given or heard an instruction from Mr Mills to stop. The rules are well known throughout the company. The security system used by the claimant on this occasion had been in existence for well over 6 months and had been used by the claimant himself in-excess of 100 times. The claimant never put forward the proposition that he did not know he should stop after the red light is shown. Throughout he simply said that he thought if the green light was shown first even though it subsequently was shown as a red light there was no obligation on him to stop. We do not find that explanation plausible or correct. The obligation was on the claimant to stop at

whatever stage the light was shown to be red. The conclusion made by the respondent that the claimant was in breach of the procedures was one which they clearly believed and we conclude that such a belief was reasonable in all the circumstances. The respondent carried out a fair investigation – they interviewed and took statements from Mr Mills and Mr Palmer. The claimant himself was interviewed as part of the investigation process prior to the disciplinary hearing. We are satisfied that the respondent undertook a fair and proper disciplinary process. As we have stated the claimant was interviewed on three separate occasions as part of the disciplinary hearing. He was given and exercised a subsequent right of appeal. The respondent complied with the ACAS Code of Practice.

15. We also note that on evidence we have heard no other employee had left the premises when the red light was shown on the security system. There was therefore no comparable case on which the claimant could rely to state that he had been treated inconsistently in respect of any other treatment given to another employee in the same given circumstances.

16. As we have stated at the commencement of this judgment we have to determine whether or not the decision taken by the respondent falls within the bands of reasonable responses. We conclude that it was. The claimant knew of the security rules. Those rules were well known to all employees and had been in existence for some considerable time. We do not find the claimant's explanation that he did not feel obliged to stop when the red light was shown because it was only on the second occasion of pressing the button that it did so was either correct, justified or plausible in the circumstances. We conclude that he knew that at whatever stage the red light came on he was obliged to stop and subject himself to a search. The decision taken by the respondent to terminate the claimant's employment as a result of him breaching their own internal security procedures was one that a reasonable employer in all the circumstances could have taken. As a result, we conclude that in all the circumstances the claimant's dismissal was fair and as a consequence of unfair dismissal is dismissed.

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Employment Judge Bloom

Date: 7 June 2019

Sent to the parties on: ..10 June 2019

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For the Tribunal Office