EMPLOYMENT TRIBUNALS

Claimant: Mr C Tanser

Respondent: AHY Hotels Ltd (in voluntary liquidation)

Heard at: Manchester **On:** 11 March 2018

Before: Employment Judge Langridge
(sitting alone)

REPRESENTATION:

Claimant: Mr D Tolcher, Solicitor
Respondent: Not in attendance

JUDGMENT having been sent to the parties on 27 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. The claimant was employed as a sous chef at the respondent's hotel and brought this claim following his dismissal for gross misconduct. A similar unfair dismissal claim was brought by his former colleague, Jason Griffiths, the head chef in the same hotel. The circumstances behind both dismissals arose from a shift worked on 1 September 2017, after concerns were raised about health and safety and hygiene issues in the kitchen after the chefs had finished their shift.

2. Both claims were initially defended by the respondent through its solicitors. Mr Griffiths later withdrew his claim and it was dismissed on 17 September 2018. On 11 February 2019 the respondent's solicitors came off the record because the respondent was by then in liquidation. A Companies House search carried out by the Tribunal today confirmed that this was a creditor's voluntary liquidation, with liquidators appointed on 9 November 2018. The Tribunal was satisfied that nothing in the Insolvency Act 1986 prevented this claim from proceeding at the hearing. It was

therefore heard in the absence of the respondent and with the benefit of oral evidence from the claimant and a review of the key documents in the bundle.

3. At the outset the claimant stated that he wanted a finding on his unfair dismissal claim, which he was entitled to have even in the respondent's absence and even in the expectation that he might not get paid if he were successful and were awarded any compensation. The Tribunal explained to the claimant that he would not automatically be given a finding of unfair dismissal, because the claim needed to be heard and assessed on its merits. It was a matter for the Tribunal to decide whether the dismissal was fair or unfair.

4. At the outset of the hearing the claimant withdrew his claims for breach of contract and in relation to trade union detriment, and those claims were therefore dismissed.

Issues and relevant law

5. The respondent asserted in its Response that the claimant was dismissed for reasons relating to his conduct, which is potentially a fair reason under section 98 Employment Rights Act 1996 ('the Act'). Even in the respondent's absence the Tribunal had to be satisfied that conduct was genuinely the reason for dismissal. It was then for the Tribunal had to determine fairness in accordance with section 98(4) of the Act. This required the Tribunal to take into account the size and administrative resources of the employer, equity and the substantial merits of the case, and the overall circumstances of the case.

6. The leading case on fairness in conduct cases is British Home Stores v Burchell [1978] IRLR 379 which set out three elements to consider: firstly, whether the respondent's belief in its reason for dismissal was genuine; secondly, whether that belief was held on reasonable grounds; and thirdly, whether the respondent had carried out a reasonable investigation. The Tribunal also took account the principles laid down in Foley v Post Office [2000] IRLR 827, as well as Sainsbury v Hitt [2003] IRLR 23, Iceland Frozen Foods v Jones [1982] IRLR 439.

7. In relation to the first element of the Burchell test, the claimant took issue with whether the respondent's belief in his guilt was genuine. He felt the respondent had an ulterior motive for dismissing him, on the grounds that his salary was too high. He also relied on his trade union activities, particularly attempts to recruit new members to the union, as part of the unfairness (though not as stand-alone claims in their own right).

8. The second element of the Burchell guidelines was whether the employer had reasonable grounds to hold its belief: in other words, the Tribunal had to assess what evidence the respondent had in support of the alleged misconduct. Any such evidence had to be gathered through a reasonable investigation, the third element of the guidelines.

9. The Tribunal had to avoid bringing its own view of the dismissal decision into consideration, but instead had to decide whether this respondent's decision to dismiss fell within the range of reasonable responses which an employer might apply when considering the conduct in question. This range also applied to the procedures

followed and the sanction itself. Accordingly, it was not for the Tribunal to decide whether the claimant was actually guilty of the conduct he was accused of, but rather to determine whether the respondent was entitled to reach that view itself. If no employer acting reasonably in these circumstances would have dismissed the claimant then his dismissal would be unfair; but if the decision fell within a range of reasonable responses to the situation then in law the Tribunal could not interfere with the respondent's decision.

Findings of fact

10. The claimant worked at the Chadwick Hotel for many years from 1 April 1993 until his dismissal on 2 October 2017. In the latter part of his employment he was a sous chef working with a head chef, Jason Griffiths. The two men did not usually work shifts together, but their shift on 1 September 2017 was an exception. When working together Mr Griffiths was in charge of the kitchen but on all other occasions the claimant was the senior chef on duty and took on that responsibility.

11. As a chef the claimant was personally responsible for maintaining food safety and hygiene standards. As he acknowledged in his evidence, it was his responsibility to ensure that food was stored and cooked to high standards to protect customers, and this included amongst other things fridge maintenance, food rotation and keeping the kitchen clean. While others might have helped by carrying out some of those tasks, for example kitchen porters, the overall responsibility was the claimant's personal one as a chef.

12. On 1 September 2017 the claimant's shift started at 12 noon and was due to finish at 9.00pm. Mr Griffiths did a split shift that day, overlapping with the claimant from 5.30pm until around 9.00pm. Earlier in the day a kitchen porter had been sent home after attending work under the influence of alcohol. Another employee came into work on a split shift but he was not trained in food hygiene and was there only to wash up. The kitchen was therefore shorthanded that night.

13. Towards the end of his shift the claimant left to call in on the night porter at the request of the hotel receptionist. Around 1½ hours later the Duty Manager, Iain McPherson, went into the kitchen to make a light meal for a customer and was concerned about what he saw. He took a number of photographs and wrote up a written statement. Without reciting the detail of all these concerns, the gist was that:

(1) Food was left uncovered;

(2) Some items of food were stored with spoons in them;

(3) Items were stored in the incorrect fridge or in the incorrect position in the fridge;

(4) The fridges were felt to be filthy; and

(5) The bins had not been emptied.

14. Mr McPherson gave specific examples of the food items in question, referring to concerns about how tomatoes, prawns, cream and salad had been stored. He also noted a failure to empty and clean the bins, which was usually the responsibility

of the night kitchen porter who came on duty after the chefs had come off their shifts. These concerns were followed up by an investigation meeting on 12 September, the claimant having not wanted to proceed in any detail on 4 September without involving his union representative.

15. At the meeting of 12 September the claimant accepted responsibility for what he described as a “one-off situation” and explained in mitigation that he had not been well that day. The emptying of the bins was the kitchen porter’s job. The claimant said it was a question of human error that hygiene standards had slipped on this occasion. He did not make any suggestion at this stage that other members of staff had accessed the kitchen after 9.00pm and were responsible.

16. By a letter of the same date the claimant was invited to a formal disciplinary hearing, before which he was supplied with the photographs and accompanying statement. He was offered the right to bring his union representative and did so.

17. Mr McPherson, despite being the key if not only witness in the case, had taken the role of investigating officer. Due to the small size of the company an external HR adviser, Stuart Lowry, was appointed to hear the case. The disciplinary hearing took place on 25 September after dealing with and rejecting the claimant's grievance about the way the case was being handled by Mr McPherson.

18. At the disciplinary hearing the claimant made a number of concessions, and the respondent’s notes included many references to what he felt should ideally have been done. Ideally, the claimant said, he would have ensured that some food was stored differently or dated more carefully. He referred to the existence of a couple of spoons in the food though he thought this might be the responsibility of the night porter. He said that fruit salad and batter had been left out deliberately because it was helpful for other members of staff who might need to serve them after his shift ended. On many occasions the claimant used the word “oversight” to describe the failings that were being put to him through the photographs taken by Mr McPherson. He accepted, for example, that fish in the fridge had not been covered, acknowledged that things could have been done better, and said he had ‘taken his eye off the ball’.

19. The notes of the disciplinary hearing made clear that the claimant admitted that some of these oversights had been in place as his shift finished at 9.00pm. In other words, he did not try to explain them by saying they had occurred after his shift ended. He made no suggestion at the disciplinary hearing that others were in the kitchen after 9.00pm and that they were in fact responsible. The claimant explained that the kitchen porter who had been sent home that day had not been replaced, although someone else had come in to wash up.

20. The claimant put forward some mitigating factors at the disciplinary hearing. He said he had not been feeling well that day, and although he reported that to Mr Griffiths he did not feel he should leave his shift (despite the potential health and safety risk) because that would have left Mr Griffiths unable to manage on his own. The claimant said he felt that he and Mr Griffiths had been targeted, and that the issues and concerns raised were not particularly serious. He mentioned the problem of being short-staffed and referred to his long service with the company. He felt that the matter should have been dealt with informally. The mitigating factors raised by

the claimant were discussed in some detail at the disciplinary hearing, as evidenced by the detailed notes.

21. The respondent notified the claimant of the decision to dismiss with effect from 2 October by a letter from Mr Lowry dated 9 October. In his letter Mr Lowry said that on balance he felt that there had been a gross dereliction of duty on 1 September. He dealt with two aspects of the allegations. The first was described as gross negligence and failing to report the issue to management. Mr Lowry felt that the staff shortage did not excuse the multiple failings to comply with food hygiene standards. He felt that the claimant should either have rectified those failings himself or reported to management that there was a problem. He said that, contrary to the suggestion from the claimant, the service that evening had been busy but not unmanageable, and he provided information about the number of meals and snacks served during the shift. On the subject of the claimant feeling unwell, Mr Lowry felt this was not in any way connected to the reduced standards of food hygiene that day. He felt that the claimant could and should have stayed and finished his shift in order to complete his tasks, rather than leave a little early as he did. He took the view that hygiene was a matter of high priority and noted that the claimant had not shown any remorse.

22. The second part of the allegation was described in the dismissal letter as serious breaches of food hygiene and safety standards, and specific examples were given in support of this. The combined effect, said Mr Lowry, was that it created an unacceptable risk to the business. The allegations were upheld for these reasons.

23. Following the dismissal letter, the claimant submitted an appeal in writing and the key grounds on which he appealed were as follows:

(1) He felt that the decision to dismiss was too severe;

(2) He took issue with the fact that the dismissal letter was not signed (a point not pursued at the Tribunal hearing);

(3) He gave examples of where the company had previously tolerated lower standards with food hygiene, for example past use of a single fridge when one fridge was not working;

(4) He felt that the question of missing food labels was unclear from the photographs, and was unhappy to rely on Mr McPherson's statement that there were no labels on the reverse side of the containers;

(5) The claimant referred to inconsistent treatment of gross misconduct by the company, giving the example of the kitchen porter who had been sent home that day and who failed to attend work the week following because he was drunk. (The claimant did not identify in his evidence to the Tribunal any basis for saying that this person was not disciplined.)

(6) The grounds of appeal referred to the connection with trade union activities, and took issue with the fact that the claimant was not suspended, which he thought was inconsistent with the notion that he was creating a risk; and

(7) The claimant referred to the lack of any previous warnings.

24. The appeal was heard by another external HR adviser, Keith Thomas, on 25 October 2017. On this occasion the claimant referred to staff helping themselves that night to food in the kitchen to make sandwiches, though the point was not pressed with any great enthusiasm. On 10 November Mr Thomas carried out some follow up enquiries with Mr McPherson, who was adamant that other members of staff had not come into the kitchen and left a mess after the claimant's shift on 1 September. As the duty manager, Mr McPherson was in a position to know who had accessed the kitchen.

25. Having made that further enquiry Mr Thomas notified the claimant of the outcome of the appeal in a very brief letter dated 24 November. This stated that the dismissal was upheld but gave no detailed reasons.

Conclusions

26. The Tribunal considered the facts of this case with regard to the relevant legal tests and the claimant's submissions. Mr Tolcher submitted that there was no evidence that the claimant actually committed the acts which led to his dismissal. He disputed that the photographs relied on by the respondent were an accurate reflection of the way he claimant left the kitchen on the night of 1 September 2017. He also submitted that it was not reasonable for the respondent to reach the conclusion that this was all the responsibility of the claimant or his colleague Mr Griffiths. The claimant argued that the respondent did not properly examine the question of who was responsible for any failings in the way the kitchen was left. The Tribunal noted that Mr Griffiths was dismissed for the same reasons, because he was treated as jointly responsible with the claimant.

27. The difficulty with the claimant's argument is that it was not for the Tribunal to decide whether he was actually guilty of the alleged misconduct; but rather the question was whether the respondent held this belief and whether it was entitled to do so on the evidence.

28. Applying the Burchell principles and the provisions of section 98(4) of the Act, the first question was to identify the reason for dismissal and determine whether that was genuinely the claimant's conduct. Other explanations like his trade union activities and the level of his salary were referred to by the claimant but not pursued with any particular evidence at this hearing. The claimant felt that his union activities were unpopular but there was no evidence of management's attitude towards this. He said his high salary was sometimes mentioned to him, not by management but by another more junior chef. Looking at the case as a whole and with the benefit of contemporaneous records, the Tribunal was satisfied that the respondent had established conduct as the reason for dismissal.

29. The next question was whether it was fair or unfair to dismiss the claimant for this reason. Following the Burchell guidelines, and even in the absence of the respondent, the Tribunal had to examine the evidence as a whole and determine whether the respondent's belief in the misconduct was genuine. Given the absence of evidence that management were affected by the claimant's trade union activities or the level of his salary, the Tribunal accepted that the respondent did genuinely

believe he was guilty of the misconduct in question. There was no evidence to suggest that Mr McPherson fabricated what he saw or photographed. In reaching this conclusion the Tribunal also took into account the claimant's numerous admissions and concessions at the time, well documented in the notes of the investigation meeting and disciplinary hearing.

30. The next consideration was whether the respondent conducted a reasonable investigation. What is reasonable will depend on the circumstances of the particular case. Here, the respondent had a written statement from Mr McPherson, the person who inspected the kitchen on the night of 1 September, and his contemporaneous photographs. The Tribunal considered whether the respondent should have done more, for example, by interviewing other members of staff to find out whether anyone accessed the kitchen after the claimant's shift finished at 9pm that evening. Overall, the Tribunal was satisfied that the investigation was carried out to a reasonable standard. The extent of any investigation will be influenced partly by the extent to which an employee accepts or disputes what he is alleged to have done. In this case the claimant did not dispute at the disciplinary hearing that food was stored incorrectly or left uncovered. He sought to explain how it should have been done in an ideal world, and argued that it was not as serious as portrayed.

31. A review of the documentary evidence made clear that at the investigation stage the claimant did not raise the question of others being responsible for the state of the kitchen or the fridge. Even if he had, it was difficult to see how it would explain away every example of the food being incorrectly stored, for example being on the wrong shelf in the fridge, or not being covered, or having spoons left in dishes. It would be inherently implausible that the few members of staff who might sometimes have helped themselves to food would have touched every individual item identified by Mr McPherson as a cause for concern (for example, tomatoes, prawns, cream and salad).

32. It was only at the appeal stage that the claimant raised this point, though it was apparent from the detail of the notes that he did not do so with any conviction. At that point the respondent could reasonably have been expected to consider what, if any, further enquiries should be made to look into the claimant's assertion. While it did not embark upon a full-blown investigation of who had had access to the kitchen that night, the respondent did follow it up in a proportionate way by speaking to Mr McPherson. As the duty manager that night he was well placed to know if staff had been in and out of the kitchen, and there was no evidence to suggest they were. On the contrary, he was quite clear that they were not. The respondent was entitled to rely on that further information and to weigh it up alongside the other evidence including the photographs and the claimant's admissions.

33. The third consideration was whether there were reasonable grounds to believe that the claimant was guilty of gross misconduct, such as to warrant dismissal, in other words whether the respondent had evidence supporting its belief. Although there was an element of undisputed facts, it was nevertheless important for the respondent to consider the mitigating circumstances put forward by the claimant. He raised the fact that he had not been feeling well that day, that the kitchen was short-staffed, and that he had received no prior warnings. It was clear from the written evidence that the respondent did take into account the mitigating factors and the Tribunal concluded that it was entitled to reach the decision to dismiss even after

allowing for these points. The fact that the claimant felt unwell (though still able to work his shift) did not explain the way the food had been stored. Being short-staffed by the absence of a kitchen porter did not explain it either, given that it was (as the claimant fairly acknowledged) the chefs' personal responsibility to ensure food was stored and labelled correctly and safely, in accordance with their training. It was also not the case that the claimant simply ran out of time to do all that he needed to do that night. He was able to leave a little early and did not raise with the duty manager the fact that he had been unable to complete important tasks due to lack of time. had that been the case, the respondent expected him to have made such a report to management, and this was a legitimate and reasonable expectation.

34. The absence of prior warnings was a further consideration, but in cases where serious misconduct or negligence is alleged the law recognises that it may be fair and lawful to dismiss. The lack of a warning on its own did not therefore avoid the consequence of dismissal.

35. One of the other factors which can affect the fairness of a dismissal is the procedural handling of the case. Little criticism of this kind was made during this hearing, though the Tribunal did consider the relevant evidence. It might not have been wise for Mr McPherson to act as the investigating officer given that he was also the witness to the wrongdoing, but it was difficult to see that any unfairness resulted from this, and it cannot be said that it rendered the dismissal in any way unfair. Mr McPherson was the manager on site on the evening of 1 September and it was important that he compiled his evidence promptly in the form of photographs and a statement. Once the respondent took the matter forward, an important procedural safeguard was put in place in that a person independent of the investigation conducted the disciplinary hearing. An external HR adviser was the decision-maker at both the disciplinary hearing and the appeal.

36. Overall, a fair procedure was followed in that an initial investigatory meeting took place, the claimant was made aware of the concerns and provided with the supporting evidence, he was given the right to bring a trade union representative to the disciplinary hearing and had a full opportunity to defend the allegations. After the dismissal, a right of appeal was offered. There was no substantive procedural flaw in the handling of the case.

37. As for the substance of the decision, the dismissal letter demonstrated that the respondent treated the allegations very seriously, and it is uncontroversial to say that the importance of food safety and kitchen hygiene cannot be overstated. Unless well managed to the highest of standards, it can cause serious risk to the health and safety of customers, as well as a potentially serious risk to the respondent's reputation and business. The respondent was entitled to treat the matter as serious and in doing so it acted reasonably in the circumstances of this case.

38. Although the claimant felt his dismissal in these circumstances was harsh and excessive, the Tribunal could not interfere unless the respondent's decision fell outside the range of reasonable responses. Another employer might have dealt with the case differently, for example by issuing a warning, but the Tribunal's conclusion is that it this respondent's decision was not outside the range of reasonable responses. This is not a case where it can be said that no reasonable employer, acting fairly, would have reached the same conclusion. In these circumstances, and

having regard to the provisions of section 98(4) of the Act, the claimant's dismissal was fair and reasonable.

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Employment Judge Langridge

Date: 25 June 2019

REASONS SENT TO THE PARTIES ON

27 June 2019

FOR THE TRIBUNAL OFFICE