

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT
MR R HUTTON

V

RESPONDENT
TESCO STORES
LIMITED

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 27 MARCH 2019

BEFORE: EMPLOYMENT JUDGE S POVEY
(SITTING ALONE)

REPRESENTATION:

FOR THE CLAIMANT:

MS RANDALL (COUNSEL)

FOR THE RESPONDENT:

MR BIDNELL-EDWARDS (COUNSEL)

RESERVED JUDGMENT

1. The claim of unfair dismissal is not made out and is dismissed.
2. The claim of wrongful dismissal is not made out and is dismissed
3. Written reasons for the judgment will follow.

REASONS

1. This is a claim by Roger Hutton against his former employer Tesco Stores Limited. Mr Hutton was employed as a customer services assistant from May 2015 until his dismissal on 2 August 2018. He brings claims that he was both unfairly and wrongfully dismissed by the Respondent.

RESERVED JUDGMENT

The Hearing

2. In the course of the hearing, I heard evidence from the Claimant. For the Respondent, I heard from David Pearce (Investigating Officer), Gemma Cannon (Disciplinary Officer) and Rhys Davies (Appeal Officer). I was provided with witness statements for all the witnesses that I heard from and a bundle of documents prepared on behalf of the Claimant and the Respondent. During the course of the hearing, all those present (including myself) viewed material extracts of CCTV footage.
3. Due to lack of time, Ms Randall and Mr Bidnell-Edwards agreed to provide written submissions after the hearing and I reserved judgment.
4. In reaching my decision, I had regard to the evidence I was provided with, the evidence I heard and the written submissions. I also had regard to the law and briefly set out the relevant parts in respect of these claims.

The Relevant Law

Unfair Dismissal

5. By virtue of Section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by her employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within Section 98 of the ERA 1996.
6. Section 98(1) requires that in deciding whether a dismissal was unfair it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within Section 98(2) of which subsection (2)(b) states:

"A reason falls within this subsection if it relates to the conduct of the employee."

7. Section 98(4) of ERA 1966 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in Section 98(2). In a conduct dismissal, the Tribunal is bound to consider the guidance issued by the Employment Appeals Tribunal in the Courts (including the decisions in British Home Stores Ltd v Burchell [1978] 379, Iceland Frozen Foods Ltd v Jones [1993] ICR 1, Post Office v Foley [2000] IRLR 827, Sainsbury's Supermarkets v Hitt [2003] IRLR 23).
8. In particular, the case law requires me to consider four sub-issues in determining whether the decision to dismiss on the grounds of conduct was fair and reasonable:
 - 8.1. Whether the employer genuinely believed that the employee had engaged in conduct for which he was dismissed;

RESERVED JUDGMENT

- 8.2. Whether they held that belief on reasonable grounds;
 - 8.3. Whether in forming that belief they carried out proper and adequate investigations, and
 - 8.4. Thereafter, whether the dismissal was a fair and proportionate sanction to the conclusions they had reached.
9. In addition, the Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses to the conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. My function is to determine whether in the circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band it is fair. If it falls outside that band, it is unfair.
10. The Tribunal is also required to consider the fairness of the procedure that was followed by the employer in deciding to dismiss the employee. However, if the procedure followed was unfair, the Tribunal is not allowed to ask itself whether the same outcome (i.e. dismissal) would have resulted anyway, even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL).
11. The requirement for procedural fairness includes consideration of the reasonableness of the decision to dismiss up to and including any appeal process undertaken (West Midlands Co-operative Society v Tipton 1986 ICR 192, HL).

Wrongful Dismissal

12. By virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI1623, proceedings may be brought before the Tribunal in respect of a claim of an employee for the recovery of damages or any sum for breach of a contract of employment where the claim arises or is outstanding on the termination of the employee's employment.
13. Section 86 of the ERA 1996 affords rights of notice to employees, the length of which is determined by their period of continuous employment with their employer. Any failure by the employer to give correct notice constitutes a breach of his contract of employment, save where either the employee waives his rights to, or accepts payments in lieu of, notice. In addition, an employer is entitled to dismiss an employee without notice where satisfied that the employee's conduct amounted to a repudiatory

RESERVED JUDGMENT

breach of the employment contract and discloses a deliberate intent to disregard the essential requirements of that contract. The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate dismissal.

The Issues

13. It was agreed that the Respondent had dismissed the Claimant and that the reason it relied upon for that dismissal was the Claimant's conduct. It was left for me to determine whether the decision to dismiss on the grounds of conduct was substantively and procedurally fair.
14. In addition, I was required to determine whether, in dismissing him without notice, the Respondent wrongfully dismissed the Claimant.

Findings of Fact

The Dismissal

15. The Claimant was employed as a customer services assistant at the Respondent's store in Swansea from May 2015 until his dismissal on 2 August 2018.
16. The claims centered upon the events of 28 June 2018. Much (but not all) of what occurred that day was captured by the store CCTV and was not materially in dispute. The following was not in issue:
 - 16.1. The Claimant had finished his morning shift and was shopping in the store. As he was still in his work uniform, a customer approached him, looking for a particular product. The Claimant had a conversation with the customer but the customer was not satisfied that the specific product he was after was not available in this particular store;
 - 16.2. The customer became increasingly annoyed, threw his basket to floor and began walking towards the exit. However, he then stopped, turned around and walked back towards the Claimant. The reason why was disputed (and is explored further, below). The Claimant asked the customer to leave the premises and, when he did not, used force to manoeuvre the customer to the exit;
 - 16.3. Once outside the store, the customer assaulted the Claimant. Another customer, who happened to work as a security guard, albeit not for the Respondent ('the security guard') intervened and restrained the customer. The police attended but the Claimant chose not to press charges;

RESERVED JUDGMENT

- 16.4. The customer later posted a video on social media, which he had taken with his phone whilst being removed from the premises by the Claimant. He also wrote a letter of complaint to the Respondent about his treatment by the Claimant;
- 16.5. The Claimant was subsequently suspended on full pay and an investigation undertaken by Mr Pearce. This resulted in disciplinary proceedings being instigated against the Claimant, conducted by Ms Cannon. Two disciplinary meetings took place between Ms. Cannon and the Claimant (on 25 July and 2 August 2018). After the second meeting and by a letter dated the same day, Ms. Cannon informed the Claimant of the decision to dismiss without notice on grounds of gross misconduct;
- 16.6. The Claimant exercised his right of appeal against the decision to dismiss. The appeal was conducted by Mr Davies. Two appeal meetings took place between Mr Davies and the Claimant (on 31 August and 14 September 2018). By a letter dated 14 September 2018 (written after the second meeting), Mr Davies upheld the decision to dismiss.
17. As set out in the dismissal letter, the Respondent claimed that the Claimant's actions towards the customer on 28 June 2018:
- 17.1. Constituted harmful or offensive contact;
 - 17.2. Negatively impacted upon customer perception of the Respondent;
 - 17.3. Was unacceptable behaviour.
18. In addition, the Respondent found that the Claimant had also sworn at the customer when he was initially walking towards the exit and it was that verbal abuse which caused the customer to stop, turn around and confront the Claimant. The Claimant has always denied swearing as claimed or at all. In doing so, he alleged that the Respondent's investigations and conclusions were flawed.
19. Each of the reasons relied upon by the Respondent fell within the list of non-exhaustive examples of what was likely to constitute gross misconduct within the Respondent's disciplinary policy.

Substantive Fairness

20. As well as being the investigating officer, Mr Pearce was the Claimant's store manager. He was not in store at the time of the incident with the customer. Rather, he was made aware of it by telephone on the day by the shift leader, Shaun Golding. Later that day, Mr Pearce was also made

RESERVED JUDGMENT

aware (and had sight of) the customer's complaint and video, as well as the in-store CCTV footage of the incident.

21. In the course of his investigations, Mr Pearce held two meetings with the Claimant. He also interviewed Mr Golding and Sarah Cotterill, a customer assistant who had witnessed aspects of the incident from her position behind one of the store's tills. The Claimant was provided with copies of their respective statements at the second investigation meeting with Mr Pearce.
22. Mr Pearce concluded from his investigations that the Claimant had a case to answer regarding his behaviour toward the customer, his decision-making and the impact his actions had potentially had on the Respondent's brand.
23. In the course of the disciplinary procedure, Ms Cannon had sight of the CCTV footage, the customer's complaint, the notes of the investigatory meetings and the statements from Mr Golding and Ms Cottrill. She concluded that no further investigations were required and conducted a disciplinary hearing with the Claimant on 25 July 2018. However, following that hearing and in light of submissions made by the Claimant, Ms Cannon proceeded to interview Mr Pearce (regarding the Claimant's status as a trade union representative) and Mr Golding (over whether or not he heard the Claimant swear at the customer and what action he would have taken if the Claimant had alerted him to the problem with the customer). She reconvened the disciplinary hearing with the Claimant on 2 August 2018.
24. Both during the disciplinary process and in his evidence to the Tribunal, the Claimant raised alleged shortcomings in the scope and conclusions of the Respondent's investigations. He queried why the security guard (who had intervened when the customer assaulted the Claimant outside of the store) had not been interviewed. Ms Cannon took the view that the security guard's only direct involvement was at the end of the incident and he could not add anything to what was captured on the CCTV recordings. Despite that, attempts were made to contact the security guard but without success.
25. There was much focus on Mr Golding's claim that he had heard the Claimant swear at the customer. The customer (in his complaint) had also claimed that he had been sworn at by the Claimant. Mr Pearce claimed that he had checked with Mr Golding whether he had seen the customer's complaint (which included the allegation of swearing) before he was interviewed. He had said that he had not but that conversation between Mr Pearce and Mr Golding was not minuted. Ms Cotterill had not heard any swearing, although she had heard the customer throw his basket to floor during the altercation. Ms Cannon had interviewed Mr Golding and he was categorical that he had heard the Claimant swear. In the appeal, Mr Davies concluded that the CCTV footage undermined Mr Golding's account of

RESERVED JUDGMENT

where he was during the incident but not what he would have been able to hear.

26. Ms Cannon set out her findings and conclusions in the dismissal letter, referred to above.

27. The Claimant, in his evidence to the Respondent and the Tribunal, agreed that:

27.1. He was not physically intimidated by the customer;

27.2. Whilst in store, he could have walked away from the confrontation with the customer;

27.3. He was aware of, and could have initiated, the “three rings” procedure (whereby checkout staff, on request, ring a bell three times, which is the signal for all available staff to convene and assist a colleague);

27.4. In removing the customer from the store in the manner he did, he acted contrary to training (which informed staff not to get physically involved);

27.5. But for being punched outside by the customer, he accepted that what he did was wrong. With hindsight, he would have acted differently and had acted in the heat of the moment; and

27.6. He would have accepted a final written warning for his actions in-store.

28. On 8 September 2018, Ms Cannon was interviewed by Mr Davies ahead of the appeal. She was asked whether she would have still dismissed the Claimant if he had not sworn at the customer. The transcript of the meeting recorded her answer as follows:

...Even without the swearing the fact that he pushed the customer out of the store after admitting that the customer wasn't physically aggressive is enough for summary dismissal anyway...

29. Ms Cannon reiterated under cross-examination that she would have reached the same decision (to dismiss the Claimant for gross misconduct) even without the allegation of swearing. That view was shared by Mr Davies who, during re-examination, stated that even without the swearing, the Claimant's conduct was unsatisfactory, harmful and constituted gross misconduct.

30. In my judgment, irrespective of whether or not the Claimant swore at the customer, the Respondent was entitled to believe, by reason of proper and

RESERVED JUDGMENT

adequate investigations, that in removing the customer from the store, the Claimant's behaviour was unacceptable, caused reputational damage and constituted harmful and/or offensive physical contact with the customer. Each of these could constitute gross misconduct. Cumulatively, they could constitute gross misconduct. Even the Claimant accepted that his conduct warranted a final written warning.

31. Under no circumstances should the customer have attacked the Claimant as he did once outside of the store. He was very fortunate not to have had charges brought against him for assault. His behaviour was wholly unacceptable and unjustified. However, that in no way departed from the Claimant's admitted failure to follow training and procedure.
32. In the retail industry, an employer is entitled to expect a certain level of behaviour from its staff towards its customers, however obnoxious those customers may behave. The Respondent had policies and procedures in place to deal with such customers, aimed at de-escalating confrontation, maintaining staff professionalism and minimizing reputational damage. The Claimant failed to follow these procedures and the consequences only served to reinforce why the Respondent required its staff to adhere to the same.
33. For all those reasons, the Respondent's decision to dismiss the Claimant for gross misconduct was based upon proper and adequate investigations, its belief as to the Claimant's conduct was genuinely held and reasonable and the decision to dismiss was within the range of reasonable responses open to it. It follows that the decision to dismiss was substantively fair.

Procedural Fairness

34. The Claimant was invited to meetings at the investigatory, disciplinary and appeal stages of the process. At each stage, he was informed of his right to be accompanied, was provided with the information and evidence available and afforded an opportunity to put his case forward. The Claimant was given a right of appeal, which he exercised. Both the disciplinary hearing and the appeal hearings were conducted by different members of staff.
35. The Claimant was given prior warning of all meetings. He was told that the disciplinary process could result in his dismissal. It was not in dispute that he was not told of that sanction during the investigatory process but, in my judgment, there was no onus on the Respondent to do so. It is not a requirement of the ACAS Code. Indeed, had the Respondent raised possible sanctions before the completion of the investigatory process, it may have been open to accusations of bias and pre-judgment.
36. The discussion Mr Pearce had with Mr Golding at the investigation stage and prior to his interview should have been minuted. However, the impact

RESERVED JUDGMENT

of that oversight was minimized by Ms Cannon's decision to interview Mr Golding herself. Similarly, it was difficult to understand why Mr Pearce believed (as he did in his oral evidence) that the customer was impartial to the process and outcome. He had, after all, submitted a complaint against the Claimant. In contrast, Mr Davies did not believe that the customer was impartial. Mr Pearce's arguably mistaken view of the customer's standing did not, in my judgment, have a material impact upon the disciplinary process as a whole. It was not a view shared by the appeal officer and the customer's evidence was only one part of the case against the Claimant. The weight attached to the customer's account was immaterial to the Claimant's own admissions as to his conduct, his failure to follow training and his own view of the severity of what he did (warranting, in his own view, a final written warning).

37. In addition, and in my judgment, Ms Golding was entitled not to interview the security guard, given his limited role in the incident. Much of what occurred was not in dispute. When considered as a whole, the Respondent's investigations were proper and adequate.
38. A criticism was made of the Respondent for failing to notify the Claimant's trade union of the action being pursued, on the basis that the Claimant was a trade union representative. However, there was some confusion over whether the Claimant, at the material time, was a trade union representative or in training to become a representative. More importantly, the Claimant accepted that he had not been prejudiced in any event because he had been accompanied by a trade union representative at every stage of the process.
39. For all those reasons, I found that the procedure followed by the Respondent, from the initial investigation to the dismissal of the Claimant's appeal, was fair.

Conclusions

40. By reason of the above findings of fact, I was satisfied that the decision by the Respondent to dismiss the Claimant was substantively fair. The Respondent's belief as to the Claimant's conduct was held on reasonable grounds and the product of adequate and proper investigations. It fell within a range of reasonable responses
41. I also concluded that the Claimant's dismissal was procedurally fair. It accorded with the ACAS Code and the principles of natural justice.
42. As such, the claim of unfair dismissal is dismissed.
43. Finally, given the Claimant's acknowledgement that he failed to follow staff training, failed to instigate the three rings system, failed to take alternative, appropriate action when confronted by the customer and that

RESERVED JUDGMENT

his conduct warranted a final written warning, the Respondent was entitled to conclude that his actions constituted gross misconduct and a fundamental breach of his employment contract. As such, the Respondent was entitled to dismiss him without notice.

44. It follows that the claim of wrongful dismissal is similarly dismissed.

EMPLOYMENT JUDGE S POVEY

Dated: 9 July 2019

Order posted to the parties on

.....10 July 2019.....

.....

For Secretary of the Tribunals