



EMPLOYMENT TRIBUNALS

Claimant: Mr M Jafrate

Respondent: Hopkins Catering Equipment Ltd

Heard at: Leeds **On:** 29 June 2018

Before: Employment Judge Bright (sitting alone)

Representation

Claimant: In person

Respondent: Ms V Hopkins (Managing Director)

WRITTEN REASONS

The claim

1. These are the written reasons for the judgment delivered orally to the parties on 29 June 2018. That judgment held that the claimant's dismissal was fair and the claim of unfair dismissal was dismissed.

The issues

2. With the help of the parties, I identified at the start of the hearing that the issues to be decided were:
 - 2.1. What was the reason for dismissal? Was it a potentially fair reason within section 98 of the Employment Rights Act 1996 ("ERA")?
 - 2.2. If so, did the respondent ("the Company") act reasonably or unreasonably in all the circumstances, including the size and administrative resources of the Company, in treating that reason as sufficient to dismiss Mr Jafrate?
 - 2.3. Did the Company have a genuine belief that Mr Jafrate or his colleague, G, had committed the misconduct?
 - 2.4. Did the Company conduct a reasonable (sufficiently thorough) investigation?
 - 2.5. Did the Company act reasonably in excluding Ms Swift from the group of employees who could have committed the act?

- 2.6. Did the Company act reasonably in identifying that either member of the group who could have committed the act was individually capable of doing so?
- 2.7. As between the members of the group was the Company unable to reasonably identify the individual perpetrator?
- 2.8. Did the respondent follow a reasonable procedure, in that Ms Hopkins conducted the investigation and the disciplinary hearing?

Submissions

3. Mr Jafrate says he was dismissed because Ms Hopkins and Ms A Swift (the Company's Stores Manager) colluded to fabricate evidence to get Mr Jafrate and G dismissed. He says the Company wanted to get rid of him because they were overstaffed, but could not afford to make him redundant and that the theft allegation was a sham. He says there was evidence that Ms Swift wanted to get rid of him as she had previously made a malicious allegation against him, which the Company did not properly consider. He says the Company did not follow a proper procedure, in that Ms Hopkins conducted the investigation and appeal and the two appeal decision makers were out of touch or unfamiliar with the Company's procedures.
4. Ms Hopkins says the Company reasonably excluded Ms Swift from the pool of possible guilty employees because she was in a meeting at the time of the alleged offence. There was no redundancy situation and no cost saving as a result of Mr Jafrate's dismissal. She says that, after the Company's investigation, it was faced with evidence that one of only two employees could have carried out the misconduct, Mr Jafrate or G. She says she was unable to determine which of the two was responsible and therefore reasonably dismissed both employees. She says the appeal was fair.

Evidence

5. Mr Jafrate gave evidence on his own behalf and called no further witnesses.
6. Ms Hopkins gave evidence for the Company and called no further witnesses.
7. Both parties provided their own bundle of documents, which were largely duplicated. As the Company's bundle numbering was clearer, I have referred to the page numbers of documents in the Company's bundle for convenience. I read the contents of both bundles of documents and the witness statements at the start of the hearing.

Findings of fact

8. I made the following findings of fact on the balance of probabilities on the basis of the evidence before me.
9. It was not disputed that there was a lengthy history of stock going missing from the Company's stores and that the Company took the decision to tighten up procedures to try to prevent theft of further items. I accepted Ms Hopkins' evidence that she employed Ms Swift as Stores Manager in part to implement the necessary changes. It was clear to me from the evidence of both Mr Jafrate and Ms Hopkins that there was some friction caused as a result of the changes. Mr Jafrate had almost 17 years' service with the Company, was very

knowledgeable about the Company's processes and did not see eye to eye with Ms Swift on some of the changes she instituted.

10. Following the discovery of further stock going missing, Ms Hopkins and the managers decided to limit access to the stores. I accepted Ms Hopkins evidence that all keyholders returned their keys to the stores, with the exception of the two storemen, Mr Jafrate and G, and their manager Ms Swift, who would continue to need access to do their jobs.
11. It was not disputed that a few days after this change, a stock audit by Ms Swift uncovered a further stock discrepancy. A preliminary investigation uncovered the requisition and stock records contained at pages 2, 3 and 4 of section 5 of the Company's bundle. It was not disputed that those documents appeared to show that at 13.29 on 28 September 2017 someone altered the computer records and paper records to cover up the theft of an item from the stores.
12. Following further investigation, conducted as set out in Ms Hopkins' witness statement at paragraph 19, I accepted that Ms Hopkins concluded that Ms Swift was in a meeting from 13.00 to 14.00 on 28 September 2017 and could not therefore have altered the computer records. The other managers in the meeting confirmed to Ms Hopkins that the meeting had taken place and that Ms Swift had been present. There was also an email in the bundle as evidence of the group invite to the meeting. I find that Ms Hopkins therefore genuinely concluded that it could not have been Ms Swift who was responsible for altering the records and it was therefore unlikely that she was responsible for the theft. I find that Ms Hopkins genuinely concluded that the only two people who had access to the stores and the computer and paper records at that time were Mr Jafrate and G.
13. Ms Hopkins held meetings with both employees and both adamantly denied the allegation of theft and fraudulently changing the documentary records. Mr Jafrate agreed that the only conclusion to be reached from the documents was that there had been a misappropriation of stock and he also agreed that there was no one else within the Company who would have been familiar enough with the procedures to know how to transfer the stock either manually or on the Opera computer software.
14. Mr Jafrate says that, if Ms Hopkins genuinely suspected him or G of committing the misconduct, she would have suspended them. I accepted Ms Hopkins' evidence as to her reasons for not suspending Mr Jafrate or G. She explained that, as the stores were supervised, both employees were under threat of disciplinary proceedings, and Ms Smith had been instructed not to leave the department, she felt that suspension was not necessary. I found her admission that perhaps her decision had not been the right one with hindsight and her reasons for having made that decision plausible.
15. Ms Hopkins produced an investigation report which concluded that there was substantial evidence that an act of theft and dishonesty had occurred, amounting to gross misconduct. She then invited Mr Jafrate and G to separate disciplinary meetings.
16. Mr Jafrate objected to Ms Hopkins conducting both the investigation and disciplinary hearing. However, I accepted Ms Hopkins' evidence at the hearing that, while there were other managers in the Company, it was a small company

of 54 employees and she was the only manager who was sufficiently trained and experienced in investigations and disciplinary matters.

17. At the disciplinary meetings, both Mr Jafrate and G adamantly denied having committed the misconduct. Mr Jafrate suggested that he had been set up by Ms Swift. He pointed to an occasion in February 2017 when Ms Swift had blamed him for a serious actuarial/procedural error which, it transpired, had been her own, as evidence that she was capable of framing him. I accepted Ms Hopkins' evidence at this hearing that she considered that possibility and ruled it out. While Mr Jafrate has stated today that Ms Swift blaming him for the previous error was not innocent, as she could not have known about the error without appreciating that it was her own, that detail does not appear to have been raised with the Company before today. It is clear to me that, at the time of the disciplinary proceedings, Ms Hopkins believed that the incident in February 2017 and the placing of blame on Mr Jafrate had been a genuine error by Ms Swift.
18. I accepted Ms Hopkins evidence at this hearing that she was not aware of any personality clash between Ms Swift and Mr Jafrate. There was insufficient evidence for me to find that the Company, Ms Swift or Ms Hopkins wanted to get rid of Mr Jafrate. On the contrary, the evidence before me suggested that he was a valued and trusted member of staff, albeit that he had some difficulty adjusting to Ms Swift's new ways of working. There was also insufficient evidence for me to find that the Company was overstaffed or trying to cut workforce overheads. There was some rearrangement of jobs following the dismissals, but I accepted Ms Hopkins' evidence that the headcount and payroll outlay was the same as before and the re-assignment of staff was to try to cover the lack of storemen.
19. I find that the Company was faced with an extremely difficult situation. There was incontrovertible evidence that a theft had taken place and records had been deliberately falsified to cover it up. There had been a lengthy history of stock discrepancies which the Company was trying to address. Ms Hopkins was presented with the only two employees who could reasonably have been able to commit the misconduct. Both employees denied the charge, but were able to offer no other plausible explanation. I find that Ms Hopkins concluded that one of them must be innocent and the other must be lying, but I accepted her evidence that she genuinely had no way of knowing which was which. While it was Mr Jafrate's initials which were entered on the fraudulent record, Ms Hopkins accepted that that was not necessarily indicative that he had created the fraudulent record.
20. It was not disputed that Ms Hopkins took advice from ACAS, who advised her that, in situations of this kind, an employer may act reasonably in dismissing both employees. Faced with the alternative of dismissing neither employee and continuing to operate with storemen in whom the Company had lost confidence, she dismissed both employees.
21. Mr Jafrate appealed against his dismissal on the grounds set out in his letter at page 38 of section 5 of the Company's bundle. He objected to the conclusion that either he or G had committed the gross misconduct, on the basis that the paper trail was too blatant to be genuine. He said it so clearly pointed to him, that it must have been obvious to the Company that it was not real.

22. Ms Hopkins instructed an outside HR person, Ms S Bogle to conduct the appeal, alongside Mr Hopkins (Chief Executive Officer). At this hearing Mr Jafrate has objected to the use of Ms Bogle on the basis that she was an outsider who did not understand the Company's procedures. Mr Jafrate also objected to Mr Hopkins, who he says was semi-retired and out of touch with the workplace. However, he did not explain what aspect of the Company's procedures they did not understand nor how that affected the outcome of the appeal. Indeed, from the perspective of assessing whether the appeal panel was biased Ms Bogle's lack of any previous connection with the Company was advantageous, in that she had no incentive to either uphold or overturn the decision to dismiss. The use of an independent appeal officer is common because it can ensure that an appeal is not tainted with bias or the appearance of bias.
23. Ms Bogle heard Mr Jafrate's arguments and, it appears from the appeal outcome letter, looked into his allegations. It was not entirely satisfactory that Ms Bogle was not available at the hearing to be cross examined, particularly as her findings on Mr Jafrate's points of appeal in her appeal outcome letter are somewhat cursory. In particular, she does not detail the additional investigations she says she conducted. However, I find from the outcome letter that she did conduct additional investigation and did consider the points Mr Jafrate raised on appeal. There was insufficient evidence of any procedural error by Ms Bogle at the appeal stage.

The law

Unfair dismissal

24. I had regard to Section 98 of the Employment Rights Act 1996 ("ERA 1996"). The onus is on the employer to show the actual or principal reason for dismissal. Conduct is a potentially fair reason for dismissal falling within section 98(2) ERA 1996.
25. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the tribunal to decide. Section 98(4) ERA 1996 reads

The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon 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 that question shall be determined in accordance with equity and the substantial merits of the case.

26. The test of whether or not the employer acted reasonably is an objective one, that is tribunals must determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. The tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones [1983] ICR 17** (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC) v Madden [2000] IRLR 827**)). The tribunal must not substitute its decision for that of the respondent. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable

employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (**Sainsbury Supermarkets Limited v Hitt [2003] IRLR 23**).

27. In determining the fairness of a dismissal for alleged misconduct, the tribunal should normally apply the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**. The tribunal considers whether the respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This lays down a three stage test: 1) the employer must establish that he genuinely did believe that the employee was guilty of misconduct; 2) that belief must have been formed on reasonable grounds; and 3) the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The burden of proof is on the employer on point (1) but it is neutral on the other two points (**Boys and Girls Welfare Society v McDonald [1996] IRLR 129**; **Sheffield Health and Social Care NHS Trust v Crabtree [2009] UKEAT/331/09**). Whether or not the employee is actually guilty of the misconduct is not relevant to the fairness of the dismissal.
28. In a case where the employer reasonably suspects one or more employees to be guilty of misconduct, but cannot identify which, the test in **Burchell** is refined, in that the employer is not required to reasonably believe in the claimant's guilt. The employer in these circumstances may act reasonably in dismissing both employees, even though there are not reasonable grounds for believing that both of them are guilty. Provided the employer reasonably believes that one of them has committed the misconduct, that may be sufficient (**Monie v Coral Racing Ltd [1980] IRLR 464**).
29. In **Parr v Whitbread plc (t/a Threshers Wine Merchants) [1990] IRLR 39** the following approach was suggested by the Employment Appeal Tribunal:
- If a Tribunal is able to find on the evidence before it: (1) that an act had been committed which if committed by an individual would justify dismissal; (2) that the employer had made a reasonable—a sufficiently thorough—investigation into the matter and with appropriate procedures; (3) that as a result of that investigation the employer reasonably believed that more than one person could have committed the act; (4) that the employer had acted reasonably in identifying the group of employees who could have committed the act and that each member of the group was individually capable of so doing; (5) that as between the members of the group the employer could not reasonably identify the individual perpetrator; then provided that the beliefs were held on solid and sensible grounds at the date of dismissal, an employer is entitled to dismiss each member of that group'.*
30. Where there are potentially a number of suspects, the employer can justifiably conclude after investigation that one or more could not be guilty of the offence and, in those circumstances, the employer is not obliged to dismiss such individuals. Provided there are solid and sensible grounds for differentiating between the members of the group, it will not be unfair to dismiss those who, after investigation, remain under suspicion (**Frames Snooker Centre v Boyce [1992] IRLR 472**.)

31. In deciding whether a conduct dismissal falls within the range of reasonable responses, a tribunal may also consider whether:
- 31.1. The respondent had sufficient regard to the claimant's length of service and disciplinary record;
 - 31.2. The respondent gave sufficient regard to arguments in mitigation;
 - 31.3. The respondent gave consideration to alternatives to dismissal; and/or
 - 31.4. The respondent followed a fair procedure, in accordance with the ACAS Code.

Determination of the issues

32. I have considered all of the arguments and evidence raised before me today carefully and find, on the balance of probabilities, as follows. I find that the Company has shown that the reason for dismissal was conduct, which is a potentially fair reason within section 98 ERA. It was not disputed that there was a theft and falsification of records to cover it up. The Company genuinely concluded that Mr Jafrate and/or G must have been responsible on reasonable grounds. An act of misconduct of this nature is clearly capable of being gross misconduct and therefore justifying summary dismissal. There was insufficient evidence to support Mr Jafrate's submission that this was a sham to get rid of him or that he was, in fact, redundant or that the Company wanted to reduce headcount or overheads.
33. To establish whether the Company has acted reasonably or unreasonably in treating the misconduct as sufficient reason for dismissing Mr Jafrate, I must apply the test of whether the Company acted within the range of reasonable responses of a reasonable employer in the circumstances.
34. In terms of the procedure followed by Ms Hopkins, Mr Jafrate's only complaint was regarding the personnel involved. Mr Jafrate objected to Ms Hopkins carrying out the investigation and the disciplinary process. While it is not ideal to have the same person conducting these two stages, it is not automatically unreasonable. This is a small, family-run business and I accepted Ms Hopkins' evidence as to the reasons why she was the only suitable candidate for both stages. I do not find it rendered the process unreasonable.
35. She investigated the allegation of theft by tracing the paper and computer records and identifying the missing item and its history. She spoke to the employees involved in that history and they agreed that the only conclusion was theft and fraudulent altering of records. She established who had the potential to commit the misconduct and uncovered evidence that Ms Smith could be ruled out because of her alibi. I find, in the circumstances that this was a reasonable investigation. At the disciplinary stage, she considered Mr Jafrate's argument that Ms Smith had previously tried to frame him for a mistake, but she concluded that there was no evidence that that was the case or that it meant Ms Smith might have framed him on this occasion.
36. Mr Jafrate also objected to the use of an independent person, Ms Bogle, and Mr Hopkins for the appeal. However, I consider that the use of an independent

person and someone who was more senior but less involved in the day-to-day running of the business effectively remedied any difficulty or conflict of interest caused by Ms Hopkins deciding both the investigation and dismissal. There was no plausible objection to the appeal personnel and I found that the Company acted within the range of reasonable responses in the appeal.

37. In relation to the remainder of the procedure, I find that the Company acted in accordance with the ACAS Code and that Ms Hopkins and the appeal chairperson both conducted sufficient investigation into Mr Jafrate's arguments in mitigation. The process in general was reasonable.
38. It is not my job to say whether Mr Jafrate or his colleague G, were guilty or innocent of the misconduct. Indeed, if I did so, it would be an error of law for the purposes of assessing liability in an unfair dismissal claim. I know that Mr Jafrate has come to the tribunal today to try to prove his innocence, but I cannot help him, unfortunately. I understand the depth of Mr Jafrate's frustration and upset. This is a situation in which an innocent employee has lost his job and it must be deeply distressing to be suspected of such misconduct. It is also, as Mr Jafrate pointed out, very difficult to prove innocence in these circumstances.
39. However, I also understand the predicament that the Company found itself in. It was faced with incontrovertible evidence that there had been an act of gross misconduct, an act of dishonesty, committed by one of the two employees. Mr Jafrate himself accepted that the evidence pointed directly at him. Despite investigating the matter thoroughly, I find that Ms Hopkins was genuinely unable to determine which of the two employees had committed the act. She was faced with either dismissing both or dismissing neither and allowing the theft to go unpunished and continuing to employ storemen in whom she had lost confidence. Mr Jafrate says that the Company should have concluded that such a blatant paper trail was false, merely because it was so blatant, and that the Company should have known it was not him. That argument is not entirely logical. In the absence of any evidence that a paper trail is false, an employer cannot be expected to ignore the direction in which the paper trail leads. It makes no sense to say that, the clearer the paper trail, the more the employer should doubt its veracity. It is easy to imagine an employer which ignores such blatant evidence facing intense criticism.
40. Mr Jafrate argued that, had he been the employer, he would have doubted the evidence. But what he would have done, or indeed, what I would have done in those circumstances, is entirely irrelevant. The legal question I have to decide is whether no reasonable employer would have dismissed both employees in those circumstances. Unfortunately for Mr Jafrate, the caselaw makes it clear that it can be reasonable for an employer to dismiss an innocent employee in precisely this situation. I find that an act had been committed which, if committed by an individual, would justify dismissal. I find that the Company made a sufficiently thorough investigation into the matter and with appropriate procedures. I find that, as a result of that investigation, the Company reasonably believed that more than one person could have committed the act. I find that the Company acted reasonably in identifying the group of employees (Mr Jafrate and G) who could have committed the act and that each member of the group was individually capable of so doing. I find that, as between Mr Jafrate and G, the Company could not reasonably identify the individual perpetrator. I find that the Company's beliefs were held on solid and sensible grounds at the date of dismissal. I find that the Company acted reasonably in excluding Ms Smith from the group of possible perpetrators on the grounds that

she had an alibi at the time the records were changed, following a reasonable investigation into her whereabouts.

41. I therefore find that the Company acted within the range of reasonable responses of a reasonable employer in the circumstances and that Mr Jafrate's dismissal was fair, though deeply unfortunate. The claim is dismissed.

Employment Judge Bright

5 July 2018