EMPLOYMENT TRIBUNALS

Claimant: Mrs J M Bailey

Respondent: Allens Performance Ltd

Heard at: Nottingham
On: Wednesday 7 August 2019 and Monday 23 September 2019
Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr I Macabe of Counsel
Respondent: Mr F Jaffier, Employment Consultant (7 August 2019)
Mr S Panter, Managing Director & sole shareholder of the Respondent (23 September 2019)

JUDGMENT having been sent to the parties on 28 September 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:

JUDGMENT

The claim of unfair of unfair dismissal is dismissed.

REASONS

Introduction

1. This is a claim of unfair dismissal pursuant to section 98(4) of the Employment Rights Act 1996 (the ERA). The claimant was summarily dismissed on 30 November 2018. In determining the case, I have heard evidence in the following order, in each case by way of a written statement-in-chief. Thus, first from Miles Waite who is a web developer and for my purposes was working for the Respondent business at all material times commencing in July 2017. The second witness for the Respondent was Stephen Panter. Then I heard from the Claimant.

2. I wish to start by saying that I found all three witnesses honourable and attempting to do their best before me

3. I had before me an agreed bundle of documents to which if I refer, I shall use the prefix Bp for the relevant page number. I remind myself that the approach in determining whether a dismissal on misconduct grounds is fair pursuant to s98 (4) of the Employment Rights Act 1996 (the ERA) is encapsulated in the well-known authority of ***British Home Stores Ltd -v- Burchell (1978) IRLR 379 EAT***. Put simply, an employer who is seeking to establish that he has fairly dismissed an employee for misconduct must demonstrate that in reaching that conclusion, he undertook a full investigation commensurate with the allegations, gave the relevant employee a fair opportunity to explain themselves at a hearing, and with the right to be accompanied by a colleague or trade union representative, and subsequently offered an appeal. There is a procedural issue on the appeal, to which I shall in due course return.

4. As to the fairness of the dismissal, I do not substitute my own view. I apply the range of reasonable responses test as per Iceland Frozen Foods Ltd v |Jones (1982) IRLR 439 EAT.

5. The range of reasonable responses test includes the disciplinary process; intelligence gathering and in that sense, also goes to therefore the reasonableness of the belief of the employer.

Findings of fact

6. This is a very small employer. It sells products for motorbikes. It also undertakes in the small workshop repairs. The business focusses on carburettors. It obviously a very well-known business in the world of motorcycles and in particular vintage bikes; it is a somewhat niche business. Working in the business for many years (and I shall take it from 2007) was the Claimant who up until 8 October 2018 had an impeccable record. She was absolutely trusted by the Respondent and in particular Mr Panter once he took over the reins of the business.

8. Inter alia she did the accounts: and I have no doubt whatsoever that she consistently did that task recording goods in and out as an additional job, doing the invoicing, petty cash, monies spent, chasing monies in and wages. She would update her legers about every fortnight and then every three months the accountant would come into the business and they would go through the accounts together.

9. I am not dealing with any issues that have attempted to be put before me today of something now uncovered says the employer relating to her falsifying overtime. It was never something that was before the employer at the material time. It might engage in terms of contribution apropos the sections 122 and 123 of the ERA but it cannot be brought into the equation in terms of the rationale for the dismissal, as to which to see ***Devis -v- Atkins (1977) IRLR 314 HL.***

10. The business had over the years attempted to import various software solutions to its stocklist and its virtual window of products that it had for

sale. It had not been successful. So into the equation came Miles Waite who joined the business in July 2017, albeit as a sub-contractor. His mission was to improve the IT side of the business. This led to the introduction of software known as Magenta, which would inter alia provide a new virtual window. It was not without its teething troubles.

11. There is no doubt from the evidence that the Claimant found it difficult to cope with all this change, many people do in the world of work and elsewhere, and did rather strongly venture her opinion from time to time. It is also clear to me that she and Miles Waite did not enjoy a good working relationship.

12. Suffice it to say that therefore prior to 8 October 2018, three core issues emerged. The first one was that some time between 26 and 28 September, some 4,000 items had been deleted from the virtual shop window. But at that stage, the investigation which was being undertaken by Mr Waite was inconclusive.

13. Secondly, there is an email trail in the bundle before me commencing circa 2 July 2018 and running through to 17th or thereabouts, which I can summarise thus. Mr Waite wanted the Claimant to provide details of the accounts etc because he wanted to put it on the computer: and into the equation came the issue of spreadsheets. The Claimant did in fact create spreadsheets apropos accounts on a regular basis and she would put those on the computer. But as she said to him in terms of his enquiries, she had not put any on since the end of June. The reason why she had stopped using the spreadsheets was because "*I do not have time to do both the books and spreadsheets. The books are up to date if you want to look at them*".

14. The Claimant had made plain all the source data that there was available and which Mr Waite could deploy so to speak if he needed to into the system, as to which see Bp 24 dated 10 July.

15. The other issue was that she may well have been difficult from time to time; she clearly is an emotional person and could throw the toys out of the pram so to speak. The issue really that came to a head on 8 October is that she had told Mr Waite that she had destroyed the spreadsheet but I have no doubt from all the evidence before me that that was said in a fit of pique. The fact is she did not and there is no evidence before me that she did. However, I shall return to that issue in a different way in due course.

16. So, in relation to the spreadsheet issue, behaviour etc she was given a warning on 11 October by Mr Panter with a currency of six months, which is in the bundle before me at Bp 32.

17. Under the ACAS Code of Practice, albeit this is a very small employer, as this was a disciplinary process there ought to have been a letter inviting her to it and setting out the case she had to meet and inviting her to have a person present. None of that happened.

18. But, having said that, the Claimant did not appeal any of the points in that written warning. There was mention therein that although she had said that she had deleted the items, it can also however be read in that she was actually saying that she had not really because there is a reference to "*he also told me that you lack the ability to delete items deliberately*".

19. In any event, there was you might think the water under the bridge: an attempt to rebuild working relationships and move forward. Curiously, on 18 October, Mr Waite then produced a further complaint but 90% of it is on historical issues and so it would have been unfair for the employer to raise that.

20. But he had now produced his final version of his enquiry into Magenta and Mr Panter was of the view that it showed that the Claimant had a case to answer to the effect that she had deliberately deleted the 1400 items.

21. So, we come to the next stage. At the end of the working day on 21 November having had said report (the final version by the way seems to have in fact been 20 November Bp 52 – 53), Mr Panter saw the Claimant at the close of business. He gave her a letter, I think, because it is dated that date and which is Bp 54. In it he set out why he required her to attend a disciplinary process, listing that they would have a hearing on 23 November and stating where.

22. He set out what were the charges so to speak. Some of that at first blush is old territory, ie behaviour as at 8th October, thus :

> "*You have repeatedly failed to comply with reasonable requests for information and contacts. On several occasions you have deliberately obfuscated, ignored and delayed matters when information has been requested*".

23. Of course, I can read into that this in fact encompasses the spreadsheets issue/accounts and the deletion issue, to which I have already referred.

24. But the gravure of the reason for wanting the disciplinary hearing was in fact over the Magenta issue. He said:

> "*I have reason to believe that you deliberately deleted at least 1400 items …*
> *This is just the most serious and latest instance of attempts to cause delays …*"

25. He then said that he was therefore going to hold the disciplinary hearing. He attached (he said) the report but it came to light in the hearing before me that the Claimant did not get the last part of that report, which is all important and to which I shall return. She was told of her right to be accompanied.

26. Mr Macabe submits in relation thereto that the issue of the deletion of the accounts/spreadsheets was not being raised clearly and on the face of it, this was water under the bridge.

27. That then brings me first of all to the disciplinary hearing and dealing with the Magenta issue. It became abundantly clear in the cross-examination before me of Mr Waite that looking at the November report conclusions, they were in fact not conclusive at all. When this was explored with Mr Waite, it became abundantly clear that owners of the Magenta software had experienced what I would call glitches (or they could have been virus attacks, nobody seems to have been the wiser in terms of the providers of said software) which was causing unexpected deletion from their virtual shop windows. Thus they were losing items by way of deletions in the same way as the Respondent.

28. So Mr Waite was driven to conclude via Mr Macabe's questions that he could not say that the Claimant was responsible for the deletions which, if it was her, could only have occurred on 26 September when she accessed the IT system for three hours or thereabouts, which she would say was not unusual in terms of her work. There is nothing to contradict that. That of course left windows for opportunity because in fact the system could have been hacked into, if that is the right word, between 25 and 28 September. Mr Waite, although he said he kept a regular check every day on activity, clearly had not or he would have spotted it when it happened. As it is, he did not spot it until the 28th.

29. So, even an employer of the size of this one faced with that evidence and just dealing with the Magenta issue, would in my submission not have been acting within the range of reasonable responses in dismissing the Claimant. I take into account, as Mr Macabe in his opening remarks said, the all-important authority of ***A v B (2003) IRLR 844 EAT***. That is to say, the more serious the accusation, the more care in terms of deliberation and investigation there should be. This was of course a career threatening issue for the Claimant, certainly at her age of 59, because if a potential employer found out that she had been dismissed for what could only be described as sabotage or, in the words of Mr Macabe in terms of the Misuse of Computers Act, a criminal offence.

30. So, could the employer have reasonably dismissed viz Magenta? For reasons I have gone to, given that big gap in the Waite conclusions, I am driven to the conclusion it would not have been acting within the range of reasonable responses.

31. However, and these things happen and this is a very small employer, in giving her evidence before me on the second day of this hearing the Claimant accepts that on 21 November when told she was being suspended and denying that she had done anything untoward with Magenta, she said that she had deleted spreadsheets for the accounts. In the disciplinary meeting, she also accepts that in denying Magenta, she admitted deletions viz the accounts spreadsheets. Finally, when I come to the appeal which took place on 14 December, the same applies. I have the minutes (Bp60-69) and then I have the decision letter rejecting her appeal, which is at Bp 70 – 71.

32. What it shows is what tipped the balance here is that Mr Panter, in trying to reconcile that the lacuna so to speak in the Magenta conclusions, had before him someone who had admitted having deleted from the accounts, spreadsheets. Thus, it tipped the balance in his decision to find that she had interfered with Magenta in the way as described. It also, in terms of the issue of spreadsheets/accounts, drove him to conclude that trust and confidence was gone.

33. Now says Mr Macabe (and it is a good argument) how could you conclude those admissions were true. This was a Claimant who was clearly distressed on 21st November and thence at the dismissal and appeal hearings. She had for some time, (about two years, as to which see the statement of an employee David Alsopp) not come to terms with the loss of her father; she was still grieving.

34. Second, she clearly felt very uncomfortable in the business in the way it had gone. She thought, reasonably or not, that the dye was cast so to speak. She was on her way out and so the demands for the accounts information to which I have referred was just but one illustration, coupled with the attitude of Mr Waite, which summarised she saw as disdainful and indicating that she was no longer a valued employee.

35. There is reference by way of illustration to her becoming upset and sobbing at the suspension meeting on the 21st and it has been agreed that she was the same at the dismissal hearing. As to a reason for her being dismissed her behaviour in those respects, I would therefore conclude that within the range of reasonable responses no reasonable employer would have concluded that this was unacceptable behaviour warranting dismissal. It was agreed before that she did not swear and indeed she never does. Yes, she was forcefully defending herself but t she was not aggressive and threatening. She made mention to the effect that if she was dismissed she would seek legal advice. That is not a threat, it is an entitlement and no reasonable employer should ever treat that as a reason for finding misconduct in terms of behaviour.

36. So, I have this very difficult dilemma. The employer never went back to see whether she actually had tampered with the spreadsheets or otherwise the accounts. In fact, it means that I have no evidence at all to show that she did. The Magenta issue in itself has this inconsequential conclusion.

37. But, then I turn it around another way. Why did this Claimant, even if she was upset, on no less than three occasions post 8 October, say that she deleted from the accounts/spreadsheets. Therefore I have to put myself, in assessing whether the employer acted within the range of responses into its mind: in other words the perception of Mr Panter. His is a very small business; it is a business that is vulnerable to such as IT disruption. It can have catastrophic consequences. He had an employee who was incredibly trusted but who had told him only commencing with the suspension meeting on the 21st November and thereafter at the disciplinary and appeal hearings occasions that she had deleted accounts

spreadsheets. Should he have gone and looked to see if it was true? This is on the basis as Mr McCabe submits that this was a false confession. But I do not look at this by the standards of the criminal court or the Police and Criminal Evidence Act (PACE), I am not here to decided guilt or innocence.

38. There is nothing to suggest it was a forced confession including at the disciplinary and appeal hearings.

39. Therefore, and with some difficulty but reinforcing as I now do that I must not substitute my own view but apply the range of reasonable responses test, after considerable thought, I have concluded that overall despite some shortcomings (and I ought to just deal with one), the dismissal was fair.

40. The shortcoming I deal with is that Mr Panter heard the appeal. The first thing to say is that under the ACAS Code of Practice, it should be someone else. But, in this case who? His wife, albeit the Company Secretary, has no involvement in the business at all other than her duties in terms of such as annual returns under the Companies Act. His father may help out on occasion but he holds no managerial position in the business. Should the business have gone outside and employed such as an HR Consultant to here the appeal? But this is a business with only 4 employees ; exempt as a small company from filing full accounts at companies House, and with a modest turnover. I repeat, I look at it in terms of the size and administrative resources of the business. In this case, very small indeed.

Conclusion

41. I therefore conclude that it does not undermine overall the fairness of the decision to dismiss. I have therefore concluded that this was a fair dismissal.

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Employment Judge P Britton

Date: 14 November 2019
JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE