



EMPLOYMENT TRIBUNALS

Claimant: Mrs V Chapman
Respondent: Amco (Medway) Limited
Heard at: Ashford
On: 10 September 2019
Before: Employment Judge Pritchard

Representation
Claimant: In person
Respondent: Mr D Brown, counsel

REASONS

1. Judgment was delivered orally at the conclusion of the hearing. These written reasons are now provided at the Respondent's request.
2. The Claimant claimed unfair dismissal. The Respondent resisted the claim.
3. The Tribunal heard evidence from:
 - 3.1. The Respondent's witnesses: Amay Mangal (Director) and Madhu Mangal (Director).
 - 3.2. The Claimant's witnesses: The Claimant and James Bryce (Superintendent Pharmacist).
4. The Tribunal was provided with a bundle of documents to which the Tribunal was referred. At the conclusion of the hearing the parties made oral submissions.

Issues

5. The issues were discussed at the commencement of the hearing and can be described as follows:
 - 5.1. Can the Respondent show the reason, or if more than one the principal reason, for the Claimant's dismissal and that it was for a reason relating to the Claimant's conduct? This will require the Respondent to show that they believed the employee was guilty of misconduct;

- 5.2. Did the Respondent have reasonable grounds upon which to sustain that belief?
- 5.3. At the stage at which that belief was formed on those grounds, had the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances?
- 5.4. Did the decision to dismiss fall within the band of reasonable responses which a reasonable employer might have adopted?
- 5.5. Was the procedure fair?
- 5.6. If the Tribunal were to find the dismissal unfair by reason of any procedural defect, would or might the Respondent have dismissed the Claimant in any event (Polkey)?
- 5.7. If the Tribunal were to find the dismissal unfair, did Claimant cause or contribute to her dismissal such that any compensation should be reduced?

Findings of fact

6. The Claimant was employed by the Respondent from 22 October 2008 as a Pharmacy Assistant until she was dismissed on 3 May 2018. The Claimant was employed at the Respondent's Silversands Pharmacy in Orpington. The Respondent is a small employer.
7. Upon concerns being raised in April 2018 by James Bryce (the Claimant's line manager and father in law), the Claimant was questioned by Amay Mangal about potential theft of goods. The Claimant was suspended on full pay. Amay Mangal interviewed a number of staff members and contacted the Respondent's suppliers to make enquiries.
8. The Respondent determined that there was a case to answer. The allegations related to the theft of product/perfume.
9. The Claimant attended a disciplinary hearing on 1 May 2018 which was chaired by Amay Mangal. The Claimant had prepared a written statement which she presented to at the disciplinary hearing. After considering the evidence, Amay Mangal concluded that summary dismissal was appropriate, communicating his decision to the Claimant by letter dated 3 May 2018.
10. The Claimant appealed Mr Mangal's decision. Madhu Mangal held an appeal hearing on 17 May 2018. Madhu Mangal found no reason to overturn the decision to dismiss.

Applicable law

11. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

12. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.
13. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on 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 must be determined in accordance with equity and substantial merits of the case.
14. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:
 - 14.1. The employer must show that he believed the employee was guilty of misconduct;
 - 14.2. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
 - 14.3. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
15. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.
16. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.
17. In British Leyland UK Ltd v Swift [1981] IRLR 91 Lord Denning MR stated:

The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view
18. It was said in London Ambulance Service NHS Trust v Small [2009] IRLR 563:

It is all too easy, even for an experienced Employment Tribunal, to slip into the substitution mindset. In conduct cases the claimant often comes to the

Employment Tribunal with more evidence and with an understandable determination to clear his name and to prove to the Employment Tribunal that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.

19. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases.
20. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

Conclusion

21. As to the reason for the dismissal, the Claimant did not suggest that she had been dismissed for some ulterior motive. Notwithstanding, the burden of proof at this stage rests with the Respondent. Having heard the Respondent's evidence, the Tribunal was satisfied that the Respondent's witness held a genuine belief in the Claimant's misconduct and that the reason for the dismissal related to that misconduct.
22. Dismissal for a reason relating to conduct is a potentially fair reason to dismiss.
23. There was no conclusive proof before the Respondent that the Claimant had stolen the goods in question. However, it would be wrong to require the Respondent to demonstrate such proof. The law makes it clear that the Tribunal must consider the adequacy of the investigation and whether the Respondent's belief was held on reasonable grounds.
24. The Respondent interviewed relevant witnesses. Such documents as were available relating to the alleged theft were obtained. The Claimant herself was interviewed at the investigatory stage. The Tribunal must not substitute its decision as to what might have comprised a full investigation. The question is whether the investigation carried out fell into the band of reasonableness. The Tribunal concluded that the investigation in this case fell within that band.
25. The Tribunal accepted Amay Mangal's evidence that when interviewed the Claimant admitted she had taken the Treseme goods in question. The notes

appear to have been taken contemporaneously. There was corroborative evidence contained in the notes taken at Dawn White's disciplinary hearing that the Claimant had removed the goods from the store. It was not in dispute that the Claimant did not pay for the Treseme products. A number of witnesses did not hear the Claimant say she would pay for the goods which contradicted what the Claimant had to say. As for the perfume, although in her statement prepared for the disciplinary hearing the Claimant set out an itemised schedule of the payments she says were made by debit card on her behalf, the Respondent's records did not show that such payments had been received. Despite the Claimant saying she had bank records to support her contention that such payments were made, she did not disclose them. In the Tribunal's judgment, Amay Mangal's belief in the Claimant's misconduct was held on reasonable grounds.

26. As to the decision to dismiss, the allegation was serious and it cannot be said that the decision to dismiss fell outside the band of reasonable responses open to the Respondent.
27. The Tribunal next considered the procedural aspects of the Respondent's disciplinary process.
28. The Respondent's note-taking was woeful but that does not necessarily lead to unfairness and it did not do so in this case. In considering this aspect of the case, the Tribunal had regard to the Respondent's size and administrative resources. The evidence which was gathered in the investigation was sufficiently clear and the allegations understood by the Claimant.
29. As for Mr Mangal carrying out both the investigation and the disciplinary hearing, the Tribunal again had regard to the fact that this the Respondent is a small employer. Of the three directors, all family members, two were away. As the ACAS Code of Practice makes clear, such matters should be dealt with without unreasonable delay.
30. Paragraph 6 of the ACAS Code states that "in misconduct cases where practicable different people should carry out the investigation and the disciplinary hearing" [emphasis added]. It was not practicable in this case for different people to consider these two aspects. Not only were two of the three directors away, but it would have been inappropriate for the other senior individual in the business to handle either aspect: Mr Bryce was not only the individual who raised the concern in the first place but he is the Claimant's father in law.
31. The Tribunal was unable to discern any other procedural irregularities which might lead to a finding of unfair dismissal.
32. For these reasons the Claimant's unfair dismissal claim was dismissed.

Employment Judge Pritchard
Date: 19 December 2019