



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr David Sohling

v

Wm Morrison Produce Limited

Heard at: Cambridge

On: 28 February 2020

Before: Employment Judge KJ Palmer

Appearances

For the Claimant: Ms B Pawlik, Lay Representative

For the Respondent: Mr S Liberadzki, Counsel

Interpreter: Ms Beata Kramarz, Polish speaking

JUDGMENT

It is the Judgment of this Tribunal that the Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

1. The Claimant was employed by the Respondent between 1 May 2008 and 18 March 2019. The Claimant worked as a Fork Lift Truck Driver / Warehouse Operative for the Respondents who are a national supermarket.
2. The first point to note is that the ET1 appears to have been issued against a company that was not the Claimant's employer, in that it was issued against Wm Morrisons Supermarkets Plc, in fact in the ET3 the Respondents pointed out that the Claimant's employer was Wm Morrison Produce Limited. That was supported in the documentation before me, particularly in respect of contract of employment that was in front of me which clearly specified that the employer was Wm Morrison Produce Limited and accordingly I amend the name of the Respondent in this case to reflect that.
3. The Claimant was dismissed summarily, purported for gross misconduct on 18 March 2019. This followed an investigatory process conducted by

the Claimant's immediate Line Manager, Mr Sam Pett, at which Mr Pett interviewed a number of other colleagues of the Claimant.

4. I had evidence for the Claimant from the Claimant himself and for the Respondents from a Mr Kris Newman who was the Dismissing Officer and the individual at the Respondents who conducted the disciplinary procedure. The investigatory process, as I have already indicated, was conducted by Sam Pett, the Claimant's immediate Line Manager. During this process the Claimant was interviewed on two occasions. Various other employees were also interviewed, most particularly Jolanta Rak, Jaroslaw Rak, Adrian Jaruk, Patryck Zielinski and Adrian Golec.
5. The dismissal was affected by letter dated 18 March 2019 and sent to the Claimant signed by Kris Newman, the Disciplinary Manager from whom I heard evidence. The grounds given for the dismissal were numerous. Firstly, that a number of allegations had been made against the Claimant by fellow colleagues. These ranged from him having indicated that he had seen Jolanta Rak changing in an inappropriate place and that he had seen her underwear; that he indicated that he had a special relationship with Sylwia Zmuda; he further indicated that he had been subjected to an attempt to kiss him by another colleague Madalena Gagatek.
6. One of the principal reasons for his dismissal was that it was alleged that he had made a false report about another colleague, Adrian Golec, that this colleague (Adrian) had actually been working for a rival supermarket Aldi whilst he was on sick leave from the Respondents.
7. During the process of the investigation conducted by Sam Pett, the Claimant admitted very clearly that he had given a false statement to other colleagues, Mr Pett in fact was one of them, that he was aware that Adrian Golec had worked on the tills for Aldi whilst he was purportedly off sick from the Respondents. There was no departure from that admission, both in the investigatory meetings which he attended and in the disciplinary meetings that he attended with Mr Newman.
8. There was, however, a departure today. The Claimant in evidence today suggested that, in fact, the false report he had given about Adrian Golec was not nearly as serious as had been originally suggested and that in fact it had simply been a joke which had clearly been taken the wrong way. I find this angle pursued by the Claimant today to be wholly unconvincing, the documentation before me ranging from the notes of the meetings of the investigatory meetings conducted by Sam Pett and the disciplinary notes before me, made it very plain that the Claimant had admitted that he had lied about Mr Golec apparently moonlighting for Aldi when off sick from the Respondent. In fact, it was clear that he had given the reason for that as being spite in that he felt that he had been unfairly subjected by Mr Golec to jibes and unpleasantries and that it was his way of seeking some sort of revenge. I find therefore, it very clear that both Mr Pett and Mr Newman were perfectly entitled to take at face value those admissions.

9. Mr Pett, as I have said, conducted a number of investigations before producing a report recommending that there was a case to answer and then of course it was Mr Newman that took matters forward.
10. There were a number of other allegations that emerged during the course of the investigation and I will deal with those as well. One of the principal allegations was that the Claimant had told colleagues that he had seen Jolanta Rak undressing and that he had seen her underwear. Initially, he denied this and made no comment about the supposed incident of him having seen Ms Rak undressing, but at the disciplinary hearing he volunteered that it was in fact true that he had seen such an incident occur. This was entirely at odds with the evidence which he had given in both the investigatory meetings which he attended and I also found that to be highly suspicious in the credibility of the Claimant's evidence. The Claimant's case, essentially, was that this was something of a conspiracy on behalf of the Respondents Morrisons. That within this conspiracy was a coterie of work colleagues who, to put not too fine a point on it, had it in for him and wished to bring about his demise.
11. The ring leader of that conspiracy, as set out in the Claimant's case today, was his Line Manager Sam Pett. Also, within the conspiracy was Jolanta Rak, her husband Jaroslaw Rak and a number of others. Although, during the course of today's evidence the Claimant seemed less clear as to who the conspirators were as the course of the case unfolded. Dealing with the suggestion that in some way Sam Pett was part of a conspiracy, I find that there was no evidence to support this. There was an attempt during the disciplinary hearing when the Claimant alleged that he had been subjected to a verbal and nearly physical attack by Sam Pett to in some way implicate Mr Pett into the conspiracy. However, this had not been mentioned at any stage previously and was only brought up during the disciplinary process. When questioned about this, Mr Newman said that it was, he felt, entirely likely that faced with the imminent prospect of dismissal the Claimant might seek to fabricate a story about Mr Pett verbally attacking him to throw doubt as to whether Mr Pett was the appropriate person to be conducting the disciplinary process and also to inveigle him into the conspiracy theory.
12. I therefore find that there is no credibility in the suggestion that Mr Pett was involved in a conspiracy to gerrymander a dismissal of the Claimant.
13. Dealing also with Jolanta Rak, whose evidence was also significantly relied upon by Mr Newman in arriving at his decision to dismiss, there was some suggestion that her evidence varied during the course of her interviews in the investigatory process and there is some truth in that. However, I do agree with the Respondents that that is explained by the fact that discussing with a male investigatory colleague the thought that another colleague might have been spreading rumours about her undressing to her underwear was something that was far too difficult for her to deal with and in fact, that was borne out by the fact that when a female colleague was asked to take part as part of the investigatory

process, Ms Rak was able to open up to that female colleague and felt much more comfortable in discussing matters. I therefore think that the evidence gained from Ms Rak is likely to be extremely credible and I entirely accept that it was reasonable for Mr Newman to take the same view. In fact, the suggestion that Ms Rak was part of a conspiracy did not hold water because the Claimant by his own admission said that he could not understand why she would be because he thought that they were friends and that he had always helped her whenever he could.

14. There were a number of inconsistencies in the way in which the Claimant dealt with the process of being interviewed during the investigation and for those reasons his evidence was not credible and once again today in this Tribunal the story was constantly changing.

The Law

15. The Claimant brings a claim for unfair dismissal and unfair dismissal is governed by the Employment Rights Act 1996, more specifically Section 98. Unusually in English Law, it is for the Respondents to show what the reason was for the dismissal; that is under s.98(1). Then there is a neutral test for the Tribunal to determine whether that was a reason which might be sufficient to justify dismissal under s.98(2). There follows a key test which exercises Tribunals in all Employment Tribunal matters relating to unfair dismissal is s.98(4). That is essentially whether in all the circumstances taking into account the size of the employer undertaking, the Respondent were reasonable in treating the reason they did as a sufficient reason to dismiss the Claimant in all the circumstances.
16. Tribunals are governed and persuaded by a number of previous authorities and in particular where gross misconduct is alleged we are guided by what is known as the Burchell test. This came from the case of Burchell v British Home Stores and essentially that is a three stage test. The Tribunal has to satisfy itself that the Respondents conducted a proper and full investigation in all the circumstances; secondly that there was a genuine belief in the Claimant's guilt; and thirdly that that belief was reasonably held in all the circumstances. Taking into account the Burchell test, Tribunals then have to apply a broader test and that is whether the decision to dismiss fell within the band of reasonable responses open to an employer faced with the set of circumstances in which they were faced. It is not for a Tribunal Judge to substitute his own view as to whether that decision was reasonable, it is for the Tribunal Judge to judge whether a reasonable employer would have done so. That follows the case of Iceland Frozen Foods v Jones.

Conclusions

17. In this case, as I have outlined, Mr Newman conducted a disciplinary process and in the circumstances, I consider that a detailed and proper investigation was behind that. Mr Pett had interviewed the Claimant twice and had interviewed five or six other employees, all of whom gave credible

evidence and he then produced a report recommending that there was sufficient ground to proceed to the disciplinary process.

18. It is my Judgment that that constitutes a tick to the first of the Burchell tests; namely that a proper and full investigation had been conducted in all the circumstances. It must be remembered, of course, that the Respondents do not have to be right about believing in the Claimant's guilt. They just have to have a reasonably held belief that he was guilty. In these circumstances, faced with the evidence that Mr Newman was faced with and the reaction of the Claimant, not least in his blatant admission of one of the most serious allegations in front of him, I can only conclude that Mr Newman had a genuine belief in the Claimant's guilt and that it was reasonably held.
19. I then have to deal with whether there was any, or should there be any, suggestion that the process followed by the Respondents was in any way flawed as is part of the Claimant's case. It is my Judgment that a proper and fulsome process was undertaken. Mr Pett conducted a perfectly reasonable investigation, a report was produced and Mr Newman conducted a disciplinary procedure. I can find no evidence to suggest that Mr Pett was an inappropriate person to conduct that investigatory process, as I have already outlined.
20. The Claimant did not appeal, therefore there was no question of a rehearing and a reassessment. Therefore, for the reasons I have set out above, it is absolutely plain to me that the dismissal of the Claimant was a fair dismissal applying the Burchell test and that it was also fair in that an employer faced with a set of circumstances which they were making a decision to dismissal summarily in those circumstances, made a decision which fell within the band of reasonable responses.
21. For those reasons, the Claimant's claim is dismissed and fails.

Employment Judge K J Palmer

Date:17/03/2020

Sent to the parties on: 20/03/2020

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For the Tribunal Office