Case No: 1304531/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Cichon	v	Compass Group UK and Ireland Limited

Heard at: Bury St Edmunds **On:** 14, 15 & 16 September 2020

Before: Employment Judge Laidler

Appearances:
For the Claimant: Ms M Wisniewska, HR Consultant.
For the Respondent: Mr J Byrne, In-House HR Representative.
Interpreter: Ms M Dubiel (Translation: Polish on 15 September 2020)

JUDGMENT having been sent to the parties on 9 October 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim form in this matter was received on 5 October 2018 and the issues identified at a preliminary hearing on 16 October 2019. At that hearing the claims of public interest disclosure and holiday pay were dismissed on withdrawal leaving the only claims for this Tribunal whether the claimant was unfairly dismissed and whether he was entitled to the remainder of a bonus payment.

2. The tribunal heard from the Claimant and:

   Julita Stolarczyk
   Krystian Lesniak
   Leigh Harris
   On his behalf.
   Matthew Dancer provided a witness statement but was not able to attend the hearing so limited weight has been given to his statement.

   On behalf of the respondent the tribunal heard from:

   Douglas McClean, General Manager
   Jonathan Davidson, Business Director.

The tribunal had a bundle of approximately 223 pages (plus additional pages added). From the evidence heard the tribunal finds the following facts.

The Facts

3. The claimant's period of employment began on 13 June 2016 to 9 July 2018. He was promoted to a position of Executive Chef. An offer letter dated 5 May 2017 (page 52) set out details of the role and there was also saw a job profile (page 59) which out the overall purpose of the role as:

   > "To plan, organise and direct the preparation and cooking of food ensuring that the company's reputation for food quality is enhanced with clients and customers, and being responsible for compliance of health, safety, food hygiene and COSHH Regulations."

   The claimant's contract of employment was enclosed with that offer letter.

4. In a separate letter dated 11 May 2017 the claimant was written to about the bonus. It was stated that as part of the initial job offer and acceptance it was agreed that the claimant would be eligible to earn a performance bonus after the first 6 months of his tenure:

   > "As a result of achieving key objectives during that period. The bonus sum available is up to £5,000 and your performance relative to the objectives will be reviewed in your appraisal in the Autumn/Winter of 2017."

5. The objectives for the year ending 30 September 2017 were listed under the headings of Health and Safety, Finance, People, Food and IPOE with required measures to be achieved under each heading.

6. The disciplinary policy to which the claimant was subject was seen at page 93-97 of the bundle. In relation to the disciplinary process it set out four levels with number four being the most serious. It stated:

   5.3 Level 3 – Final Recorded Warning

   In the event of further unsatisfactory conduct, or if the offence is a more serious one, a Level 3 Final Recorded Warning will be issued. This will detail the reasons for the warning, state that any further breach will result in dismissal and included the right of appeal.

   …

   This warning will remain live for twelve months (or 52 working weeks)

   5.4 Level 4 – Dismissal

   In the event of further unsatisfactory conduct, or if the offence is classified as Gross Misconduct, the employee will be dismissed. It should be noted that dismissal may not necessarily be for the same reasons as previous warnings.

The policy also contained a non-exhaustive list of acts of misconduct and gross misconduct and those of gross misconduct included 'serious breach of health, safety and hygiene procedures including food safety' and 'serious breach of trust and confidence'.

7. The claimant was subject to a final written warning (page 117). It had been found that the claimant had failed to meet the standard of job performance required by the respondent. There were five matters set out in the warning dated 13 July 2017:

> "(1) Failure to implement/action appropriate management control of the event due to poor preparation for the event resulting in the under delivery of the Sunset Safari event on the 24 June 2017. This was demonstrated by poor planning including not holding regular structured meetings with the claimant's senior team, having no clear operational plan in place of the evening and failing to request additional help from colleagues who had delivered similar events.
>
> (2) Jeopardising the company relationship with the client and bringing the company into disrepute.
>
> (3) Poor use of vacuum packer i.e. using a ready to eat vac packer for raw chicken against company and legal requirements.
>
> (4) No chef briefing and no documented sign off of briefings.
>
> (5) Service area not set up with basic legal requirements i.e. no hand washing facilities available in the service area."

8. There was a list of eleven areas the claimant needed to address to remedy these matters and four ways in which the respondent would assist. It was stated that the warning would be disregarded after 12 months' satisfactory conduct and performance.

9. The claimant did not appeal that warning.

10. The claimant's end of year review 2016-17 was carried out on 28 November 2017 by his line manager Zoe Fitzpatrick (page 121). It recorded the claimant had found the move to leisure catering difficult and struggled to manage his team. He must continue to tighten up on kitchen controls and delegate the workload allowing him to concentrate on the overall performance as currently they were lacking in areas. He under performed in certain areas as set out in that appraisal document. Consequently, the claimant was only paid £2,000 of the £5,000 bonus and seeks to recover the balance in these proceedings.

11. On 17 April 2018 a Profit Protection Audit was carried out by Simon Wright of the respondent's internal audit team and a report sent to the previous general manager on 4 May 2018 (page 140). Douglas McClean had only just commenced employment at Whipsnade as the new general manager (although he had been with the business approximately 20 years) and did not see the report straightaway. The unit had scored 50% classing it as high risk. Out of date food items had been found left in the Visitor Centre fridge including meat pies and pre-prepared pizzas left in the Base Camp Pizzeria without any date labels.

12. On 19 June 2018 Mr McClean held an investigatory meeting with the claimant. The notes of the meeting record that the claimant stated he had forgotten to remind the logistics team to record and dispose of the pizzas. An agency staff chef had been working in the pizzeria and although the claimant stated he had briefed him on policies and his expectations, he had no documentary evidence that had been done. The claimant stated he verbally briefed his staff. He explained the processes for defrosting and labelling were displayed on the main fridges and all staff were aware of them. Asked whether there were any training cards on record the claimant said there was no evidence. When staff started they did online food safety and a Health and Safety course he said. Since the audit he had put in place training with record cards that they sign once trained on a process.

13. On 1 July 2018 there was an email from the claimant about various amounts of food not correctly labelled in the Visitor Centre (page 178). This was investigated on 4 July. There was another matter where the claimant had failed to provide remuneration or feedback to a job candidate when they worked a 7 hour shift in June 2018 and had failed to appropriately manage a colleague with regards to them taking unauthorised absence in December 2018 by suggesting he would not be offering them shifts on their return.

14. By letter of 5 July 2018 the claimant was invited to a disciplinary hearing to be held on 9 July 2018. He was advised in that letter of the allegations and his right to be accompanied. He was reminded that the matter was regarded very seriously and could result in dismissal.

15. The hearing was carried out by Johnathon Davidson, Business Director who had not had previous dealings with the claimant.

16. The claimant accepted that the fridge and labelling were his responsibility.

17. When asked about staff training, the claimant referred to the One Compass Welcome online course. The Tribunal accepts the evidence of the respondent that this is general induction training and does not cover all the specific food hygiene requirements and regulations. Only at the end of taking the course when the new employee states they are involved with food preparation are they directed to further online training dealing with the particular food hygiene regulations and health and safety issues. The claimant accepted he did not have training record cards for the staff. Regarding the agency chef the claimant said that the supplying agency Blue Arrow should carry out training with their chefs but had no documentary evidence they had done so.

18. Although the other matters in paragraph 13 above, were discussed Mr Davidson decided to drop the additional allegations and they do not need therefore to be discussed in any further detail in these reasons. Mr Davidson took account of the fact that the claimant was already on a final warning which itself covered issues about food labelling and formed the view that the outcome had to be dismissal. The claimant was however paid notice and the dismissal was not classed as gross misconduct but described as ‘progressive’ under the process outlined in the disciplinary policy.

19. The outcome was confirmed to the claimant by letter of 11 July 2018. The Tribunal is satisfied that this was Mr Davidson's decision alone although he had discussed the decision he intended to make with an HR representative. He made it clear that he had taken the decision as the claimant had failed to meet the standard of conduct required by the respondent in the following way:

    Persistent misconduct for being in serious breach of health, safety and hygiene procedures including food safety, whereby a profit protection audit identified issues relating to the labelling and storage of food stuffs.

    Serious breach of trust and confidence

20. The letter set out the basis for reaching this conclusion which included that lack of training record cards to substantiate that training and/or coaching had taken place either within the team or in relation to the agency chef.

21. The claimant states to this Tribunal that the respondent dismissed him to make way for his replacement Nick who they then paid at a lower salary. Mr McClean gave evidence, which is accepted, that he carried out a benchmarking exercise and discovered he did market forces determined that he did not have to pay the claimant's salary for a replacement chef and could pay less which is what was offered to Nick, an internal candidate. The Tribunal was satisfied that the notice posted on the noticeboard about the vacancy could no longer be found by the respondent. Although one of the claimant's witnesses heard gossip that the claimant was going to be dismissed and replaced with Nick, she acknowledged it was and the Tribunal is satisfied only gossip.

22. The claimant appealed this decision by letter of the 17 July 2018 stating he had been singled out and penalised/disciplined for matters of which he was not directly responsible.

23. A meeting was held by Fred Wilson on 26 July 2018 to discuss the appeal, the minutes of which appear at page 204. These show that Mr Wilson discussed with the claimant each of the thirteen bullet points in his grounds of appeal. As the penultimate one alleged that the claimant's mitigation had not been considered Mr Wilson gave the claimant another opportunity to put that to him after a short adjournment. No issue has been taken by the claimant about the appeal hearing in these proceedings.

24. The outcome letter dated 3 August 2018 (page 215) explained to the claimant why his appeal had not been successful. It set out each bullet point in the grounds of appeal and why it was not upheld.

The Law

25. There is little dispute in the various skeleton arguments as to the relevant legal position.

26. The respondent must satisfy the Tribunal as to the reason for the dismissal and as this is a case based on conduct the Tribunal must consider the three-fold test in British Home Stores Ltd v Burchell. First there must be established by the employer the fact of the belief in the misconduct, that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly that the employer at the stage at which he formed that belief had carried out as much investigation into the matter as was reasonable in all of the circumstances of the case. The Tribunal must then determine within the meaning of s.98(4) whether the respondent acted fairly in treating that reason as one to justify the dismissal of the claimant.

27. The Tribunal must not substitute it's view for that of the employer but must decide whether the action taken by the employer was within the band of reasonable responses.

The Tribunal's Conclusions

28. The respondent dismissed for conduct, a potentially fair reason for dismissal. At the time it formed that view it had carried out a reasonable investigation. The profit protection audit had been carried out which revealed deficiencies within areas of the claimant's responsibility. At an investigatory meeting with Mr McClean the claimant admitted that these were within his remit and responsibility and acknowledged he did not have documentary evidence to confirm staff briefings and staff training.

29. The claimant was invited to a disciplinary hearing at which he again had the opportunity to state his case and again acknowledged his responsibility and was unable to provide evidence of briefings and training. His position that all staff carried out the welcome training was not accepted by the respondent as adequate and the Tribunal accepts that was a reasonable position as it is satisfied that was a generic induction course.

30. The respondent had carried out a reasonable investigation. Mr Davidson had reasonable grounds following such for coming to the view that the claimant had not worked to the required standard required of him and as set out in the final level 3 warning. Mr Davidson did not pursue the other matters. With the level 3 warning on file and still current Mr Davidson took the view that the outcome had to be dismissal. That dismissal was within the band of reasonable responses. In the respondent's own policy, the matters of which the claimant was charged amounted to and were in the list of examples of gross misconduct for which dismissal would be the sanction. However, the respondent did not treat this as gross misconduct choosing to deal with it as a 'progressive dismissal' following the level 3 warning. It is not for this Tribunal to substitute it's view for that of the employer.

31. The suggestion that the respondent went through these processes solely to dismiss the claimant to save money by promoting Nick to his position at a lower salary is without foundation. Nick was offered the role as an internal promotion and after Mr McClean had carried out an exercise to establish to his satisfaction that market forces dictated he could pay a lower salary.

32. The dismissal was fair, and the claim of unfair dismissal fails and is dismissed.

33. With regard to the bonus claim, the entitlement required the claimant to achieve in all the objectives set out. He did not do so as evidenced by his end of year appraisal. He was paid two fifths of the bonus to recognise those areas where he had achieved. He had not earned and is not entitled to the remaining £3,000 the claim for which is also dismissed.

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Employment Judge Laidler

Date: 13 October 2020

Judgment sent to the parties on

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For the Tribunal office