



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs A Pawlica

v

XPO Supply Chain UK Limited

Heard at: Bury St Edmunds

On: 26 February 2020; and
26 November 2020

Before: Employment Judge Bloom

Appearances

For the Claimant: Ms B Suwalska, Consultant

For the Respondent: Mr S Liberadski, Counsel

RESERVED JUDGMENT

The Claimant's Claims of Unfair Dismissal and Wrongful Dismissal both fail and are, as a consequence, dismissed.

RESERVED REASONS

1. The Hearing of this case took place over the course of two days at the Bury St Edmunds Employment Tribunal on 26 February 2020 and, following a delay caused by the COVID pandemic, resumed via a Cloud Video Platform (CVP) Hearing on 26 November 2020. Throughout the proceedings, the Claimant was represented by Ms Suwalska and the Respondent by Mr Liberadski. I heard evidence from Andrew Flynn who was employed by the Respondent as a Contract Manager, from the Claimant and from her husband. I considered the content of a joint Bundle of documents consisting of 128 pages. Detailed submissions were made at the conclusion of the Hearing by both parties' representatives; Judgment was reserved.
2. The Claimant brought to the Employment Tribunal Claims of Unfair Dismissal and Wrongful Dismissal following the summary termination of her employment by the Respondent on 4 April 2019.

3. Having heard from the witnesses and having considered the relevant documents in the Bundle, and on the balance of probabilities, I come to the following findings of fact:
 - 3.1 the Respondent is a large logistics business operating from a number of sites. One such site was located in Wellingborough. The Claimant was employed at that site as a Front Line Manager. Her husband was also employed at the site. The Claimant's employment began on 2 January 2007 and was terminated on 4 April 2019. Prior to her dismissal, she had a good disciplinary record.
 - 3.2 All employees are subject to the Respondent's Disciplinary Policy (pages 42 – 46) which states, inter alia,

“...that the removal or attempted removal of any article or articles which are company property without authorisation will constitute an offence of gross misconduct which could lead to dismissal”.
 - 3.3 The process relevant to these proceedings involves the Respondent receiving an order for items which are then processed with the warehouse, packed by pickers and then dispatched to the customer. Employees are allowed to place personal orders.
 - 3.4 In February 2019, a decision was taken by the Respondent to close the operation at the Wellingborough site. The Claimant, together with her colleagues, received Notice of Termination of her employment by reason of redundancy on 11 February 2019, to take effect on 6 May 2019. The circumstances of this case are not relevant to that decision.
 - 3.5 The Claimant's husband was involved in the distribution process and was involved in the picking and packing of items for dispatch. On 20 February 2019 the Claimant's husband informed her that he had added a coffee machine and a handbag to his own personal order. He had not paid for those items and their removal from the site was not authorised. To put no finer point on it, he had stolen those items. He later admitted dishonestly ordering these items, plus other items to a value of just short of £10,000.00. Upon hearing of this, the Claimant informed Management of the matter. Mr Pawlica was going to be subject to disciplinary proceedings, but resigned before they could take place.
 - 3.6 As part of the investigation process into her husband's matter, the Claimant attended an Investigation Meeting on 21 February 2019. In this meeting it was noted that on 14 February 2019, the Claimant herself had ordered some cosmetic items to be delivered to her home. The order showed as blank of the Respondent's system. The Respondent decided to look into this matter further and as a

consequence, the Claimant was suspended from work on 21 February 2019.

- 3.7 As part of their detailed investigation, the Respondents viewed CCTV footage of the area where orders were picked. The footage showed the Claimant's husband alongside another employee packing the Claimant's order into a large box. Five small cosmetic items were placed into the box and the Claimant's husband then added additional items into that box which did not show on the order. A heavy box label was put on the box by Mr Pawlica which would not have been necessary if it had contained five relatively small cosmetic items. The Respondent's tracking information also showed the box to be substantially heavier than would be expected for a box containing only a few small items. Yodel, who delivered the box to the Claimant's home on 16 February 2019, also charged an additional sum to take into account the size and weight of the box.
- 3.8 On 27 February 2019, the Claimant was invited to attend an Investigation Meeting to discuss an allegation that she had been a party to the removal of items without authorisation – in effect an allegation of theft.
- 3.9 When asked about the matter in this meeting, the Claimant stated that no one else had been involved in placing the order. When shown the CCTV footage showing the large box, the Claimant stated that it was not the box that had been delivered to her home. The Respondent's CCTV footage and tracking system, however, showed the Claimant's assertion to be incorrect. There was a clear link between the CCTV footage, the tracking of the order, its dispatch and delivery to show that the large box identified on the CCTV footage was the one delivered to the Claimant's home (pages 50 – 60 of the Bundle).
- 3.10 On 27 February 2019, the Claimant submitted a statement of fitness to work which identified that she was not fit for work as a result of "*anxiety and depression*". In order to see if the Claimant was able, however, to attend a Disciplinary Hearing, the Respondent requested the Claimant to undergo a telephone assessment with Occupational Health on 19 March 2019. She declined this opportunity stating she did not have access to a private area in order to take the call. The Respondent decided to give the Claimant another opportunity of having that assessment. This was arranged to take place on 1 April 2019. However, in a call with the Respondent's Human Resources Department on 26 March 2019, the Claimant expressed her unwillingness to cooperate in this process, (page 105).

- 3.11 On 27 March 2019 (page 106), the Respondent wrote to the Claimant inviting her to attend a Disciplinary Hearing on 1 April 2019. She advised that she was facing allegations of gross misconduct, namely

“misappropriation of company property with the removal and / or attempted removal of company property. Complete breakdown of loss of trust and confidence...”

and that one possible outcome of the Hearing could be her dismissal.

The Claimant failed to attend the re-arranged Occupational Health assessment scheduled for earlier that day and failed to attend the Disciplinary Hearing. Rather than take a decision in the Claimant's absence that day, the Hearing was re-scheduled to proceed on 4 April 2019. The Claimant was so advised in writing on 1 April 2019 (page 109).

- 3.12 By email on 4 April 2019, the Claimant advised the Respondent that she would not attend the Disciplinary Hearing and also declined to provide the Respondent with a statement replying to the allegations against her. She considered that the pack she had been sent did not contain all of the relevant material. I do not find any substance in that allegation.
- 3.13 The Disciplinary Hearing was conducted by Mr Flynn in the Claimant's absence on 4 April 2019. He concluded that, having considered all of the relevant material and the Claimant's responses at the earlier Investigation Meeting, that the allegations against her were proven. He concluded that they constituted an offence of gross misconduct and, as a result, he summarily dismissed the Claimant with effect from that date. His decision was confirmed in his letter to the Claimant dated 4 April 2019 (page 117).
- 3.14 Mr Flynn's letter of 4 April 2019 gave the Claimant a right to appeal against his decision. The Claimant did not take up that opportunity. On 1 July 2019, she presented her claims to the Employment Tribunal.
- 3.15 It is also important to note the Claimant's explanation and that of her husband regarding the delivery of the box of items to her home on 16 February 2019. The Claimant has stated she did not take delivery of the items and did not sign for them that morning. She said she was upstairs in bed. She stated that her husband had signed for them. The Claimant's husband, in his evidence, confirmed that version of events. Much time was spent during the Hearing looking at the signature on the Yodel delivery form to see if it was that of the Claimant or that of her husband. I find, on the balance of probabilities, it is the Claimant's signature. It bears

greater similarity to the Claimant's signature in the Bundle (for example by comparing page 64 with the Yodel delivery note on page 119), than any sample signature of the Claimant's husband. In any event, even if the box was signed for by the Claimant's husband, the explanation given by him that he opened it downstairs, removed items, re-sealed it and then took it upstairs to the Claimant in bed, does not to me seem plausible. I find that the Claimant knowingly took into her possession items which had not been paid for which were in that box in addition to the five cosmetic items which had been ordered. This, in my judgment, falls within the definition of the allegation made against the Claimant. It was dishonest and amounted to an offence of gross misconduct.

4. As far as the Claim of Unfair Dismissal is concerned, I find that the reason for the Claimant's dismissal was one relating to her conduct – Section 98(2)(b) Employment Rights Act 1996. In fact, as I have found, it was for an offence of gross misconduct. That is a potentially fair reason for dismissal. I am satisfied that the Respondent has proven on the balance of probabilities that the reason for the Claimant's dismissal was one relating to her conduct.

5. I then go on to consider whether that dismissal was fair or unfair in accordance with the provisions of Section 98(4) Employment Rights Act 1996 which states that –

“...the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case”.

6. In such cases, I am reminded that due consideration should be given to the well established test set out in British Home Stores Limited v Burchell, namely:

6.1 Did the Respondent believe the Claimant was guilty of misconduct?

6.2 Did the Respondent have reasonable grounds upon which to sustain that belief?

6.3 Did the Respondent carry out a reasonable investigation?

7. I conclude that the answers to the questions in paragraph 6 above are in the affirmative. The Respondent carefully considered all of the evidence including its own documentation and CCTV footage. They asked for an explanation which they considered to be unsatisfactory. They had reasonable grounds, in my judgment, to believe that items had been placed in a box delivered to the Claimant's home on 16 February 2019

which had not been paid for. They had CCTV footage to show this; they had information regarding the excess weight on the box; the heavy label placed on that box; the excess charge submitted by Yodel for its delivery' and the signature on the delivery note. They held an Investigation Meeting with the Claimant. The Claimant was given ample opportunity of attending two Disciplinary Hearings as well as the chance for her health to be assessed by Occupational Health on two occasions. The Respondent was justified in holding the second Disciplinary Hearing in the absence of the Claimant. She did not provide a statement denying the allegations or set out her account of them. She also failed to take up the opportunity of appealing against the decision to dismiss her.

8. I remind myself that it is not for the Employment Tribunal to substitute its view for that of a reasonable employer in determining whether or not the dismissal was fair or unfair. In my judgment, the decision taken by the Respondent to dismiss the claimant fell within the bands of reasonable responses open to any employer. In all the circumstances, I find the Claimant's dismissal was fair, and, as a consequence, her Claim of Unfair Dismissal fails and is dismissed.
9. I now turn to the Claimant's Claim of Wrongful Dismissal. As stated, the Claimant was dismissed without notice or pay in lieu of notice. In such a claim, the reasonableness or otherwise of the employer's actions are not relevant. I must consider whether or not the Employment Contract has been breached. This involves an examination of a factual question, namely, was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of her Contract of Employment, thus entitling the Respondent to summarily dismiss her, i.e. without notice? To determine this issue, I have to consider whether or not the Claimant committed the acts of gross misconduct alleged against her.
10. For the reasons I have set out above, I conclude on the balance of probabilities that she was involved, together with her husband, in the dishonest appropriation of property delivered to her home on 16 February 2019, namely that the items were contained in a box which had not been ordered or paid for on 14 February 2019. This was an act of dishonesty justifying the Claimant's dismissal without notice. It therefore follows that her Claim of Wrongful Dismissal also fails and is also dismissed.

16 December 2020

Employment Judge Bloom

Sent to the parties on: ..07/01/2021.....

For the Tribunal Office
T Henry-Yeo