EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs K Marangakis	**v**	**Iceland Foods Limited**

Heard at: Watford **On**: 27, 28 July 2020

Before: Employment Judge Loy

Appearances

For the Claimant: In person
For the Respondent: Mr K Wilson, Counsel

RESERVED JUDGMENT

The reserved judgment of the tribunal is that:

1. The claimant was not dismissed by the respondent on 24 January 2019;

2. The claimant's claim for unfair dismissal fails for lack of jurisdiction.

REASONS

The claim

1. The claimant was employed by the respondent, a well-known large food retailer, as a part-time Sales Assistant in the respondent's Egham store. She commenced employment on 22 September 2013. Precisely when that employment terminated is in dispute between the parties. The claimant says she was dismissed on 24 January 2019. The respondent says that she was not dismissed until 16 July 2019.

2. By a claim form presented on 28 March 2019, following a period of early conciliation between 28 February and 28 March 2019, the claimant made a claim of unfair dismissal. For reasons which will become clear below, the respondent says there was no dismissal by that date.

3. The chronology is important. It was common ground that the claimant was initially dismissed on 24 January 2019 for alleged gross misconduct, which involved the allegation that she left the till where she was working when customers were present and waiting in the queue (which the claimant accepted); and that she allegedly shouted at, and behaved aggressively towards, Mr Harker, the trainee Manager at the respondent's Egham store (which the claimant does not accept). The claimant appealed her dismissal. The appeal was ultimately successful. The respondent says that the claimant was reinstated on 10 April 2019 with back pay and preserved continuity of service. A final written warning was substituted for summary dismissal.

4. Despite the upholding of her appeal, the claimant maintains that she remained dismissed with effect from 24 January 2019, and it is that alleged dismissal that the claimant says is unfair. The respondent's position is that as a matter of law the legal effect of her appeal being upheld was that she was reinstated, and that her dismissal of 24 January vanishes, and is of no effect. Accordingly, as a matter of both law and logic the respondent says that if she was not dismissed, she cannot have been unfairly dismissed. The respondent relies upon the statutory definition of dismissal under s.95 of the Employment Rights Act 1996 ("ERA"). The claimant says that she remained dismissed on 24 January 2019 and that this dismissal was unfair.

5. On 16 July 2019 the respondent says that it dismissed the claimant under s.95 of the ERA for failing to attend work. The claimant was asked at the outset of this hearing whether or not she was pursuing a claim for constructive dismissal. The claimant's unequivocal position was that she was not pursuing a claim of constructive dismissal. The only relevant "dismissal" for this hearing was therefore that of 24 January 2019.

Issues

6. The two issues for the tribunal are therefore:

    6.1 Was the claimant dismissed; and

    6.2 If so was the claimant's dismissal unfair?

7. Those issues fell to be determined sequentially on the basis that if there was no dismissal under s.95 of the ERA, the claimant's case must fail. If there was a dismissal on 24 January 2019, the claimant set out the grounds upon which she alleges that dismissal to have been unfair. Those grounds are that:

    7.1 The dismissal on 24 January 2019 was predetermined;

    7.2 The respondent failed to send the claimant the respondent's policies and procedures after she requested them on or about 19 December 2018;

7.3 A subject access request refers to the claimant as having been suspended for 'brand damaging behaviour;' (not 'alleged brand damaging behaviour,' indicating predetermination of the outcome;

7.4 The SAR documents showed that "the whole of the HR Department" had been involved in the claimant's dismissal, not just the manager who claimed to have been the decision maker;

7.5 She telephoned the HR Department when she left, but was not allowed to speak to anyone for 24 hours;

7.6 She asked for but was not given CCTV footage;

7.7 The respondent's disciplinary process was unprofessional;

7.8 A manager told the claimant that he had been lenient on her;

7.9 The respondent failed properly to investigate the matter as the appeal demonstrated;

7.10 Documents show that the HR Department advised that the line manager needed to do three more tasks, including going back to the claimant and revisiting the CCTV. Those steps were not taken;

7.11 The claimant was not allowed to question the respondent's witnesses;

7.12 The claimant saw the respondent's witness statements half way through the disciplinary hearing;

7.13 When the claimant asked about the witness statements she said, "If I hadn't asked for them today would you have shown them to me?" and the HR representative said "No";

7.14 Differences in the witness statements went unchallenged;

7.15 Documents showed an intention not to communicate with the claimant.

8. The respondent maintains that the dismissal was for a fair reason, namely misconduct, and that the respondent adhered to the procedural and substantive stages of its procedures.

9. The tribunal sets out the very significant challenges that the claimant makes to her dismissal even though, for the reasons set out below, the tribunal considered that it did not have jurisdiction to make a decision about any of them. The tribunal considered that it was appropriate nevertheless to make it clear that the claimant's challenges to the defence of her dismissal disclosed a highly arguable case that if she had been dismissed the dismissal was unfair.

Was the claimant dismissed on 24 January 2019

Facts

10. The tribunal makes the following findings of fact, many of which (as indicated below) were common ground:

    10.1 The claimant was dismissed in the circumstances set out above, and appealed.

    10.2 At no stage did the claimant withdraw her appeal. There was evidence that Acas had advised her to see her appeal through, and that she followed that advice. The claimant was asked by the tribunal whether or not she withdrew her appeal at this stage and she unequivocally confirmed that she had not.

    10.3 At a hearing on 22 March 2019 the claimant was asked what was her desired outcome of her appeal. She said that the mutual trust which forms part of the contract between her and the employer had been broken. In direct response to a question she said, "I don't want to work for Iceland, I want apologies and compensation". Mr Keeble did not dispute that evidence. Mr Keeble had five options open to him as to the outcome of the appeal.

    10.4 By 27 March 2019, at the latest, the claimant told her employer that she did not want to be reinstated, but that she wanted a corporate apology and financial compensation.

    10.5 Mr Keeble, the appeal manager, did not have the power to make either an apology or an award of compensation under the respondent's policies and procedures.

    10.6 The appeal outcome letter of 10 April 2019 stated,

    > "…My decision is to uphold your appeal against your summary dismissal … I believe it is appropriate to issue you with a lesser sanction of a final written warning … Therefore your employment would be reinstated with continuous service and you will receive any back-pay owing to you".

    A further letter from Mr Keeble of 15 May 2019 stated,

    > "My decision following your appeal hearing was to reinstate you to the business, with continuous service from the date of your dismissal."

    10.7 The claimant did not in fact return to work. Mr Keeble's proposal was for the claimant to return to work in the Staines store. The return to work at the Staines store was a transfer within the disciplinary authority of Mr Keeble under the respondent's Disciplinary Policy.

10.8 There is no claim for constructive dismissal by the claimant and there is no issue before the tribunal as to the fairness of the dismissal which the respondent says took effect on 16 July 2019.

The law

11. The statutory definition of dismissal is set out at s.95 of the ERA 1996, which states as follows:

> "**95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) F1. . . , only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
>
> (a) the employer gives notice to the employee to terminate his contract of employment, and
>
> (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
>
> and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

12. There was in fact a dismissal. The tribunal must then turn to the effect on a dismissal of a successful appeal resulting in reinstatement.

13. Mr Wilson, on behalf of the respondent, has submitted that the effect of a successful appeal, resulting in reinstatement with effect from the original dismissal date of 24 January 2019, is that dismissal "vanishes" as a matter of law. The claimant's case is that the dismissal did not vanish in circumstances where she made it explicitly clear that she did not wish to be reinstated (which the tribunal finds as a matter of fact she did make clear to the respondent as set out above).

14. The most recent, authoritative, and clear authority on the allowing of an appeal of an employee against his or her dismissal, was the Court of Appeal in Folkestone Nursing Home Ltd v Patel [2019] ICR 273. Sales LJ as he then was, with whose judgment Ryder and McFarlane LJJ agreed said this:

> "26 I consider that the short answer to this ground of appeal is that it is clearly implicit in a term in an employment contract confirming a contractual right to appeal against disciplinary action taking the form of dismissal that, if an

appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout. This is not a matter of implying terms, but simply the meaning to be given to the words of the relevant contract, reading them objectively."

"27 By including a contractual right of appeal in the employment contract, the employer makes available to the employee a facility to seek to overturn the disciplinary decision made against him and to have the dismissal treated as being of no effect. If the appeal is successful, then subject to any other contractual provisions, the employee is entitled to be treated as having never been dismissed, to be paid all back pay and to have the benefit of all other terms of his contract of employment through the relevant period and into the future. Those terms include the usual implied duty of an employer to maintain trust and confidence.

28. Conversely, if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that is successful appeal results in the employee having an option whether to return to work or not.

29. If an appeal is brought pursuant to such a term and is successful, the employer is contractually bound to treat the previous dismissal as having no effect and the employee is bound in the same way. It is inherent in the very concept of an appeal in respect of a disciplinary dismissal.

30. An employment contract involves significant obligations on each side, and each party has a clear interest in knowing whether they stand in relation to the contract and those obligations, as to whether they exist or not – see Geys v Société Générale, London Branch [2013] ICR 117; [2013] 1AC 523, Paris 57-59 S Hale of Richmond JSC. If a contractual appeal is brought against a dismissal for disciplinary reasons, a reasonable person in the shoes of the employee will expect his full contractual rights and employment relationship to be restored without more as soon as he is notified that his appeal has been successful. He would not think that any further action by him was required, in terms of saying that he agrees that this is the effect. He is asked for that to happen by the very act of appealing. Similarly, a reasonable person in the shoes of the employer will understand that this is the effect of a successful appeal as soon as the parties are notified of the outcome of the appeal, without any question of a further round of debate about whether the employee is prepared to accept this or not. It is the same: the employee has already asked for that to be the outcome by the very act of appealing."

15. The rest of the judgment of Sales LJ is also material. In paragraph 42, he sets out a passage of the judgment of Mummery LJ in Roberts v West Coast Trains Ltd [2005] ICR 254, where Mummery LJ referred to the fact that the employee in that case had made a claim of unfair dismissal before his appeal against his dismissal was allowed as being "legally irrelevant" on

the basis that the allowing of the appeal meant that the claimant could not press that claim. The factual situation in Patel is in some aspects parallel to this case, as the employee in that case did not return to work after his successful appeal.

16. In paragraph 43 Sales LJ showed the impact of the allowing of the appeal in the Patel case:

> "In our case, the employee lodged an appeal and did not withdraw it before it was found to be successful, even though that happened after he had lodged his claim with the tribunal. According to the analysis of Mummery LJ, in line with the view of Elias J, the success of the appeal means that the employee's employment contract treated as continuing down to that point, with no dismissal. In line with Mummery LJ's indication in Roberts' para 25, the success of the appeal in the present case did not constitute an offer which the employee could accept or reject. Similarly, in my view, the employee's success on his appeal did not give rise to an option for him to continue with the employment or not. When his appeal was successful the employee was bound by the result to the same extent as the employer."

17. Sales LJ said specifically that the fact that an employee might appeal otherwise than with a view to obtaining reinstatement, for example with a view simply to clearing his or her name, does not affect the impact of the allowing of the appeal. Sales LJ said in paragraph 32 of his judgment:

> "[I]n my view these other possible reasons why an employee might wish to invoke a contractual appeal process are collateral to the object of having such a process included in the contract of employment. That object is, that the employee is contractually entitled to ask the employer to reopen its previous decision to dismiss and to substitute a decision that there should not be a dismissal. Where a contractual appeal is brought, that is the obvious purpose of the appeal, judging the matter objectively. The fact that an employee might have other motives for seeking to appeal does not affect the interpretation of the contract."

18. Although the case of Patel dealt with contractual disciplinary procedures, it was decided by the EAT in London Probation Board v Kirkpatrick [2005] ICR 965 [19] that:

> "The point is one of general application without reference to its statutory context. It represents what the lay members on this tribunal consider to be absolutely standard employment relations practice since the whole point of internal appeals is to allow for bad or unfair decisions to be put right. The effect of Kirkpatrick is that the same principles apply to non-contractual disciplinary procedures. The rationale is that the whole purpose of an appeal is to correct mistakes at the first level of disciplinary action including overturning decisions to dismiss and employee. That is what happened in this case. The "risk" so to speak of reinstatement is borne by the employee. In normal circumstances a successful appeal against dismissal would be welcomed by an employee because they get their job back and that is what they want. In this case, the claimant changed her mind in between making her appeal and that appeal being finally determined."

19. The ultimate question for the tribunal to determine on the matter of dismissal is this: In circumstances where the employee expressly no longer seeks

reinstatement, but nonetheless continues with her appeal, does the original dismissal still vanish if the employer in fact reinstates the employee.

20. The tribunal has come to the conclusion that the dismissal does vanish in these circumstances. According to Patel, only if the appeal is withdrawn can an employee "escape" the consequences of a successful appeal in law. If an employee continues with the appeal it is at his or her own risk. Also from Patel, dismissal vanishes upon reinstatement on an objective basis, meaning that the motives or subjective intention or desires of the appellant employee are not to the point. Put simply, unless there is withdrawal from the appeal process altogether, both the employee and the employer will be bound by the reinstated contract of employment consequent upon a successful appeal. Were it not so, the legal effect of a successful appeal would be dependent on the different motives and/or changing states of mind of a particular appellant, which would be inconsistent with the legal certainty brought about by Patel. As Sales LJ said in Patel at (36);

> "So, plainly, if the employee, having lodged the appeal, withdraws from it, then the employer cannot seek to determine that appeal. In those circumstances, the employee can rely upon the original decision to dismissal. But, in our judgment, if the employee choses to keep the appeal alive, then he takes the risk that if he is subsequently reinstated in employment, his unfair dismissal claim will be defeated, and that is so even if he lodges an originating application prior to the appeal being determined."

21. While noting that it is not of any binding effect on this tribunal, the effect of Patel is summarised in IDS Employment Law Handbooks Vol.3, 14.78 as follows:

> "Even if the employee does not wish to continue employment, the effect of a successful appeal is to treat the employee as if he or she had never been dismissed".

22. In the circumstances the tribunal considers itself bound by the decision of the Court of Appeal in Patel to the effect that even where Mrs Marangakis had made it clear that she did not wish to be reinstated, but did not formally withdraw her appeal, she took the risk that a successful appeal would mean in law that the dismissal on 24 January 2019 was of no legal effect. It follows that the tribunal having considered itself so bound by this authority has no jurisdiction to consider the claimant's claim for unfair dismissal.

23. In so finding, the tribunal is mindful that its decision has the effect of preventing Mrs Marangakis from making the challenges to the fairness of her dismissal that she has carefully set out in her witness statement and which were recorded by Employment Judge Heal at a preliminary hearing on 24 January 2020, sent to the parties on 12 February 2020.

24. It is, however, the inescapable consequence of the tribunal's application of Patel and the other authorities to the facts of this case which, in the view of this tribunal, means that it has no jurisdiction to consider what might have otherwise have been the merit of the claimant's application for unfair

dismissal. Put simply, the tribunal feels bound by the authorities referred to in this judgment to conclude that there is no dismissal before this tribunal the fairness of which this tribunal could consider.

Reconsideration

25. The claimant has written to the tribunal about reconsideration. Her time to apply for reconsideration runs from the date on which this document has been sent. If she wishes to apply, she should do so within that timeframe, and with reference to this document.

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Regional Employment Judge Foxwell

Signed on behalf of Employment Judge Loy pursuant to Rule 63

Date:…3 March 2021……

Sent to the parties on:

……3 March 2021.

For the Tribunal:

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