



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ANDREWS (sitting alone)

BETWEEN:

Mr D Flower

Claimant

and

Wandsworth Council

Respondent

ON: 15 February 2021

Appearances:

For the Claimant: In person

For the Respondent: Miss H Platt, Counsel

WRITTEN REASONS
FOR JUDGMENT DATED 15 FEBRUARY 2021
PROVIDED AT THE REQUEST OF THE RESPONDENT

1. In this matter the claimant complains that he was unfairly dismissed.

Evidence

2. I heard evidence for the respondent from Mr K Power, Deputy Director of Environment and Community Services, and Mr N Chadwick, Director of Environment and Community Services. The claimant also gave evidence and there was an agreed bundle of documents.

Relevant Law

3. By section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his or her employer.
4. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal

was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

5. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.
6. In that exercise, the Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
 - a. genuinely believed the claimant was guilty of misconduct;
 - b. had reasonable grounds on which to sustain that belief; and
 - c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.
7. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (*Iceland Frozen Foods v Jones* [1983] ICR 17 and *Graham v S of S for Work & Pensions* [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (*Sainsbury's Supermarkets v Hitt* [2003] IRLR 23).
8. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (*OCS Group Ltd v Taylor* [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.
9. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

Findings of Fact

10. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.
11. The claimant was employed by the respondent as a glazier from July 1991 until his dismissal in January 2020. He worked off-site in tenants' and leaseholders' properties and council buildings and offices.
12. The respondent's code of conduct for employees (the relevant version having been issued in February 2019) includes provisions requiring the declaration of outside employment interests and any financial interests in the event of any potential conflict with the Council's business. Further that all relationships of a business or private nature with external contractors, or potential contractors, should be made known to the appropriate manager.

13. The respondent's disciplinary process (the relevant version having been issued in June 2018) provides for, in the appropriate circumstances, suspension, a disciplinary investigation and hearing with summary dismissal a possible outcome for cases of gross misconduct and a right of appeal with appropriate representation throughout.
14. In about August 2019 the respondent carried out a review of processes within its transport mechanical workshop service. On 1 November Mr Walsh became Head of Direct Services Organisation and assisted with that review. A number of irregularities in relation to expenditure and supply services from a number of companies, one of which was Treads Tyres Limited (TTL), was identified. By the time of that investigation TTL was owned by the claimant together with his partner who was also a director. The preliminary findings of that review were that there was an unusually high level of payments to TTL (approximately £200,000 in four years – tyre services previously having been supplied by ATS who invoiced at a lower rate) and there was no record of any conflict of interest having been disclosed by the claimant. There was also corresponding suspicious activity by two other employees: Mr Hall, Transport Technician, who raised the orders for tyres and Mr Cornish, Transport Supervisor, who authorised those orders.
15. In accordance with the respondent's disciplinary code of practice Mr Power reviewed those preliminary findings and agreed that a disciplinary investigation should be conducted. As there was an indication of potential financial irregularities he also notified the South West London Fraud Partnership and made arrangements for the claimant to be suspended whilst the investigation was conducted. Mr Cornish and Mr Hall were also suspended and ultimately also dismissed. The claimant was notified of that suspension by letter dated 26 November and Mr Angus, a senior manager from another service area, was appointed to conduct the disciplinary investigation.
16. Mr Angus wrote to the claimant on 4 December inviting him to a meeting on 10 December to discuss allegations of financial irregularities.
17. The claimant was also interviewed under caution on 5 December 2019 by Mr Linsdall of the Fraud Partnership during which the ownership and history of TTL was discussed as well as Mr Hall's earlier involvement as a shareholder following a loan he had made to the claimant. The claimant explained the process for placing and fulfilling orders, stated that he did not believe there was any conflict of interest, that there had been no conspiracy with Mr Cornish or Mr Hall nor any financial reward to them for orders placed. The claimant also confirmed that he was using a lock up on the respondent's premises to store tyres without permission.
18. At the investigatory meeting with Mr Angus on 10 December the claimant's involvement and role with TTL was again discussed and how the company had been set up. The claimant said that he had asked the Transport and Fleet Manager, Mr Cousins, if the respondent would use someone called Joey to supply tyres. He said that he did not know Joey particularly well and did not know his surname but had set up TTL to help him out and Joey had become TTL's first employee. He said that Mr Cornish, Mr Spooner (another Transport Supervisor) and Mr Mason (his line manager) all knew that TTL belonged to him and that his mobile number was clearly displayed on the TTL van. Further the

claimant said he had not realised that he had to declare his involvement with TTL. They also discussed the lock up and he again confirmed that he did not have permission to use it.

19. Mr Angus obtained written comments from Mr Cousins and Mr Spooner. Mr Cousins said he did not recall any employee speaking to him about any involvement with TTL and he had not authorised the private use of any lock up. Mr Spooner said that he only knew of TTL through Mr Cousins and he had no knowledge of its ownership or control.
20. Mr Angus produced a comprehensive report in mid January 2020 in which he concluded there was sufficient evidence for the matter to proceed to a formal hearing.
21. By a letter dated 17 January the claimant was informed that he was required to attend a disciplinary interview on 28 January to consider allegations of financial irregularities and breach of the code of conduct. Copies of the investigation report and disciplinary code were enclosed and the claimant was informed of his right to be accompanied and call witnesses and that dismissal was a potential outcome of the process.
22. At that hearing Mr Angus attended to present his findings together with Mr Lindsall who attended as a witness. The claimant attended unaccompanied. He had a full opportunity to say what he wanted, ask questions and explain his position. The respondent's concerns about the processes and irregularities with the invoicing and ordering process were put to him as well as copies of relevant invoices. In particular that 50 invoices and work tickets were sampled for analysis and:

'A significant percentage (30%) had discrepancies on the following lines:

1. No mention of a tyre requested on the work ticket, yet an order placed.
 2. The number of tyres ordered is greater than the number requested on the work ticket.
 3. Original work ticket does not request any tyres, but a second style or handwriting has added the request.
 4. Order placed for a "callout" when there is no record of a breakdown or puncture.
- All orders, bar one, were placed by [Mr] Hall ...and approved by [Mr] Cornish ...'

23. The claimant accepted that the basic position described in the investigation report was accurate but denied that there was any wrongdoing on his part other than that he accepted that he had not got permission to store the tyres in the lock up and that with hindsight he should have disclosed his interest in TTL.
24. The hearing reconvened on 30 January at which Mr Power informed the claimant that the charges against him had been proved, constituted gross misconduct and that he was summarily dismissed.
25. That dismissal was by letter on the same day in which Mr Power said:

I found your evidence inconsistent and flawed. You set up and were an active shareholder in the company Treads Tyres (45% share). This company was receiving substantial payments from the Council and you failed to declare any potential conflict of interest.

You were also using council premises without approval for storing approximately 60 tyres which you confirmed were used for the running of your company Treads Tyres....

The serious nature of the allegation found could have consequent damaging effects on the reputation and integrity of the Councils I do consider that your actions were deliberate and are a breach of the trust that the councils place in its employees.'

and the claimant was informed of his right of appeal.

26. The claimant appealed by an undated letter and the appeal was held on 11 March. Mr Power presented a short oral report, answered questions from the appeal manager and claimant. The claimant presented his case and there was then an adjournment during which Mr Chadwick considered the matter with his HR colleague but did not identify any valid grounds for considering a different outcome to the original hearing. The meeting reconvened and the claimant was informed that the decision to dismiss on the grounds of gross misconduct was confirmed.
27. For reasons that were not clear the very brief appeal outcome letter was not sent to the claimant until 10 July.

Conclusions

28. The respondent, through Mr Power and Mr Chadwick, had a genuine belief in the guilt of the claimant of financial irregularities in relation to the dealings between the respondent and TTL as well as a failure to formally declare his interest in TTL.
29. There were reasonable grounds to sustain that belief. It was uncontroversial that at the date of the disciplinary hearing, TTL was jointly owned by the claimant and his partner of 20 years. The claimant had not formally declared that ownership to the respondent, although in hindsight he acknowledged that he probably should have. There was no evidence to support the claimant's case that any managers knew about his involvement. The respondent made up the majority of TTL's business. The claimant raised invoices on behalf of TTL to the respondent which he sent from the company's email address. These amounted to a significant sum and there were apparent discrepancies between the invoices and actual products ordered.
30. It was also reasonable for Mr Power to conclude that the circumstances of the creation of TTL to apparently help out Joey (whose surname the claimant could not remember at the initial investigation) who was not at that stage particularly known to the claimant, the early involvement of Mr Hall and the unconvincing explanation given for that involvement, and the discrepancies that were identified with regard to the invoices all pointed to collusion between the claimant, Mr Cornish and Mr Hall both of whom of course were also dismissed.
31. At the time of forming those beliefs there had been a reasonable investigation. The relevant people were asked about their involvement and relevant documents considered. The claimant at this Tribunal hearing referred to Joey having filed documents in 2015 with the respondent regarding the company and that that documentation would have shown his involvement. That documentation was not before the Tribunal however and had not been put before or referred to Mr Power or Mr Chadwick when they made their decision despite the claimant having had every opportunity at the time to bring it to their attention.

32. Mr Power and Mr Chadwick also had a genuine belief based on the claimant's admission, that he had stored private property on the property of the respondent without permission.
33. The respondent followed a reasonable process. The initial letter setting out the alleged financial irregularities could have been clearer as to exactly what they were but the detailed investigation report was enclosed with that letter and it is clear from the notes of the various meetings that the detail of the irregularities that ultimately led to Mr Power deciding to dismiss were put to the claimant for comment.
34. As to whether the penalty was appropriate, having reasonably concluded that the claimant was guilty of gross misconduct in respect of the financial irregularities in the invoicing between TTL and the respondent (but not in respect of the failure to store items without permission which would not reasonably constitute gross misconduct), dismissal without notice is not a surprising penalty. It should not be automatic however and particularly in a case such as this where the employee has very long service and a previously clear disciplinary record, the claimant is right that the respondent could have dealt with the situation differently, e.g. given him a lower disciplinary penalty and cancelled its dealings with TTL. I cannot however conclude that summary dismissal was unreasonable in all the circumstances.
35. Accordingly the dismissal was fair and the claim fails.

Employment Judge K Andrews
Date: 8 April 2021