



EMPLOYMENT TRIBUNALS

Claimant: Mohil Kansara

Respondent: Gems of Broadway

Heard at: London South Employment Tribunal, via CVP.
On: 15th March 2021

Before: Employment Judge Apted

Representation

Claimant: self-represented

Respondent: Mr Akinsanya - solicitor

JUDGMENT

The hearing has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face-to-face hearing was not held because it was not practicable because of the Covid-19 virus.

1. The Claimant was unfairly dismissed.
2. A 75% reduction in the compensatory award for unfair dismissal will be made in accordance with the provisions in Polkey.
3. The claimant contributed to his dismissal to the extent of 25% to be applied to the basic award for unfair dismissal.
4. The respondent will pay the claimant a basic award of £1,968.75 gross for unfair dismissal.
5. The respondent will pay the claimant a compensatory award of £4,356.56 gross for unfair dismissal.

REASONS

These reasons are provided at the Claimant's request.

Introduction:

6. The claimant Mohil Kansara was employed by the respondent, Gems of Broadway, or its predecessor, as a sales assistant from August 2014 until his dismissal on the 22nd of February 2020. The respondent accepted that there was continuity of service.
7. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996.
8. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct in the form of an assault, and it was entitled therefore to terminate his employment without notice because of his gross misconduct. Alternatively, the respondent says that their relationship had broken down and there was therefore some other substantial reason of a kind such as to justify his dismissal.
9. The claimant represented himself and gave sworn evidence. The respondent was represented by Mr Akinsanya who called sworn evidence from Mrs Bhura. I considered the documents from an agreed 29-page bundle of documents which the parties introduced in evidence.
10. The hearing was conducted remotely via video using the cloud video platform (CVP), as a result of the COVID-19 pandemic. All parties were able to see and hear each other clearly and were able to participate fully in the proceedings. I was satisfied that the open justice principle was secured and that no party was prejudiced by the fact that the hearing was heard remotely.

Issues for the Tribunal to decide:

11. Having dealt with preliminary matters, I agreed with the parties the issues for me to decide. Although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's claim for unfair dismissal succeeded, I agreed with Mr. Akinsanya and Mr. Kansara that I would consider them at this stage and invited them to deal with them in evidence and submissions:

Unfair Dismissal:

12. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) & (2) of the Employment Rights Act of 1996? The respondent asserted that it was a reason relating to the

claimant's conduct. Alternatively, the respondent submitted that the relationship had broken down to the extent that there was some other substantial reason of a kind such as to justify his dismissal.

13. If so, was the dismissal fair or unfair within section 98(4) and in particular did the respondent in all respects act within the band of reasonable responses? The claimant stated that the dismissal was unfair because the respondent followed an unfair process in that they failed to carry out any disciplinary process.
14. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**; **Software 2000 Ltd v Andrews [2007] ICR 825**; **W Devis & Sons Ltd v Atkins [1977] 3 All ER 40**; and **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**.
15. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal as set out in section 122(2) of the 1996 act and if so to what extent?
16. Did the claimant by his blameworthy or culpable conduct cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6) of the 1996 act?

Findings of Fact:

17. The relevant facts are as follows. The respondent runs a jewellery shop. The claimant was employed as a sales assistant. After the shop closed for the afternoon on the 21st February 2020, the claimant entered the respondent's office. There was a disagreement between them about a task that the respondent asked the claimant to perform and whether the respondent should complete that task herself. No other members of staff were present. The respondent stated that the claimant pushed her, held her hands and shook her quite a few times. She suffered from panic attacks but was able to leave the office. This incident was denied by the claimant, who said that having entered the office, he was asked to perform a banking task by the respondent, which he politely declined as he had other tasks to do. Thereafter, the claimant said that they left the office and shop together, without any animosity between them. He said that he "...didn't recall any of the shouting or misbehaving..." The following day, the 22nd February 2020, the claimant went back to the shop when he was dismissed. This was confirmed in a letter to the claimant sent to his home address on the 22nd February 2020. The respondent accepts that no disciplinary process took place. The claimant further states that he did not return to the shop on the 22nd February, but was met in the carpark by a third party and told not to return. He stated that he did not receive the letter dated the 22nd February.
18. In my judgment, I am satisfied that the incident alleged to have taken place in the office on the 21st February 2020, took place as described by the respondent. I find it unlikely that she would dismiss the claimant for no

reason whatsoever and essentially fabricate an incident in order to orchestrate his dismissal. Given that this incident resulted in the claimant's immediate dismissal and had a significant impact upon his life, I find his explanation that he could not recall the incident as lacking in credibility. It therefore follows, that I am satisfied that the claimant was dismissed on the 22nd February 2020 and that confirmation of that was sent to and received by the claimant at his home address, by letter.

19. However, prior to that dismissal, no disciplinary procedure took place at all. The claimant was simply, summarily dismissed. Nothing was done at all which in any way complied with the ACAS Code of Practice on disciplinary and grievance procedures (save informing the claimant of his dismissal in writing). There was no investigation or investigatory meeting. No allegations were put into writing. No disciplinary meeting was held, no opportunity to appeal was provided and no appeal hearing was held.

Relevant Law & Conclusions – unfair dismissal:

20. Section 98 of the 1996 act deals with the fairness of dismissals. There are two stages within section 98. Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Secondly, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider without there being any burden of proof on either party whether the respondent acted fairly or unfairly in dismissing for that reason.
21. In this case I find that the potentially fair reason for dismissal was conduct. In his submissions to me, Mr Akinsanya argued that the relationship between the complainant and respondent had broken down to the extent that there was some other substantial reason of a kind such as to justify the dismissal of the claimant. I reject that submission. The principal reason for the dismissal as set out in the witness statement of Mrs Bhura was misconduct.
22. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether in the circumstances including the size and administrative resources of the employers 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 the equity and substantial merits of the case.
23. In misconduct dismissals there is well established guidance for tribunals on fairness within section 98(4) in the decisions in **BHS v Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4) the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is

immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer.

24. I find that the respondent held a genuine belief that the claimant was guilty of misconduct. Her evidence about why she dismissed the claimant, the dismissal and the dismissal letters were clear and unequivocal.
25. However, in my judgement the respondent did not carry out a reasonable investigation. The respondent did not comply with the ACAS Code of Practice on disciplinary and grievance procedures at all. The claimant was not given the opportunity to provide any explanation. No evidence was given about any actions taken in any previous similar cases. No evidence was given of any regard for the claimant's disciplinary and work record generally. No evidence was provided that his length of service had been taken into consideration or whether the incident was out of character and unlikely to recur. No appeals process was undertaken and there was no evidence that the claimant had even been given an opportunity to appeal against the decision.
26. I find that no reasonable employer in the respondent's position would have dismissed the claimant in these circumstances. Whilst the claimant's actions had been serious, a reasonable employer would have considered and assessed any explanation before deciding what view to take of his culpability and what sanction to impose. In this case however, the respondent accepts that no procedure was undertaken at all and the decision was made to immediately dismiss the claimant before ascertaining his side of the story. I find for these reasons that the respondent's decision to dismiss the claimant was outside the range of reasonable responses to his conduct.
27. I have considered the size of the respondent's organisation as well as the fact that there were no other parties present to this incident and that there was no other party who could have carried out an investigation. Nevertheless, within the range of reasonable responses, the respondent's size and resources do not excuse the unfairness in the actions taken in this case.
28. I find therefore that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

Relevant law and conclusions – Polkey

29. I then have to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case the claimant might have been fairly dismissed in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**, **Software 2000 Ltd v Andrews [2007] ICR 825**; **W Devis & Sons Ltd v Atkins [1977] 3 All ER 40**; and **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**.
30. I find that if the respondent had properly considered the claimant's length of service, any explanation for his actions and his disciplinary record generally, there is a very substantial chance that they would still have dismissed the

claimant. I do not regard it as inevitable that they would still have dismissed him, but I find it to be very likely. I take into account the claimant's length of service but also how seriously the respondent took his actions. I consider that there is a 75% chance that the claimant would still have been dismissed and if the respondent had properly and fairly considered his length of service and any explanation, the dismissal would have been within the range of reasonable responses.

Relevant law and conclusions - contributory fault:

31. The tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act of 1996.

Section 122(2) provides as follows:

"Where the tribunal considers that any conduct of the complaint before the dismissal (or where the dismissal was with notice before the notice was given), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

Section 123(6) then provides as follows:

"Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

32. I adopt a systematic approach when considering a deduction to the basic or compensatory award. Firstly, I must identify the conduct which is said to give rise to possible contributory fault. Secondly, decide whether that conduct is blameworthy. Thirdly, under section 123(6), ask myself whether the blameworthy conduct caused or contributed to the dismissal to any extent and fourthly decide to what extent it is just and equitable for the award to be reduced.

33. The claimant's conduct said to give rise to contributory fault is his assault upon the respondent. I find that that conduct was blameworthy. That conduct was the reason for the dismissal. I find that it would be just and equitable to reduce any basic award by a further 25% to reflect the claimant's culpability.

34. I do not consider it just and equitable to reduce the compensatory award any further under section 123(6) of the 1996 act.

Remedy:

Basic Award:

35. The claimant is entitled to £2,625. At the effective date of termination, he had been employed for 5 whole years, was aged 34 and was earning £592.56 gross per week. Pay is capped at £525 per week.

36. That basic award is reduced by 25% for contributory fault, giving a total basic award of £1,968.75 gross.

Compensatory award:

37. The claimant was unable to obtain employment until the 20th August 2020. He is therefore entitled to compensation for his immediate loss of earnings of £592.56 per week for 21 weeks. This gives a figure of £7,110.72.

38. The claimant was then able to secure employment, but at a reduced figure of £363.46 per week. This is therefore a difference in his weekly salary of £229.10 per week.

39. As at the date of the hearing, the claimant had been earning this reduced figure for 29 weeks. £229.10 multiplied by 29 equals £6,643.90.

40. Given the claimant's age and level of qualification, I consider that is fair and reasonable to compensate him for an additional 12 weeks for his future loss of earnings. £229.10 multiplied by 12 equals £2,749.20.

41. I allow the claimant £400 for his loss of statutory rights.

42. This therefore provides the claimant with an initial compensatory award of £16,903.82. From that figure, I deduct a payment that he received in lieu of notice of £2,962.80. That provides a figure of £13,941.02.

43. From that figure, I deduct 75% in accordance with the principles in Polkey, which provides a figure of £3,485.25.

44. I increase that sum by 25% for failure to comply with the ACAS Code of Practice (which is £871.31).

45. This provides a total figure for the compensatory award of £4,356.56 gross.

46. I therefore order that the respondent shall pay to the claimant compensation for unfair dismissal of £6,325.31 gross.

Employment Judge **Apted**

Date: 19 April 2021