EMPLOYMENT TRIBUNALS

Claimant:
Ms M-F Matei

Respondent:
DHL Services Ltd (sued as DHL Ltd)

Heard at: **Leeds (by video link)** **On: Friday 06 August 2021**

Before: **Employment Judge R S Drake**

Representation
Claimant: In Person (not represented)
Respondent: Mr R Dunn (of Counsel)

RESERVED JUDGEMENT

1 The title of the Respondents is amended so as to describe them as DHL Services Ltd.

2 The Claimant's complaint of unfair dismissal fails and is dismissed because the Respondents have established that they dismissed the Claimant for a reason relating to conduct and the Tribunal is satisfied they acted reasonably in all the circumstances.

3 Because this decision was not given extempore and required detailed deliberation of three witness statements, nearly 300 pages of documents, CCTV footage and consideration of the notes of oral evidence, it was reserved and is now promulgated with full reasons as set out below.

4 Because of the above Judgments, the need for a Remedies Hearing is obviated and avoided.

REASONS

Introduction

First, I record my gratitude to the parties for their effective and in some cases disarmingly candid presentation of their respective cases, helpful and co-operative advocacy, and also extremely helpful preparation of the presentation of documentary evidence and the offering of final oral and written submissions.

Second, though I was able to read the three hundred pages of documents on the day of hearing, after hearing all the oral evidence, cross-examination, and submissions, I recognised the need to read the documents with more focus in order to reach my conclusion on the merits of the substantive case. Therefore, I reserved the giving of full decision and reasons.

Issues and Respective Arguments

I determined (with the assistance of the parties, and thus largely by agreement), that the issues to be examined and respective cases were those identified below: -

1 Unfair Dismissal

1.1 The parties agree that the Claimant was dismissed with immediate effect on 12 January 2021;

1.2 Was the Claimant dismissed for one of the potentially fair reasons set out in Section 98(1) of the Employment Rights Act 1996 ("ERA")? If so, could the Respondents establish what was the reason (or, if more than one, the principal reason) for dismissal? The Respondent asserts their reason was principally a reason relating to conduct under Section 98(2)(b) ERA 1996 and/or (by implication) some other substantial reason under Section 98(1)(b) ERA being consequent loss of trust and confidence;

1.3 If a/the reason for the Claimant's dismissal was related to conduct as alleged:

1.3.1 Can the Respondents show - (i) they genuinely believed the Claimant was guilty of misconduct, (in this case they argue gross misconduct) - (ii) did they have reasonable grounds for such belief and - (iii) had they identified such grounds after undertaking as much investigation as would be conducted by another reasonable employer? The Claimant says that she

had done nothing amounting to what the Respondents believed to be acts of deceit and/or dishonesty, that she was treated unfairly in investigation meetings by being asked questions so as to elicit only the answers the Respondents wished to hear, that it was unfair to rely upon CCTV evidence, that she had a clean record as at the time of the events complained of, and that she faced extenuating circumstances relating to her domestic needs in meeting to return temporarily to Romania to be with her children. In terms she argued that the decision to dismiss was excessive.

1.3.2 In short, was the decision to dismiss arrived at in accordance with the above three-part test as set out by the EAT in **BHS v Burchell [1978] IRLR 379**;

1.3.3 If so, did the Respondents act fairly and reasonably in dismissing the Claimant on grounds as pleaded of gross misconduct (for the purposes of section 98(4) ERA 1996), or put more simply, was it reasonable in all the circumstances for the Respondents to dismiss the Claimant rather than impose a lesser sanction?

1.3.4 If not dismissed for misconduct, can the Claimant establish that she was dismissed for the sole purpose of achieving cost savings?

2 Remedy

If the Tribunal were satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason relating to conduct, but is satisfied the dismissal was nonetheless substantively and/or procedurally unfair, it would have to determine whether the Claimant would have been dismissed fairly in any event if a fair procedure had been adopted, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119 and 123 ERA. This was not a live issue once I reached my conclusions as set out below, but I seek to make it clear that I started my consideration of this case overall with an awareness that this may become a live issue.

The Law

3 The relevant law applicable to this case (I have not quoted each part of the section/subsections not relevant to this case) is set out in Section 98 of the Employment Rights Act 1996 (“ERA”) which provides: -

" - (1) In determining … whether dismissal of an employee is fair or unfair it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal - and -

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee…."

" – (2) A reason falls within this subsection if it -

(a) ……..
(b) It relates to conduct … "

4 If the Respondent satisfies the test set out in Section 98(1) and (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

"Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

(a) 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

(b) Shall be determined in accordance with equity and the substantial merits of the case."

5 The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office** and **HSBC Bank – v- Madden [2000]**) which is to consider whether the employer's actions, including its decision to dismiss, fell within the band of responses which a reasonable employer could adopt in the same circumstances, but not substituting the Tribunal's view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. literally just one other) reasonable employer to act.

Findings of Facts and Reasons

6. I made the following findings of fact based upon evidence which I heard from the Claimant herself (who had been based at the Respondent's

premises at Scunthorpe) and the Respondents' witnesses Mr M McIntyre (Warehouse Shift Manager at Scunthorpe and also acting as dismissing officer in this case), and lastly Ms H Millward (Resource Planning Manager at Scunthorpe who heard the Claimant's appeal). Each was thoroughly cross-examined in that where the Claimant had difficulty framing her questions, I framed them for her in the interest of ensuring equality of arms, and I raised the questions she needed to ask in order to test the oral testimony with which she took issue. I commend both sides for giving candid and frank evidence even where they perceived that in parts it might damage their own positions. I also considered not only the written statements of the above-mentioned witnesses, but also, when attention was drawn to it, the contents of a combined documents bundle comprising over 300 pages. Further, I considered the content of CCTV footage of the events in question depicting the actions of the Claimant which she eventually admitted. Lastly, time was allowed at the conclusion of oral testimony to enable both sides to express Final Submissions which were also considered in detail.

7. Using abbreviations of "C" and "R" for Claimant and Respondent respectively and referring to witnesses by their initials (**MM**, and **HM**) and the documents in bold type page numbers in the Evidence Bundle (**P1 to P287**) or paragraphs in witness statements, the findings of fact relevant to the Tribunal's decision are as follows: -

    7.1 C was employed by R at their location in Scunthorpe and at the time of the termination of her employment by them had been engaged by them (following a brief period of her being supplied by an Agency) since 30 September 2018 (**P58–65 and ET1)**. At the time of dismissal, she held the post of Warehouse Operative, working on the Respondent's contract with a high street supermarket chain. Events occurred in December 2020 which gave rise to R calling C to Investigative Meetings (conducted by a Mr J Butler, a First Line Manager) on 15 and 16 December 2020, a disciplinary meeting (conducted by MM) on 21 December 2020. C was given a concise description of the reasons for the meetings in letters dated 12 and 17 December 2020 respectively (**P132-133 – and – P149-150**) and in each advised of her right to be accompanied.

    7.2 There are few conflicts of evidence in the considerable volume of documentary (300+ pages) and oral evidence before me. I find the accounts of what happened, and the chronology of events described by R in particular to be persuasive and cogent. Furthermore, I find the accounts by MM and HM of what they had in mind and the sincerity of their attention to what was said to them by C to be convincing to the required standard of proof, which is on balance of probabilities. I do not find impeachable as to credibility

any aspect of their testimony, or anything said by C in issue with them, who took considerable issue with their interpretation of events. C argues that there was investigative error by R relying on CCTV footage, and that the investigations of her actions were based on unsupported supposition, that in any event the outcome did not take account of her clean record as at the time of the events in question, and little or no weight was attached to her pleaded mitigation related to her domestic situation during Covid restrictions of having difficulty maintaining contact with her family in her native land, Romania.

7.3 The chronology of main events is as follows, with my further findings about them duly added: -

7.3.1 C started employment with R on 30 September 2018 as a warehouse operative having initially commenced as an agency worker; her terms are recorded in a contract (**PP58-65**) and associated Policy Documents (**PP33-57 and 66-91**) which include a Disciplinary Procedure (**PP84-91**);

7.3.2 This latter Procedure includes a statement (**P87**) that “Employees may be summarily dismissed i.e. without notice” for certain forms of conduct which include “deliberate or serious breaches of conduct standards or rules and procedures”, “any action which can be construed as an intention to deceive the business”, and “ conduct which causes or has the potential to cause unacceptable loss damage or injury", deliberate or serious breaches of working time rules and regulations enforce from time to time” – the Claimant accepted before me today that she was aware of these statements and that they applied to her as rules of working behaviour;

7.3.3 C’s role was to pick goods in a warehouse in order to fulfil customer orders. She had a headset through which she received communication which told her from where in the warehouse to pick goods and also the quantity. She was required to attend the location of those goods and then using the voice recognition system provided in the headset to confirm she was at that location. The communication system then told her how many goods she was to pick, and then she had to pick and immediately confirm through the headset that this process was completed – described as “the Pick Confirmation” at the pick location; it was

crucial to the process that when this confirmation was given, new instructions for the next pick were given as the pic confirmation was logged automatically on the respondents systems to show what pics had been done, by whom, and that thus stock integrity was maintained and records kept appropriately. Each pick was expected to last no more than a few minutes; are placed great reliance upon the accuracy of information thus logged in by employees such as see so as to ensure that they could fulfil customer requirements appropriately and also maintain stock record integrity, otherwise their relationship with their commercial customer and with the customers' end consumer customers could be prejudiced to a serious degree; the current in evidence before me confirmed she was aware of this basic fact of commercial life governing the significance of her complying with instructions to confirm picking instructions at the point of picking up a time of picking rather than elsewhere;

7.3.4 Both parties accepted that C was entitled to take lunch breaks and up during shifts she was permitted to take concessionary breaks of a few minutes to take refreshment or relief, but that this should not affect her duty to record fulfilment of picking instructions at the point in time and at the place where they were fulfilled;

7.3.5 C was regarded as a competent, trained, and experienced warehouse operative, who should be mindful of not doing anything which might put herself or customers (or any other third parties) at potential risk of commercial;

7.3.6 R suspected that on 7,9 and 10 December 2020 C had been taking extended drinks breaks over the allotted time li it of 10 minutes and had done so on a number of occasions. It was suspected that she had attempted to conceal her actions in that despite picking goods at their allotted locations, instead of providing contemporaneous confirmation at the pick location as required, she only provided the pick confirmation sometime later part way through the extended break when she was not at the pick location. They suspected that this created a false impression that she had finished her break and was again working on the warehouse floor when in fact she was not; all

suspected that this constituted two issues, the first being wasting of company time by extending breaks, and the second being of dishonesty delaying pick confirmation in order to deceive;

7.3.7 R called an Investigative Meeting on 11, 15 and 16 December 2020 (notes agreed by C appear at **PP125, 134, 142**) which was conducted by Mr J. Butler her Line Manager. He permitted C to be accompanied by her staff representative Mr Jackson. Mr Butler concluded that the matter should proceed to a Disciplinary Hearing to be undertaken by MM in accordance with C's contract;

7.3.8 A Disciplinary Hearing was undertaken by MM on 21 December 2020, and again C was accompanied by a staff representative; (Agreed notes appear at **PP 154 – 167**) - MM put to C the allegations about her conduct and their effect, and she was invited to consider the evidence including CCTV footage (which I have also seen) showing that at the times she had confirmed a number of picks she was not at the pick locations, but was on extended break and had access to her headset to be able to give confirmation of picks she had not made at that precise time but much earlier at the locations to which she had been directed;

7.3.9 C disagreed with what the evidence appeared to indicate to MM and otherwise gave no explanation at first; she started by saying she had no comment but then later in the course of the conversation changed her testimony to say that she accepted that she had communicated pick confirmations which were invalid as they had not been communicated at the place or at the time when they should have been, but had been expressed during extended drink breaks; today in her evidence to me, C has accepted that what she said to MM was not truthful at the time;

7.3.10 C has agreed the contents of the notes of the investigative and the disciplinary hearings and does not today challenge their accuracy; consequently I can assess them as they stand; similarly for the same reasons, I can accept the accuracy all the notes of the previous investigative hearing meetings; it follows that I can conclude that C has accepted at all relevant times that she had given pick confirmations at times and at a

place when she was not permitted to do so under company procedures of which she admitted she was aware, and that by doing so she had deceived R and potentially corrupted their records;

7.3.11 Though the disciplinary hearing conducted by MM ended on 21 December 2020, he took considerable care and time to consider the situation; only on 12 January 2021 did he reach a conclusion which he set out in a letter of the same date (**PP168-171**) confirming that he concluded C had wasted company time and that she had been dishonest in attempting to deceive R by covertly covering up time gaps by confirming picks while she was on extended drink breaks, and that thus she was guilty of gross misconduct as defined by R's disciplinary procedure; he concluded after taking account of mitigation that the appropriate sanction was to dismiss without notice.

7.3.12 Having seen and heard MM's testimony to me today, I am satisfied that his evidence is honest and sincere and that indeed he did not rush to judgement, but that he applied his mind carefully to the evidence before him and was empathetic to C and thus took account of the mitigation she had offered about concerns for her children's welfare which she prayed in aid. I am entirely satisfied that MM reached his conclusion based on the evidence before him which was eventually not contested by C; though she had tried initially to minimise her responsibility for what she had done;

7.3.13 MM concluded there was nothing left to investigate before he reached his conclusion, both as to facts and as to outcome;

7.3.14 C appealed MM's decision the hearing of which came before HM who had not had any prior involvement in the matter, and thus whose engagement as appeal officer was unimpeachable;

7.3.15 HM conducted the hearing of the appeal as if it was a hearing from fresh rather than a simple review and thus her hearing was most complete and capable of correcting any earlier procedural error if there had been any (agreed notes and of the outcome appear at **PP 204-210**); I conclude though that there was no procedural or substantive error, HM concluded on hearing everything C wished to put before her that MM's decision was

sound both procedurally and substantively, so she therefore confirmed the dismissal and thus dismissed the appeal;

7.3.16 On the evidence before me I find that C did not raise any novel issues at the appeal or offer any further mitigation which might tip the balance of MM's decision to the extent that HM felt she should not change it;

7.3.17 I am satisfied, having seen and heard C today, that she is an intelligent person who gave her evidence calmly and cogently to me today, but that she was clearly aware that what she stood accused of amounted to gross misconduct; yet though she had initially tried to minimise what she did or not answer in before MM, ultimately, she had to concede that what she stood accused of was a sound accusation and did amount to serious misconduct;

Conclusions on Application of Law to Facts

8 I find that R has shown that C was dismissed because of a reason relating to conduct (which is the reason they had in mind for dismissal and that they also had in mind resultant loss of trust and confidence of their commercial client because they could discern no acceptance of the seriousness of the situation C had created by doing what she did. Rather, I find that all R could reasonably conclude was that C was fully aware that by doing what she did in the way that she did it on several occasions and knowingly, she was deceiving stock control systems and thus jeopardising the accuracy of stock control information, and therefore in turn the relationship with its commercial client.

9 On the evidence and findings of fact, I do not find that the reasons alleged by C for her dismissal (i.e., cost saving) have any merits whatsoever.

10 I take the law as described in paras 3 - 5 above as my guidance and my further findings in this respect are as follows: -

10.1 MM as dismissing officer reached his conclusion after as full an investigation as another reasonable employer would carry out with no material gaps in the evidence he could gather; he was entitled to conclude that C's account need not be investigated further as there was no material point to be re-investigated so far as would be so considered by another reasonable employer – ultimately but after prevarication and obfuscation which became aggravating factors, C admitted what she had done and when she did it;

10.2 MM undertook a careful and indeed textbook process of Disciplinary hearing ensuring C knew what he had to face and yet still had ample opportunity to offer his side of the case as well as arguments as to why his case should be preferred;

10.3 MM preferred the CCTV verification of the apparent explanation for her conduct to that offered initially by C, but which in the discussion she later accepted, and it was open to him to do so since rarely if ever is direct evidence found and so a reasonable employer has to base a balanced case as best it can on seeking evidence either way which upsets the balance one way or the other and in this case against C. When faced with the argument that the events evidenced by CCTV speak for themselves, he had to take into account that despite initial prevarication, C accepted what was alleged against her (accessing/using her headset at the precise times she confirmed picks and did so in the rest area) as to what she did and when, and what such actions constituted in the context of C having accepted what might constitute gross misconduct when entering into her contract. Thus, MM was justifiably able to draw a conclusion I would expect of another reasonable employer. I find the **Burchell** test described in the totality of para 1.3 above to be well and truly satisfied;

10.4 C argues that she faced threats by being told she may face the risk of dismissal if her account of what she did was deemed unsatisfactory. However, I do not find that telling an employee that if a finding is made against her, this may lead to her dismissal to be any evidence whatsoever of prejudgment as to outcome. I find that it would have been an unreasonable employer who would not make potential consequences clear so as to enable a person such as this C to know what jeopardy she might face. I reject C's arguments in this respect completely as I cannot find any prejudged view or thinking on the part of either MM or HM, and no rush to judgment on their part such as to impeach the soundness of their findings and their actions.

10.5 I find that the conclusion R reached to dismiss falls within a band of reasonable responses the Tribunal would expect from another reasonable employer in the same circumstances as a finding of gross misconduct does not preclude a lesser outcome, but it certainly gives a sound foundation for an outcome of dismissal. I reach this finding taking account of the case law guidance described in para 5 above.

10.6 I find that the appeal was conducted with objectively model procedure and attitude of mind as displayed by both MM and HM.

10.7 I find that even if C didn't expressly think that she exposed R to risk of prejudice to its customer relations, it is likely on a balance of probabilities that as an intelligent warehouse operative duly trained in her tasks, she should or ought to have known she had done so, and that this shows that her conduct was gross misconduct given the nature of risk in question.

10.8 I find that here were no material errors in approach or conduct by R and that C's criticism of them, beyond disagreeing with their point of view and seeking to test their witness testimony today, this does not amount to any basis for finding that they have not acted reasonably in all the circumstances for the purposes of S98(4) ERA as described in para 5 above.

10.9 I find that "gross misconduct" according to all the decided authorities is the only legally valid and fair basis for terminating someone's contract without notice and in this respect all the authorities require that "gross" means the most serious form measured not simply by reference to intent and mental state of the perpetrator of the misconduct, but also in cases of awareness of risk, to the measure of the consequences as seen by the and any objective victim.

10.10 A person may be justifiably and fairly dismissed for gross misconduct even if there is lack of intent, but where the awareness of consequences is serious. In short, I can find that the reason thus relied upon in the disciplinary hearing, and confirmed on appeal as a basis for dismissal, was a sufficient reason on the facts of this case.

10.11 R has shown to my satisfaction that it had conducted a fair and reasonable procedure in leading up to and reaching a conclusion to dismiss. This was manifestly fair, though I recognise C's sincerity in his challenge of the witnesses both at the time and today as he was entitled to test them in formal evidence giving;

11 A significant test, as in all unfair dismissal cases, is as set out in **Iceland** and is based on what **an** other reasonable employer might do (my emphasis added) not what it might not do, nor what many or all employers would do. The outcome of dismissal was one which in this case and in this Tribunal's finding potentially fell within the bounds of what "an" other reasonable employer would do in the same circumstances. The dismissal was therefore fair.

12 I further concluded that C was acting genuinely and in mistaken belief (she was not significantly represented in this case) that she could challenge the witnesses' testimony and beat it today because she based his thinking on an erroneous impression as to the weight of evidence which an employer can rely on in a case such as this.

13 Thus, I concluded that it would not be appropriate in this case to find that C's pursuit of his claim was unreasonable or doomed to fail as such, since a test of testimony was useful, valuable and in this case decisive when coupled with the evidence of how much and how well R investigated and then dealt with the matter procedurally.

14 Further, I find that R has established that objectively C's actions were gross misconduct and amounted to breach of contract to the extent that not giving her notice was appropriate and lawful.

Employment Judge R S Drake

Date: 06 August 2021