EMPLOYMENT TRIBUNALS

Claimant: **Mr Peter Smallman**

Respondent: **HHGL Ltd t/a Homebase**

By CVP on: **1-3 September 2021**

Before: **Employment Judge Martin**

Representation
Claimant: **In person**
Respondent: **Mr Edwards - Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claims are dismissed

RESERVED REASONS

1. By a claim form presented on 2 July 2019 the Claimant brought claims of unfair dismissal, breach of contract and discrimination on the protected characteristic of religion or belief. He withdrew his claim of discrimination at a preliminary hearing on 4 January 2021 and this part of his claim was dismissed.

2. I had before me a bundle from the Respondent comprising 262 pages and a bundle from the Claimant comprising 725 pages. I also had a witness statement from the Claimant and on behalf of the Respondent from Mr David Wells who at the relevant times was and Area Manager and Regional Manager for the Southeast region. He is now Divisional Loss Manager.

3. The issues that are to be determined in this hearing were agreed as:

    a. Was the instruction from the Respondent to the Claimant to work from the Broadstairs store rather than the Folkestone store and to not attend the Folkestone store a reasonable instruction in accordance with his contract of employment?

    b. If yes, did the Respondent have a section 98 Employment Rights Act 1996 fair reason for the dismissal (conduct) for serious misconduct on the

grounds of failing to follow such reasonable instruction?

c. If yes, did the Respondent follow a fair and reasonable procedure in respect of the transfer of the Claimant's employment to the Broadstairs store and in respect of his dismissal?

d. If the dismissal is found to be procedurally unfair would the Claimant have been dismissed in any event?

e. If the dismissal is found to be unfair, did the Claimant contribute to his dismissal be refusing to transfer stores and to engage with the Respondent in discussing this proposal and in attending the Folkestone store in breach of instruction?

f. With regard to the Claimant's claim for unpaid wages/breach of contract, the Claimant appears to rely upon an oral agreement reached in 2017 or 2018 that he would work a 39-hour week and seeks compensation/damages despite the fact that he has consistently worked a 20 hours each week since about December 2017.

Findings of fact and conclusions

4. These reasons set out the facts which are relevant to the issues, and which are necessary to explain my decision. Not all evidence heard is repeated here, however all evidence was considered. During the hearing I explained to the Claimant that the only matters for me to consider were the issues that had previously been agreed and that other matters such as harassment and breach of trust and confidence by the Respondent were not relevant to matters I was to determine.

5. The Claimant was employed on 19 December 2016 as a Team Member. His employment was terminated with notice by the Respondent on 30 May 2019.

The unfair dismissal claim

6. Where an employee has been dismissed, an employer must show one of the prescribed reasons for dismissal contained in sections 98(1) and (2). It is trite law that the reason for dismissal is a set of facts known to, or beliefs held by, an employer at the time of dismissal, which causes that employer to dismiss the employee. The reason for dismissal does not have to be correctly labelled at the time of dismissal and the employer can rely upon different reasons before an employment tribunal (**Abernethy –v- Mott, Hay and Anderson** [1974] IRLR 213, CA).

7. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

"the determination of the question whether the dismissal is 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"

8. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not

substitute its own view for that of the employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA). The Tribunal's task is to objectively apply the standard of a reasonable employer.

9. Here, the potentially fair reason for dismissal given by the Respondent is conduct based on the Claimant's failure to follow a reasonable management instruction. The Claimant's case is that this is not the real reason for dismissal and the true reason is because of grievances he had raised previously and a disciplinary process against him which was ultimately not taken forward.

10. The Claimant had been employed by the Respondent for a relatively short period of time. In that time, the Claimant had raised several grievances all of which had been considered by the Respondent. While investigating one of his grievances, staff who worked with the Claimant made complaints about his behaviour. This in turn led to a disciplinary investigation which recommended the allegations should be put forward to a disciplinary hearing. A disciplinary chair was appointed, and a letter was sent to the Claimant. The Claimant was suspended pending the disciplinary hearing.

11. After further consideration, the Respondent decided not to proceed with the disciplinary hearing and instead to move the Claimant to the Broadstairs store as it believed it was entitled to do under the Claimant's contract of employment. The Claimant refused and instead attended the Folkestone store.

12. The Claimant was sent an offer of employment on 12 December 2016 which enclosed his contract of employment. He accepts that this is the contract he worked under even though it was not signed. It was common ground that his normal place of work was at the Folkestone store. The Claimant's contract of employment (as relevant to the unfair dismissal claim) provides:

    "3.0 Place of Work

    You have been selected to work in NAME store (your normal place of work). We sometimes need to review our demand for colleagues and as a result, where we have reasonable grounds for doing so, we may change your normal place of work and transfer you to an alternative store in the area or within reasonable traveling distance of your home. If this is the case we will let you know, giving you reasonable advance notice."

13. The Claimant said that the instruction to move to the Broadstairs store was not a reasonable instruction. He takes issue with the first disciplinary process being abandoned and for some reason wanted it to proceed. He does not accept that his working relationship with local management and colleagues had broken down.

14. In relation to the working relationship the Claimant had with local management and other staff at the Folkestone store, I find that the relationship had fundamentally broken down. My reasons for so finding are that the Claimant had made numerous very serious allegations against local management and the CEO. He alleged that the Respondent was involved in hypnosis and neurolinguistic programming which would have a profound effect on staff both at home and at work. He gave no basis for his belief. He reported this to the Health and Safety Executive and the local council. They took no action. He suggested that a local manager, MC adjusted taps in the toilets (so that very little water came out) to be nasty to employees despite them sharing these facilities with the public. During an investigation into his grievances, it was reported by a colleague that the Claimant had told him that he wanted his local manager to die a slow and painful death.

15. As already said, the Respondent investigated these matters which formed part of grievances raised by the Claimant in 2017 and in 2018. The Claimant says they were not fully investigated and even though a decision had been made about the allegations raised, he continued to pursue his complaints. They were raised as part of the disciplinary hearing which led to his dismissal. As far as the Respondent was concerned, they were investigated and an outcome had been given (and appealed) and that these matters were closed.

16. The Respondent submitted that it had several different options available to it when the first disciplinary proceedings against the Claimant were contemplated. It could spend a lot of time investigating and conducting the disciplinary process against the Claimant and maybe other staff as well which would not help resolve the unrest at the Folkestone store and would influence the efficiency of the store. It was submitted that the Claimant was not prepared to accept any resolution other than his complete vindication and the dismissal of other staff. I accept this submission and find that it was a reasonable response for the Respondent to abandon the disciplinary process and to move the Claimant to another place of work. This was as submitted by the Respondent, a pragmatic way of resolving the issues. The Claimant had been described as trustworthy and from this I take it that his work was of a good standard. I find that the Respondent could have continued with the disciplinary process which may have resulted in the Claimant being dismissed, but it chose not to do so.

17. The Respondent tried to get agreement from the Claimant to move to Broadstairs store, but this was not successful. It listened to the Claimant's concerns about the added travel time and travel expenses. It offered to change the Claimant's rota from working for 20 hour per week over four days to working 20 hours per week working over five days. The Claimant was asked to let the Respondent know whether he wanted to do this. The Respondent also agreed to cover his additional travel expanses and to reduce his working day by 30 minutes for a period of 6 months. The Claimant did not respond to the suggestion to change to working a three-day week and therefore the Respondent said he would continue to work over four days.

18. I find that the communications from the Respondent were very clear and set out the reasons for the move to Broadstairs fully. The letter of 26 April 2019 states the Respondent's reasoning for the move which include his relationship with his line manager, his relationship with local managers, his relationship with other staff, his reopening of grievances. The letter goes on to say:

    "***This leaves us in the position that, at the moment, there are outstanding allegations concerning your behaviour and also clearly outstanding issues on your side notwithstanding the outcome of your grievance appeal (as evidenced by the 13 points set out in your email dated 4 April 2019) regarding your position. We are highly concerned that trying to unpick all of this and restore relations to a professional level whereby all parties can work together is simply not achievable.***

    We would, therefore, like to discuss with you one solution we are considering which is. in accordance with provisions in your contract of employment, to transfer your employment to the Broadstairs store. You would work in the same role and we would discuss with you arrangements around travelling time and expenses to make this workable.

    It Is our proposal that, in moving forwards, this would both draw a line under the allegations regarding you and also your current Issues and concerns. Of course. we would like to take into account your views when considering this as a possible outcome so invite you to a meeting on Thursday 2nd May 2019 at Broadstairs Store at 10.30am with Suzanne Britter Head of HR to discuss this further. After this meeting, we will make a decision as to whether this is a viable solution"

19. On 10 May 2019 in response to an email from the Claimant he was asked to confirm what working pattern he wanted in Broadstairs. The Respondent said:

    "As a result of this decision, I confirm that we will not proceed with your disciplinary hearing, nor investigate your outstanding grievances and therefore this concludes both processes. In doing so this does not apportion blame or determine right or wrong as it is already clear the relationships with the personnel in Folkestone store are untenable.

    This outcome draws a line in the sand to enable us to move toward in a constructive way".

20. On 10 May 2019 following other communications from the Claimant the Respondent sent the following email to the Claimant.

    "In response to your email, as previously stated in my earlier email today and in my outcome letter my decision is final and as such I am not prepared to respond to any further comments or complaints regarding this. I would also like to confirm that this is an outcome decision, and not an offer.

    It is part of your contractual terms of employment that where we have reasonable grounds for doing so, we may change your normal place of work and transfer you to an alternative store. I believe this is a reasonable solution to the circumstances we find ourselves and ensures your continued employment with the business. As such I have transferred your contracted place of work to Broadstairs store.

    As you haven't confirmed which of the 2 options of working patterns are most suitable then I will transfer you on your current contractual horns and working pattern and expect you to return to work at Broadstairs store week commencing Monday 13th May 2019. This will make your next shift commence at 9 am on Tuesday 14th May 2019. Please report to Simon Woodhall, Store Manager Broadstairs on your arrival – and he will be able to give you your new employment contract, and introduce you to the team."

21. Another email was sent to the Claimant on 13 May 2019:

    "Dear Peter

    I am writing to confirm your working arrangements for this week.

    In Kate's letter of 7th May 2019 she offered you two options regarding your return to work this week. Both options involve you working from the Broadstairs store for reasons that have been explained to you. We have considered this at length but do not see any other way of resolving the current situation. Attempts have been made to accommodate the points you made regarding a change of store, including reduction of hours worked, changes to your weekly working pattern and payment of additional travel mileage. You have, however, indicated that you do not wish to work from Broadstairs and have said that you intend to attend work tomorrow at Folkestone unless we dismiss you.

    I would therefore like to take this opportunity to confirm the position and our instructions to you. We are not dismissing you. You will be expected to attend work at Broadstairs tomorrow at 9 am, Upon arrival, please ask for Simon Woodhall. Your hours of work will be reduced by 30 minutes per day (but you will still be paid for a 20 hour working week). Your finishing time will therefore be 1.30 pm. Arrangements will also be made to pay you in respect of the additional travel mileage. If instead, you prefer to opt for Option B (as per Kate's letter) do let us know by return and arrangements will be made to accommodate this.

    To be clear, you are not to attend Folkestone store as you are on the rota tomorrow

at Broadstairs rather than Folkestone. We hope it is not necessary but, should you attend Folkestone rather than Broadstairs store, we will have no option but to treat this as failure to comply with a reasonable instruction.

May I reiterate what Kate has already said to you, we hope that the transfer to Broadstairs will be a positive move for you and for Homebase."

22. The Claimant went to work at Folkestone on 14 May 2019 rather than Broadstairs. Although denied by the Claimant, the Respondent said that he had to be asked to leave the premises. This resulted in the Claimant being suspended and invited to a disciplinary hearing. The reason for his suspension and the disciplinary process being instigated was explained, namely his failure to follow a reasonable management instruction. Mr Wells was identified in the letter of suspension (17 May 2019) as the disciplinary chairperson. The disciplinary hearing was originally to take place on 21 May 2019 but was later rescheduled to 23 May 2019 as the Claimant said he had not received the original suspension letter. Again, the disciplinary chair person was identified as Mr Wells.

23. The Claimant was offered the right to be accompanied but chose not to have someone with him as he said there was no one he could trust. He was allowed to record the meeting and a transcript was in the bundle. This shows that 38 minutes into the disciplinary hearing he said that Mr Wells was not the correct person to hold it as he had been involved in a previous grievance. Mr Wells said that his involvement had been limited as the grievance investigation had been passed to someone else.

24. The Respondent submitted that Mr Wells was an appropriate person to consider this disciplinary matter as he had not been involved in the decision to move the Claimant to Broadstairs and he had an appreciation for the event happening prior to this which would mean that these historical issues would not have to be re-investigated.

25. I am satisfied that Mr Wells was suitable having not been involved in the previous decision to transfer the Claimant to Broadstairs and that he did not reach any conclusions on the grievance he was initially involved in. In any event even if he was not there was no evidence given that the Appeal officer (who has now left the Respondent and therefore did not give evidence) was not suitable. The Appeal against Mr Wells' decision to dismiss the Claimant with notice was not upheld. Therefore, if Mr Wells should not have conducted the disciplinary hearing, this was rectified by the appeal. In any event the Claimant did not object to Mr Wells conducting the hearing despite receiving at least two prior communications that he was the disciplinary chairperson. It was not until 38 minutes into the hearing that this was first raised. By this time the Claimant had put his case forward.

26. Mr Wells found that the contract of employment (as set out above) did give the Respondent the right to move the Claimant to Broadstairs. He found that there were clear instructions given to the Claimant which he chose to disregard. The consequences of disregarding the instruction were also made clear.

27. The Claimant said in his evidence that he attended the Folkestone store to work or to be disciplined for the first disciplinary process. For some reason the Claimant wanted the first disciplinary process to be resurrected.

28. I have found the reason for dismissal was for failing to follow a reasonable management instruction (conduct). I reject the Claimant's argument that the true reason was because of the previous matters which he had complained of and were for the reasons behind the first disciplinary process being initiated. If the Respondent had wanted to dismiss the Claimant, then it could have continued with

the first disciplinary process, which could have led to the Claimant's dismissal if the matters alleged against him were found to have happened. At that time the Respondent wanted to retain the Claimant as an employee working in Broadstairs. I find that the management instruction to move the Claimant to Broadstairs was reasonable given the breakdown in relations at the Folkestone store.

29. In terms of the Respondent's contractual right to move the Claimant, the Claimant submitted that the clause only allows the Respondent to move him to another store for operational reasons not for disciplinary reasons. I find the decision to move was for operational reasons as the Respondent requires a workforce that can work in harmony. Even if the transfer was not for operational reasons, I am satisfied that the contractual clause is sufficiently wide to allow the Respondent to move a member of staff to another store for a reasonable reason.

30. In all the circumstances I find the decision to dismiss the Claimant fair. Failure to follow a reasonable instruction is defined as both an act of misconduct and an act of gross misconduct in the Respondent's disciplinary procedure. I am satisfied that the reason for the instruction was the breakdown in relation at the Folkestone store and that the Respondent adopted a reasonable process to resolve the issues.

31. If for some reason I had found the decision to be unfair I would have reduced the compensation by 100% due to the Claimant's contributory fault.

Unpaid wages claim

32. The Claimant claims that there was a verbal agreement to increase his contractual hours from 20 hours per week to 39 hours per week. He can not say who specifically made this agreement with him. The Respondent's position is that for a period of about five months it asked staff to work 38 hours per week as overtime to cover the opening of a new store. The Claimant's payslips show the extra hours being paid as overtime. There was no written confirmation whether by contractual document or by email that the changes were contractual. The Claimant is correct that various managers referred to the extra hours as contractual, but I do not find this determinative of the issues. The Claimant continued working for the Respondent for a substantial period of time once the increase in hours was stopped.

33. The Claimant's contract provides:

"***2.0 Hours of Work***

Your hours of work will be 20 per week, these hours will be scheduled by the Company on a 5 days out of 7 days rota basis and will include weekends and Bank Holidays. The Company reserves the right to amend your working hours and any agreed rates to meet changes in operating requirements and you will be given reasonable notice of any such changes."

34. The Claimant submits that this clause does not permit the Respondent to reduce his hours of work. The Respondent submits that the right to amend working hours means it does have the contractual right to change the Claimant's hours in terms of number of hours worked per week (as opposed to start and finish times as the Claimant submitted).

35. I have considered this clause and the parties submission. My clear finding is that this clause does give the Respondent the right to amend the Claimant's working hours (ie number of hours worked per week) provided reasonable notice is given.

36. It is for the Claimant to prove a breach of contract. I find he has been unable to do so on the evidence before me. The payslips refer to the addional hours as overtime

and this was not questioned by the Claimant. Even if I had found differently and found that the Claimant was given the extra hours on a contractual basis, I would have found that the contractual term point 2.0 set out above, gives the Respondent the right to change hours on reasonable notice.

37. The Claimant's claims for unfair dismissal and unpaid wages is dismissed.

Employment Judge Martin

Date: 3 September 2021