



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Izzard

v

British Gas Services Limited

Heard at: Watford

On: 16 December 2021

Before: Employment Judge Forde

Appearances

For the Claimant: In person

For the Respondent: Miss Hoskin, counsel

JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed.
2. The claimant's claim for breach of contract in respect of notice fails.

REASONS

Introduction

1. By way of a claim form presented on 14 November 2020 the claimant complains of unfair dismissal in relation to his dismissal from his position as a Technical Engineer employed by the respondent, that dismissal taking place on 18 September 2020. The claimant was summarily dismissed for gross misconduct following a disciplinary investigation.
2. By way of its response, the respondent resists the claimant's complaints of unfair dismissal. It says that it conducted a fair and reasonable investigation of the allegations of misconduct which confronted the claimant and that it was entitled to dismiss the claimant at the conclusion of the disciplinary procedure.

Issues

3. The issues to be determined by the tribunal were agreed at the outset of the hearing as follows:

- 3.1 What was the reason for dismissal? The respondent says that the reason was conduct. The claimant says that the respondent was planning a “fire and hire” scheme and he was fired with no evidence of the reason. He says that the main reason he was sacked was a Facebook post asking for advice on self-employment.
- 3.2 Did the respondent have a reasonable belief the claimant had committed misconduct?
- 3.3 If so, did the respondent have reasonable grounds for that belief following a reasonable investigation?
- 3.4 Was the dismissal procedurally fair?
- 3.5 Was the decision to dismiss within the range of reasonable responses of a reasonable employer?

Remedy

4. If the dismissal was procedurally unfair, what was the chance of the claimant being fairly dismissed if a fair procedure had been followed?
5. Should there be any reduction for a failure to follow the Acas Code?
6. Did the claimant contribute to the dismissal and, if so, what reduction should be made to any basic and/or compensatory award?

Evidence

7. The claimant, Mr Izzard, was employed by the respondent as a Technical Engineer until his dismissal without notice on 8 September 2020.
8. The claimant claims that his dismissal was unfair within s.98 of the Employment Rights Act 1996. The claimant also claims that the respondent breached his contract of employment by failing to give him the required notice of termination of his employment.
9. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct following an investigation into various aspects into the way in which the claimant conducted his affairs within the confines of the claimant’s work policies in so far as the procurement of equipment and supplies are germane to the claimant’s position as a technical engineer.
10. Following an investigation, the respondent determined that the claimant had not followed the respondent’s rules and procedures in so far as the ordering of equipment was concerned such that the respondent believed that had procured stock and goods in quantities in excess of what he required in order to do his job.
11. The evidence before the tribunal included witness statements from the claimant and from Ms Winchester, the dismissing officer. There was a central

bundle of documents to which the parties and the tribunal could refer during the course of the hearing.

12. The respondent's witness gave evidence first. In this case, it was Ms Winchester. At the outset of the hearing and in correspondence with the tribunal, the claimant had raised his concern that he had expected and had intended to question a number of the respondent's employees. I explained to the claimant that it was for the respondent to justify the dismissal and therefore it was for the respondent to call the witnesses it felt necessary to justify its position.
13. Ms Winchester explained that her first involvement with the case was when she was asked to chair the disciplinary panel that ultimately dismissed the Ms Winchester explained that she was a work level 7 manager within the respondent and had substantial experience of conducting disciplinary matters.
14. From her reading of the information pack provided to her prior to the disciplinary meeting that she held with the claimant she was able to see that the claimant was employed as a technical engineer and that the respondent issues each engineer with a full kit of tools at the start of their employment in respect of which they are responsible for maintaining and replenishing, a point is reinforced in the claimant's contract of employment. It was not a matter of dispute that engineers such as the claimant place orders through a central system for stock themselves.
15. Ms Winchester determined that there had been a clear increase in the volume of items that the claimant was ordering and this started in November 2019 when he was ordering between roughly £1,000 to £2,500 rising to to as high as £5,000 of stock each month. This was much higher than the claimant's previous stock orders and significantly higher than stock orders for four other technical engineers combined. Tellingly, Ms Winchester was able to see that the claimant appeared to be ordering excessive volumes of the same items at once. She could also see that the claimant had been ordering tools which were not necessary for his role as an engineer and could see that following an audit of the claimant's van in May 2020 only £2,738 worth of stock could be accounted for out of a total of £6,490 ordered. In his responses he provided to the disciplinary investigation, the claimant was unable to provide the investigator with a clear answer as to why or where the £3,752 worth of stock had gone missing.
16. Having considered that a full and proper investigation had taken place and she was prepared to conduct the disciplinary investigation.
17. A letter was sent to the claimant on 10 July 2020 inviting him to a disciplinary hearing on 23 July. At that hearing, the claimant faced allegations that he had ordered an excessive volume of stock, that consumables and tool of approximately £4,000 were not accounted for in breach of the respondent's Rules of Conduct, specifically paragraph 3.3.5 of those Rules which states that Employees must not commit acts of theft or fraud against the employer and shall not "misappropriate the money or property of the employer.

18. Shortly before the claimant's disciplinary hearing, on 20 July, the claimant was signed off sick with stress and referred to Occupational Health who deemed that the claimant was fit to attend the disciplinary hearing. The hearing was rescheduled to take place on 14 August 2020.
19. On 3 August 2020, Ms Winchester received an email from an Area Customer Manager, Mr Philips, with a screen shot of a message that had been recently posted by the claimant on Facebook. In his message, the claimant appeared to be looking for advice for working for himself. The post stated, "Looks like I will be going it alone.. any advice?.." Ms Winchester stated that she did not think anything of the post other than thinking that the claimant was pre-empting the outcome of the disciplinary investigation. Specifically, Ms Winchester was at pains to make the point that she had reached no decision as to the outcome of the disciplinary investigation she was chairing. However, Ms Winchester did contact the respondent's Employee Relations Department for advice on what, if any action should be taken and in particular whether or not it would be appropriate to suspend the claimant. However, Employee Relations confirmed that the claimant should remain on sickness absence. No action was taken in relation to the Facebook post and it did not form any part of the evidence that was relied upon at the disciplinary hearing.
20. The disciplinary hearing took place as scheduled on 14 August 2020. The claimant was accompanied by his union representative. Mr Tudway presented the respondent's case. In short, the claimant's position was that it was his practice to build up stock for winter hence the level of ordering. The claimant made the point that he was part of a "hit squad" of engineers who undertook work when the respondent experienced high demand for the type of work and services that the claimant provided on its behalf. However, the evidence before Ms Winchester showed that the claimant had been excessively ordering stock up to March 2020 and after the winter had passed. Ms Winchester was not convinced by the claimant's explanation which simply did not make any sense to her.
21. The claimant went on to say that his ordering became a habit and that he never checked what he was doing. Ms Winchester found the claimant's approach to the respondent's property and his adherence to the company's procedures with regard to the order of property to be "extremely concerning". Tellingly, the claimant did not explain to Ms Winchester during the course of the disciplinary hearing why he was ordering such a high quantity of the same or similar items. Ms Winchester made the point that the level of stock the claimant was ordering would have taken him months to utilise. In fact, it was the case in his evidence before the tribunal that the claimant was similarly challenged with regards to his inability to provide an adequate explanation for this level of overordering. He explained that it was a mistake which he had reflected upon as a matter of hindsight and if it had been brought to his attention sooner he would have changed the way in which he was doing things.
22. In the way that he did before the tribunal, the claimant explained to Ms Winchester that his line manager, Clive Rubenstein, was aware of how much stock he was keeping in his garage and that he had obtained his permission

to do so contrary to the respondent's policy in respect to the ordering of stock. Further, the claimant provided explanations as to the whereabouts of stock which included the fact that some of the stock he had ordered had not been received, that he had returned items but he did not have the evidence to substantiate this, that a crane had broken in the respondent's distribution centre which had resulted in him receiving duplicate stock, and that he had used stock on some of his jobs but had not registered the stock usage, contrary to the respondent's requirement of engineers to do so. A clear breach of policy.

23. Additionally, the claimant alleged that there had been a burglary of his garage and that he had not kept a list of items stolen he was therefore unable to provide Ms Winchester with the reassurance that she needed that the claimant was not using the property ordered for other purposes such as working on his own account. In conclusion, Ms Winchester felt that the claimant's answers were very vague, that he was unable to provide a straight response to the majority of questions and that there was no clear explanation or tangible evidence from the claimant to explain why he had ordered so much stock and where the stock had gone, She then adjourned the meeting to conduct further investigations and to check what the claimant had asserted in his responses.
24. In respect of the incident at the distribution centre, Mandy Clarke of that centre confirmed that any re-orders made by engineers were cancelled so no engineers ended up with duplicate stock. Following a telephone call with the claimant's line manager, Clive Rubenstein, Mr Rubenstein vehemently denied having provided the claimant with authority or permission to store stock in his garage. In addition, the claimant's position with regard to loss of stock arising from the burglary at his garage was not as he had portrayed during the course of the meeting as he had reported to the police that scrap metal had been stolen as opposed to property belonging to the respondent. Specifically, Ms Winchester, having reviewed what the claimant provided to her in respect of this allegation, noted the following:

“40. I could see that Dave initially reported up to £1,000 of metal stolen, but he later changed this to £4,000 of tools (page 200), which I thought was strange. I also thought it was odd that the tools had been taken out of their boxes and the boxes had been left behind in his garage (page 200). There was also no mention in the report of Dave telling the police that the tools were not his own property.”
25. Having weighed the evidence, Ms Winchester reached the view that it was her belief that there was sufficient evidence to find that the claimant had committed theft in breach of Clause 3.3.5 of the respondent's rules. As theft amounted to gross misconduct under the respondent's Disciplinary Police, the claimant was summarily dismissed, but only after having weighed up whether the dismissal was was reasonable given the circumstances of the claimant's employment including his hitherto unblemished service..
26. The disciplinary hearing was convened on 17 December 2020 and it was explained to the claimant the reasoning and rationale behind his dismissal.

This was confirmed in an outcome letter sent to the claimant on 18 September 2020.

27. The claimant appealed against the decision to dismiss him on 25 September and it was passed to Mr Stuart Powell to deal with. It is understood that following an invite to the appeal hearing, the claimant withdrew his appeal before the hearing took place.
28. The claimant gave evidence. It was the claimant's position that he believed that his dismissal was premediated and not managed correctly. The claimant explained that in his view the investigation was not thorough and his focus in this regard was in relation to the respondent's level of organisation in respect of its items ordered and returned. Specifically, it was his view that the "manifests" in relation to orders returned should be kept and stored but they were not produced in evidence. It was his view that items overordered were returned but the respondent is unable to show that it conducted an investigation of the same and was able to prove his position which was that while he may have overordered goods they were returned.
29. Secondly, in terms of the comparison provided with other engineers, it was the claimant's position that those engineers used for this purpose were not comparable by reason of them doing different work.
30. Third, the claimant raised issues regarding his mental health in the course of the meeting with Ms Winchester which was not factored into the respondent's decision to dismiss.
31. Fourth, he felt that the respondent did not take into account his length of service and stated that it was his view that in light of the same and the errors that had occurred that dismissal was over the top and premeditated and that the correct decision would have been a written warning. Given what he said, I found that the claimant was tacitly admitting what had occurred with regards to his overordering was in contravention of the respondent's procedures.
32. Lastly, he explained to the tribunal in evidence that it was his view that the respondent was engaged in a fire and re-hire process whereby it was seeking to dismiss and then re-engage technical engineers such as the respondent on less favourable terms. However, there was no evidence of this before the tribunal and not something that could form part of my consideration.

Findings of fact

33. The relevant findings of fact are as follows.
34. The claimant was employed by the respondent from 17 November 2018 until his dismissal on 18 September 2020 when he was dismissed for reasons of gross misconduct by Ms Winchester on behalf of the respondent. The respondent is the UK's largest supplier of gas and is a large employer for the purposes of my consideration.

35. Prior to the issues that concerned the respondent's disciplinary investigation, the claimant enjoyed an issue free disciplinary record. In the period November 2019 to May 2020, the claimant's level of stock ordering had changed from what it had previously been during the preceding nine years of his employment such that the respondent embarked upon an investigation which in turn led to the disciplinary investigation and Ms Winchester's findings. I find that there was a clear increase in the volume of stock the claimant was ordering starting in November 2019 and that amount of stock was a large amount of stock much of it which remained unaccounted for following the respondent's disciplinary investigation. Accordingly, it was entirely appropriate for the respondent to investigate the claimant's conduct. Specifically, I find that over the three month period which was used as a comparator for the claimant's ordering patterns, that four engineers who undertook work similar or of the same as the claimant ordered 893 items at a total cost of £2,700. In the same period, the claimant ordered 1,971 items at a cost of £4,854. As I have said, I find that this rate of ordering was a striking increase of his previous rate of ordering from previous years.
36. Furthermore, I find that the investigation conducted by the respondent was thorough and procedurally fair. In particular, I note that the claimant confirmed in the meetings that the process was fair and that his trade union representative confirmed the same also. During the course of the disciplinary meeting conducted by Ms Winchester, the claimant had the opportunity to account for the stock ordered and that both Mr Tudway and Ms Winchester took the time during he course of the disciplinary meeting to follow up on matters raised by the claimant found the claimant's explanations to be wanting.
37. Tellingly, both during the course of the disciplinary hearing and in his evidence before the tribunal, the claimant was unable to explain the size change in ordering patterns over the four other engineers and I further find that the claimant was wholly responsible for the improper ordering of stock and use of the respondent's property and was unable to provide an adequate explanation. Accordingly, I find that the respondent conducted a fair and proper disciplinary investigation and was entitled to find that the claimant had not followed its policies and procedures in relation to the ordering of stock.

Relevant law and conclusions – unfair dismissal

38. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of a complaint to the tribunal under s,111. The employee must show that he was dismissed by the respondent under s.95, but in this case the respondent admits that it dismissed the claimant (within s.95(1)(a) of the 1996 Act) on 18 September 2020.
39. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within s.98. First, the employer must show that it had a potentially fair reason for dismissal within s.98(2). Second, 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.

40. In this case, it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of gross misconduct. Gross misconduct is a potentially fair reason for dismissal under s.98(2). The respondent has satisfied the requirements of s.98(2).
41. 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 reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.
42. In misconduct dismissals, there is well established guidance for tribunals on fairness within s.98(4) in the decisions of 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 s.98(4), the tribunal must decide whether the employer acted within the 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 own view for that of the reasonable employer.
43. I find that the respondent in the form of Ms Winchester, held a genuine belief that the claimant was guilty of misconduct. Ms Winchester's evidence was clear about why she dismissed the claimant, the dismissal letter was unequivocal, and although the claimant indicated that he intended to appeal, he withdrew his appeal.
44. The claimant contends that the respondent did not carry out a reasonable investigation but I have found that the respondent did conduct a reasonable investigation for the reasons I have stated above in this judgment. I find that Ms Winchester applied her mind to the issues at play and afforded the claimant every opportunity to provide an explanation for the clear concerns that the respondent had as regard his conduct. I conclude that the claimant failed to provide an adequate explanation as required and in the circumstances, the respondent was entirely justified in reaching the conclusions that it did and in dismissing the claimant. Accordingly, the claimant's claim of unfair dismissal fails. Furthermore, the decision to dismiss I find to have been reasonable in all of the circumstances.

Relevant law and conclusions – breach of contract

45. The claimant was dismissed without notice. He brings a breach of contract claim in respect of his entitlement to notice.
46. The respondent says it was entitled to dismiss him without notice for reason of the finding of gross misconduct. Given my findings in respect of the claimant's conduct and the respondent's findings in respect of that conduct, it follows that the claimant's claim of breach of contract fails and he is not entitled to notice pay. The respondent was entitled to find that the claimant had committed a series of acts which cumulatively amounted to a gross misconduct. Given this, the respondent was entitled to dismiss the claimant summarily. Accordingly, it follows that the claimant's complaint of breach of contract fails and is dismissed.

Employment Judge Forde

Date: 28 February 2022

Sent to the parties on: 1 March 2022

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For the Tribunal Office