



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr Kaneshwaran Sinniah

Sainsburys Supermarkets Limited

Heard at : London Central Employment Tribunal

On: 7 and 8 April 2022

Before: Employment Judge Coen

Representations

For the Claimant: In Person

For the Respondent: Mr N Bidnell-Edwards, of Counsel

JUDGMENT

The judgment of the Tribunal is that:

- 1) The correct Respondent for the purpose of these proceedings is Sainsburys Supermarkets Limited, being the Claimant's former employer;
- 2) The Claimant's claim for unfair dismissal is not well founded and the claim is accordingly dismissed;

- 3) The Claimant's claim for wrongful dismissal is not well founded and the claim is accordingly dismissed.

REASONS

Introduction

1. The Respondent is a major supermarket business, and a large employer, with stores across the United Kingdom.
2. The Claimant was employed by the Respondent as a trading assistant at one of its Central London stores from 10 July 2015 until he was summarily dismissed on the stated ground of gross misconduct on 21 November 2019.
3. By a claim form presented to the Tribunal on 10 March 2020 the Claimant complained of unfair dismissal and wrongful dismissal. Both claims were resisted by the Respondent.
4. The case came before me for a final hearing which was held remotely by CVP on 7 and 8 April 2022. The Claimant appeared in person and the Respondent was represented by Mr N. Bidnell-Edwards, Counsel.
5. The Claimant was assisted by a Tamil interpreter. An interpreter was present throughout the hearing, although, owing to illness, a different interpreter assisted on the second day of the hearing. At the hearing the Claimant said that he could not read or write English and had not read the Respondent's witness statements. Consequently, I adjourned the hearing on the morning of the first day to allow the interpreter time to translate the Respondent's witness statements for the Claimant. I also provided the Claimant with additional time to give his evidence and sought to assist him with putting questions to the Respondent's witnesses.
6. As a preliminary point, I heard, and granted, an application by the Respondent to change the name of the Respondent from Sainsburys plc to Sainsburys Supermarkets Limited, with the latter being the Claimant's employer and, therefore, the correct Respondent. I also considered whether there were any issues arising in connection with time limits and concluded that there were none.
7. I heard evidence over the course of the two days and at the end of the second day gave an oral decision dismissing both claims.
8. These reasons are supplied in writing pursuant to an oral request by the Claimant at the end of the hearing.

Procedure, Documents and Evidence Heard

9. At the hearing, I heard evidence from the Claimant. Evidence on behalf of the Respondent was provided by Mrs Victoria Lovells (a Store Manager for the Respondent (High Street Kensington branch)) and from Mr Simon Huggard (former Area Operations Manager for the Respondent). All the witnesses provided witness statements.

10. A bundle of documents was also put before the Tribunal providing detail about matters relating to the Claimant's case.

Factual Background

11. The Claimant was employed by the Respondent as a trading assistant in one of its Central London branches with effect from 10 July 2015.

12. Between 28 October 2019 and 10 November 2019, the Claimant took sick leave. He presented a sick note which stated that he had a toe infection. During the period from 28 Oct 2019 to 10 November 2019 the Claimant was in receipt of statutory sick pay and, from 28 October 2019 to 7 November 2019, company sick pay.

13. On 31 October 2019, the Claimant was observed by a member of staff of the Respondent (who was having a driving lesson in the area) working in the Mina Cash and Carry Store in East London (the "Mina Store"). He saw the Claimant enter the Mina Store and saw him working there. The member of staff in question informed management who arranged for staff to carry out two further visits to the Mina Store. On 6 November 2019 the Claimant was again seen working in the Mina Store by a member of staff of the Respondent who observed him for thirty minutes during which time he got stock from a delivery and put it on the shelves. The member of staff took a photograph. On 7 November 2019, the Claimant was seen by two further members of staff of the Respondent in work clothes on his knees replenishing stock, unloading deliveries, moving around and taking instructions at the Mina Store. Photographs were taken. All three members of staff provided written statements to the Respondent.

14. At his return-to-work meeting on 13 November 2019 the Claimant informed the Respondent that he had rested for two weeks, still had pain in his toe and requested light duties with the Respondent.

15. On 13 November 2019 Nik Sparkes (Kensington Church Street, Store Manager) met briefly with the Claimant in the workplace and informed him that, owing to the nature of the allegations against him, he would be suspended on full pay pending investigation. A suspension checklist was completed by the Respondent setting out best practice requirements around the communication of the suspension to the Claimant. At the same meeting, the Claimant was handed a letter (dated 12 November 2019) explaining that he was being suspended on full pay pending investigation into the allegation that he had

intended to defraud the company of sick pay while working for a cash and carry. The letter stated that the suspension was precautionary in order to allow the Respondent to conduct the investigation impartially and fairly, and that it did not presume any allegation or outcome. The letter also referred to the Disciplinary and Appeals policy and provided contact details for Human Resources and an Employee Assistance Programme.

16. At the same meeting on 13 November 2019, the Claimant was also provided with a letter signed by Nik Sparkes (Kensington Church Street, Store Manager) inviting him to attend an investigation meeting with Nik Sparkes on 14 November 2019. Nik Sparkes was provided with a copy of the colleague statements prior to the meeting. At the meeting on 14 November 2019, the Claimant was accompanied by a colleague who served as a translator. The meeting notes record that the Claimant requested a translator at the meeting. The Respondent stated that it had not arranged a formal translator on the basis that the Claimant had not requested a translator prior to the meeting. The Claimant confirmed that he was satisfied to proceed with his colleague translating for him. A note taker took a contemporaneous note. At the meeting the Claimant was informed of the evidence taken by the Respondent (with Nik Sparkes reading out the three colleague statements to him) and he was asked for his version of events. The Claimant stated that he did not work while he was at the Mina Store, that he went there to collect his payslip and that he was helping out there for free. He also said that he did not know that he could not work when he was signed off sick.

17. Following the investigation meeting on 14 November 2019, the Claimant was invited (by a letter dated 14 November 2019 signed by Victoria Lovells (then Westminster Gatliff Road Store Manager)) to attend a disciplinary meeting on 21 November 2019. The letter stated that the purpose of the meeting was to consider the allegation of intention to defraud company sick pay by working in the Mina Store. The Claimant was invited to bring a colleague or representative and the letter explained that the outcome of the meeting could result in a sanction, up to and including dismissal.

18. The disciplinary meeting was held with Victoria Lovells on 21 November 2019. Before the meeting, Victoria Lovells was provided with the evidence from colleagues, photographs, the notes of the investigatory meeting and the Claimant's fitness to work note. The Claimant was accompanied by a work colleague whom he had asked to be a translator. A note taker was present and a note was taken. My view is that the notes taken represent a fair, but not verbatim, account of the discussion of the meeting. Victoria Lovells read out the colleague statements, showed photographs to the Claimant and asked him to provide his version of events. At that meeting, the Claimant said that he had provided the sick note to his three employers and that he was not aware that when he gave a sick note to one employer, he could not work somewhere else. He said that he was helping the Mina Store and not working there. He also said that he had been shopping in the Mina Store on one occasion.

19. The Claimant was notified by letter dated 22 November 2019 that he would be summarily dismissed for gross misconduct with effect from 21 November 2019. The notes of the disciplinary meeting held on 21 November 2019 were enclosed with the letter.

The main planks on which the decision was stated to rest were that: 1) the Claimant had been observed on a number of occasions working in the Mina Store while taking sick pay from the Respondent; 2) the reasons he provided for having been in the Mina Store were not plausible; 3) he had defrauded the Respondent of sick pay, caused a loss to the business, and breached the relationship of trust and confidence between employer and employee. The Respondent's notes stated that they had considered alternative sanctions (either taking no action or providing a written warning) but concluded that they were not appropriate in light of the seriousness of the issues. The letter informed the Claimant of his right to appeal against the dismissal.

20. The Claimant appealed against his dismissal and was invited (by a letter dated 13 December 2019) to an appeal meeting. The meeting was conducted by Mr Simon Huggard (Area Operations Manager for the Respondent) on 18 December 2019. The Claimant was not known to Mr Huggard. Prior to the meeting, Mr Huggard was provided with the notes of previous meetings and the evidence taken by colleagues.

21. A note taker was present. I am, again, satisfied that the note taken represents a fair, but not verbatim, account of what was said. The Claimant attended with a work colleague as a translator. At the meeting, Mr Huggard explained to the Claimant that he was aware that the Claimant's first language was not English and asked him interrupt if there was anything which he did not understand. The Claimant confirmed that he had received all the relevant paperwork from the Respondent. Mr Huggard explained the allegations against the Claimant. The Claimant gave reasons for his appeal, being that he had helped out at the Mina Store for one day, that he had gone to the Mina Store on the other two days to collect pay and that he felt that he was disliked by the Store Manager in the Respondent's store. On further discussion it transpired that this latter issue related to events which had occurred two years previously and the Claimant felt that he did not get on well with the manager in question. He was offered the opportunity to raise a grievance about this.

22. Mr Huggard refused to allow the appeal and the Claimant was informed of the decision by letter dated 24 December 2019. The stated reasons for this were that: there was clear evidence that the Claimant had worked in the Mina Store and that at the appeal meeting the Claimant had presented no new evidence around the alleged misconduct; that even had it been the case that the Claimant worked without remuneration at the Mina Store, he was still in breach of the Respondent's policies; and that the Claimant's allegations of bias were irrelevant to the stated misconduct and had not been substantiated.

Law

Unfair Dismissal

23. The unfair dismissal complaint rests on the provisions of section 98 of the Employment Rights Act 1996 ('the 1996 Act'). It is convenient to set out the relevant subsections:

- (1) In determining for the purposes of this Part whether the 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 holding the position which the employee held.
- (2) A reason falls within this subsection if it – ...
- (b) relates to the employee's conduct ...
- (4) Where the employer has fulfilled the requirements of subsection (1), 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.

24. It is firstly necessary to consider the reason for the dismissal. This requires the Tribunal to consider the mental processes of the decision maker. The burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996. Conduct, or a reason relating to conduct, is a potentially fair reason for a dismissal.

25. Where the employer does show a potentially fair reason for dismissing an employee, the question of fairness is determined by section 98(4) of the Employment Rights Act 1996.

26. Although my function is to apply the clear language of the legislation, I am mindful that assistance is available to me, both legislative and judicial. By the Trade Union and Labour Relations (Consolidation) Act 1992, s207(3), any ACAS code of practice which appears to be relevant to any question is admissible and "shall be taken into account in determining that question". I also bear in mind in particular the guidance applicable to misconduct cases contained in **British Home Stores Ltd v Burchell [1978] IRLR 379 EAT**. The more serious the allegation and the more serious the potential consequences of the disciplinary action, the greater the need for the employer to conduct a careful and thorough investigation (**A v B [2003] IRLR 405 EAT** and **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA**).

27. From **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, **Foley v Post Office**, and **Midland Bank v Madden [2000] IRLR 827 CA** is derived the principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to him in the circumstances. It is not for the Tribunal to decide on the basis of what it would have done had it been the employer. The question must be whether the employer in question acted in a reasonable way given the reason for dismissal, not whether the Tribunal would have investigated things differently.

28. I also bear in mind **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA**, in which Mummery LJ, giving the only substantial judgment, said this (para 30 of the report):

The range of reasonable responses test (or to put it another way the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

29. Therefore, the questions for the Tribunal (drawing, in particular, from **Burchell** and **Hitt**) are:

- Did the employer genuinely believe that the employee was guilty of misconduct?
- If so, was that belief based on reasonable grounds? Had the employer carried out such investigation into the matter as was reasonable?
- Did the employer follow a reasonably fair procedure?
- If all of those requirements are met, was it within the band of reasonable responses to dismiss the employee, rather than impose some other disciplinary sanction such as a warning?

30. It is important to note that it is possible for a dismissal to be fair even if the employee was not in fact guilty of the alleged misconduct. This is because the legal test involves looking at the situation from the employer's perspective at the time in question and assessing the decision taken on the information available at that time. To that extent, it is not necessary for the Tribunal to focus on the employee's guilt or innocence, but it must confine itself to reviewing the reasonableness of the employer's actions.

Wrongful Dismissal

31. A claim for wrongful dismissal is based on a common law action for breach of contract. In these circumstances, the claim relates to the failure to give the required notice of termination of employment. The Tribunal is not concerned with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? **Enable Care and Home Support Ltd v Pearson EAT 0366/09**. It contains no test of fairness. The burden is on the employer to prove, on the balance of probabilities, that the employee was actually guilty of gross misconduct.

Secondary Findings and Conclusions

32. At the Tribunal hearing, the Claimant went to great lengths to provide information about his employee record. The Claimant's evidence was that he had worked very hard for five years, that there were no complaints recorded against him on his personal file,

and that he had been honest, hardworking and trustworthy. He believed that he had been dismissed on suspicion without merit and that his colleagues had sought to fabricate a story about him. He said that he enjoyed his work and wanted to have his job back. While the Claimant may well have been a model employee, it is important that I state that my role is solely to establish whether the Claimant's dismissal in the circumstances in question was within a band of reasonable responses available to the Respondent at that time.

33. The Claimant asserted at the Tribunal hearing that the store manager of the Respondent did not like him. He stated that he was asked to do bakery (as opposed to customer-facing) work in the supermarket because he did not speak good English and that he was frequently left alone packing and unpacking supermarket goods. In his evidence, he referred to a number of workplace accidents in the course of his employment, including a broken leg, two broken fingers and a coffee burn to his hand. I make no findings on these allegations as they did not form the subject matter of the case which I had to decide.

34. The Claimant also stated that he felt intimidated during the disciplinary hearings. He said that he was not shown the photographs of him working at the Mina Store and that the Respondent's staff wrote everything down on their own and sent him outside. He said that he felt that he had been treated like a thief. While I fully accept that the Claimant would have found the disciplinary process stressful (as would anyone faced with misconduct allegations) I am not persuaded that he was treated abusively or unfairly, uncomfortable as the process may have been. Neither am I persuaded that paperwork was fabricated after the meetings. The notes of the meetings were fairly recorded (often in manuscript) and bore the signs of having been written contemporaneously.

35. The Claimant said that he could not read or write in English and had to take paperwork to others (being friends or family members) to have it translated for him. The Claimant also asserted that the translator provided by the Respondent during the disciplinary process spoke with a stammer. I find that at the time of the misconduct allegations the Claimant indicated throughout the process that he was able to understand the proceedings with the aid of his colleague (who translated for him). In any event, if he was struggling, he did not make the Respondent aware of this at the time. To that extent, any difficulties which the Claimant might have had with understanding the issues at stake were not raised during the disciplinary hearings but were ventilated subsequently at the Tribunal hearing.

36. I turn now to the legal tests. What was the true reason for the dismissal? I am satisfied that it was the belief of the Respondent that the Claimant had committed the act of misconduct of which he was accused following his return to work in November 2019. I reject the Claimant's case that the reason, or principal reason, for his dismissal was the fact that his manager did not like him, or that he had been bullied and injured in the workplace. I am clear that neither the accidents complained of, nor the Claimant's assertions about colleagues seeking to injure him, had any bearing on the decision to commence disciplinary proceedings or upon the outcome of those proceedings.

37. My principal reason for deciding that the disciplinary action taken against the Claimant was not because he was disliked in the workplace or subjected to a campaign of vindictiveness or that colleagues and management were seeking to find fault with him are four-fold. Firstly, the disciplinary action occurred because the Claimant was seen at the Mina Store by a member of staff who was having a driving lesson and it was this that contributed to the subsequent series of steps taken by the Respondent. Secondly, it appeared from the Claimant's evidence that there had been a considerable lapse of time between the issues complained of and the disciplinary proceedings, rendering it unlikely that the issues complained of were connected to the disciplinary action. Thirdly, the Claimant did not provide dates or documentary evidence for the various accidents and events of which he complained, making it difficult to establish the factual backdrop and context to their occurrence. Lastly, I found his complaints to sit somewhat awkwardly against his assertions that he enjoyed his job. I, therefore, conclude that the Claimant was fairly dismissed. In reaching this conclusion I considered the four limbs of the required test.

38. Did the Respondent act reasonably in treating the reason as sufficient? I adopt the *Burchell* model in addressing this question. I find that there were reasonable grounds for the Respondent's belief. I find that it was reasonable for the Respondent to have concluded, on the basis of the evidence provided at the time of the allegations, that the Claimant had worked in the Mina Store. There was ample evidence on which it was open to the Respondent to conclude that the Claimant had acted as was alleged. The Respondent had reports from members of staff who had observed the Claimant in the Mina Store on three separate occasions. All those persons provided the Respondent with written statements. The Claimant himself did not deny being in the Mina Store and provided, at various stages of the disciplinary proceedings, confused and inconsistent accounts of his reasons for being in the Mina Store.

39. Was there a reasonable investigation? I find that the investigation was certainly reasonable. Statements were taken promptly by three members of staff and the Claimant was given sight of the evidence against him. There were three substantive meetings: an investigatory meeting, a disciplinary meeting and an appeal meeting. The Claimant was given a full opportunity at, and subsequent to, the disciplinary hearing to respond to the case against him and to provide his version of events.

40. Was there a reasonably fair procedure? I conclude that the Respondent followed a reasonably fair procedure. A member of staff was provided to translate for the Claimant at all meetings. The meetings took place over a period of time. The various meetings were carried out by different members of staff and not just by staff within the store where the Claimant had worked. Meetings were minuted. At each meeting, the entire background was considered and discussed again and evidence/commentary from the Claimant was taken afresh. Letters were sent to the Claimant between the meetings explaining next steps. While the Claimant asserted at the Tribunal hearing that the translator who was provided was inadequate, he did not appear to have raised this at the time of the relevant

meetings. To that extent, the Respondent could not reasonably have made any adjustments to allow for it.

41. Finally, was the dismissal within the band of reasonable responses of the Respondent? I consider that dismissal fell within a range of reasonable responses available to the Respondent at the time in question. It is clear that the conduct complained of was serious, as the Claimant was reasonably believed to be receiving sick pay from the Respondent and earning wages elsewhere. The conduct in question could reasonably be expected to damage the relationship of trust and confidence between employer and employee. Mitigating factors were considered, but rejected in light of the fact that the Claimant did not seem to recognise the gravity of the issue. To that extent, it would have been reasonable for the Respondent to assume that the provision of a warning may have resulted in a recurrence of the conduct complained of. On any view, misconduct of the type in question would have been difficult to condone. It is also worth noting that it is important for an employer to take seriously and, where necessary, sanction issues arising in connection with sickness, particularly in a business which relies predominantly on the actual presence of staff in the workplace and is therefore likely to require more rigid boundaries around fitness to work. Had the Claimant not been dismissed, it may well have given the impression to other staff that conduct of the type in question was tolerated by the Respondent.

42. That disposes of the unfair dismissal claim. Turning to the Claimant's wrongful dismissal claim, it is necessary to consider whether the conduct in question was sufficiently serious to constitute a repudiatory breach of contract.

43. The Staff Handbook stated that '*Gross misconduct means a breach of policy and procedure that's so serious it can lead to summary dismissal, when you're dismissed immediately without any notice. Here are some examples of gross misconduct:*

Fraud... falsifying company records or paperwork.

Any other serious breach of procedure or policy that leads to a loss of trust and confidence.

This wording was reiterated in the Disciplinary and Appeals Policy.

44. The misconduct of which the Claimant was accused was an intention to defraud the company of sick pay while working elsewhere. In my judgment, I am satisfied that the Respondent has proved, on the balance of probabilities, that the Claimant was guilty of the misconduct in question. The Claimant was observed working in the Mina Store on more than one occasion and failed to provide a plausible explanation for being there in a different capacity. In the circumstances, I am also satisfied that the conduct complained of did amount to a repudiatory breach of contract, meriting summary dismissal, on the basis that it would have had a serious impact on the relationship of trust and confidence between employer and employee. It was plainly open to the Respondent to dismiss the Claimant without notice given the gravity of the conduct in question.

Employment Judge Coen

Dated: 1 May 2022.....

Judgment and Reasons sent to the parties on:

03/05/2022