



EMPLOYMENT TRIBUNALS

Claimant: Miss S Rafiq

Respondent: Tesco Stores Limited

Heard at: Manchester

On: 25 and 26 May 2022

Before: Employment Judge Fearon

REPRESENTATION:

Claimant: Mrs Hansen, USDAW trade union

Respondent: Ms Whittington, of counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded and is dismissed.
2. The claimant's complaint of breach of contract is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent, Tesco Stores Limited, as a Customer Assistant from 23 July 2018 until her summary dismissal on 20 March 2021.
2. By a claim form presented on 6 August 2021 the claimant complained that her dismissal was unfair and that the respondent had breached her contract of employment by failing to give her the required notice of termination of her employment.

3. The respondent contests the claim. The respondent says the claimant was fairly dismissed for misconduct, which was being involved in an altercation with a member of the public on the respondent's premises just after finishing her shift and when still wearing the respondent's uniform. In relation to the breach of contract claim, the respondent denies wrongful dismissal and says it was entitled to terminate the claimant's employment without notice because of her gross misconduct.

4. The Claimant was represented by Mrs Hansen, USDAW trade union. The claimant gave sworn evidence. The respondent was represented by Miss Whittington, counsel who called sworn evidence from Daniel Rosler, Stock and Admin Team Manager, Ardul Khan, Lead Manager and Victoria Prestage, Store Manager.

5. I considered documents which the parties introduced in evidence in an agreed bundle of 351 pages and an agreed witness statement bundle of 31 pages. By agreement of the parties, at the start of the hearing I watched the CCTV footage of the material incident on Ms Whittington's laptop.

The Issues

6. It was not in issue that the claimant was dismissed.

7. Although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's claim of unfair dismissal succeeded, I agreed with Mrs Hansen and Ms Whittington that I would consider them at this stage and invited them to deal with those issues in evidence and in submissions.

Unfair dismissal

7.1 Was the claimant dismissed for a potentially fair reason?

7.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

a) Were there reasonable grounds for that belief?

b) At the time the belief was formed, had the respondent carried out reasonable investigations and reached its conclusions based on reasonable investigations?

c) After hearing the evidence, it was confirmed by Mrs Hansen in oral submissions that the claimant accepted that the disciplinary process at each of the investigation, disciplinary and appeal stages was a fair process and she accepted that the process was procedurally fair.

d) Was the dismissal within the range of reasonable responses?

7.2.1 The claimant says the dismissal was unfair because the respondent failed to consider all relevant factors and failed to thoroughly investigate all issues raised by the trade union on behalf of the claimant in the appeal. The respondent says that no issues were raised in the claim form regarding the appeal process except in relation to the re-interviewing of Mr Ward.

7.3 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey. The respondent said that the claimant would have been dismissed in any event, therefore any award should be reduced by 100%. The claimant said any reduction should be minimal.

Breach of contract

7.4 What was the claimant's notice period?

7.5 Was the claimant guilty of gross misconduct? It is for the respondent to prove that the claimant committed an act of gross misconduct.

Findings of Fact

8. The claimant was employed by the respondent as a Customer Assistant from 23 July 2018 until her dismissal on 20 March 2021.

9. The respondent has over 3,400 stores in the United Kingdom and has around 300,000 employees.

10. On 15 February 2021 at around 10:10pm after the claimant's shift had ended and she was leaving the respondent's store a member of the public shouted at her. I accept the claimant's evidence in her witness statement and on cross examination that this member of the public made offensive comments to her, mentioned her sister by name and said she knew where she lived.

11. The respondent's managers, Mr Khan and Ms Prestage viewed the CCTV footage of the incident and observed that it showed a physical altercation between the claimant and the third party; the claimant approaching the third party on up to four occasions including that the claimant got close to the third party's face; the claimant having to be restrained and one of the respondent's managers having to intervene between the claimant and the third party. They also observed the CCTV footage showed people present during the incident including a mother and child.

12. Peter Hobson and Hannah Keagan gave statements dated 25 February 2021 (page 116 and page 107 of the bundle) which were taken in to account by the respondent's managers. Hannah Keagan said the claimant had continued to shout at the member of public and she described the claimant's behaviour as aggressive. Mr Hobson confirmed the claimant kept shouting at the member of the public and approached her on more than one occasion during the incident. The claimant was invited to go into the store by one of the respondent's managers Hannah Keagan, as evidenced in the notes on page 154 of the bundle, but the claimant refused to do so.

13. The claimant had completed Protecting My Personal Safety Training on 1 July 2019 (page 60 of the bundle) which trained on what to do in such situations. The training provides "distance should be placed between you and an aggressor" and "you should seek to calm the situation".

14. On 16 February 2021 a suspension meeting was held and it was explained to the claimant that she was suspended from work pending a full investigation, with the

reason given that she was involved in a physical and verbal altercation with a member of the public whilst in Tesco uniform. It was confirmed that the claimant would have an opportunity to give her version of events during the investigation meeting, and this decision was confirmed by a letter to the claimant.

15. The claimant was invited to an investigation meeting on 23 February 2021 but due to the claimant's unavailability this was rescheduled to 27 February 2021.

16. Mr Daniel Rosler conducted the investigation meeting on 27 February 2021, taking the claimant through all of the witness statements and giving her opportunity to comment on them. The claimant was accompanied by her representative, Rob Goslin. No issue was taken with the notes of that meeting, the claimant having signed them to confirm their contents.

17. The meeting was adjourned to allow for further investigation. The adjourned meeting took place on 9 March 2021, when the decision to discipline was confirmed.

18. The claimant was invited to a disciplinary meeting on 13 March 2021 and she attended with her trade union representative. At the meeting she explained her position that during the incident she was shocked, emotionally distressed and acted in self defence.

19. The disciplinary meeting was adjourned to 20 March 2021, on which date the claimant was summarily dismissed for a one-off act of gross misconduct without notice pay for four reasons which were confirmed in a letter to her of that same date, being:

- (1) Aggressive and provocative behaviour which led directly to physical and verbal altercation;
- (2) Being involved in a physical and verbal altercation with a member of the public whilst in uniform and on company property;
- (3) Failing to adhere to the company training regarding personal safety; and
- (4) Failing to calm down and instead repeatedly attempting to escalate the situation despite numerous people attempting to diffuse it.

20. The claimant appealed the decision to dismiss on the basis that there was insufficient consideration of her explanation of the circumstances leading up to the dismissal and the dismissal was too harsh a penalty.

21. An appeal hearing was held on 7 April 2021 chaired by Vicky Prestage, and the claimant attended that hearing with her representative, Mrs Hansen. The claimant asked for further investigations to be made in relation to Mr Ward's evidence and the hearing was adjourned to allow for further investigations to take place particularly given the reliance the claimant was placing on Mr Ward's evidence.

22. The claimant contends Mr Ward was influenced to change his witness evidence in the meeting held to conduct further investigations which was described as an Investigation Meeting rather than a meeting for a witness statement. She says that in the appeal process Ms Prestage accepted she did not consider an investigation meeting was a reasonable way to investigate with Mr Ward.

23. I find that Mr Ward's evidence was revisited due to the reliance placed on it by the claimant in her appeal and it was reasonable for the respondent to seek clarity.

24. Following investigations with Mr Ward a second appeal hearing took place on 21 April 2021 which the claimant attended with her representative Mrs Hansen.

25. At the appeal hearing, in mitigation the claimant stated there was a previous incident in store that she was aware of in November 2020. The claimant was not present at the November 2020 incident and heard about it from store colleagues. Mr Khan was present at this incident in November 2020 and I accept his evidence that this was an incident involving a shoplifter who had been apprehended for stealing alcohol, was restrained as she tried to leave the store and was then taken to the back of the store

26. The trade union representative, Mrs Hansen, asked if this incident could be looked into in the appeal as a comparable situation. This issue was discussed again at the second appeal hearing.

27. The claimant says the respondent did not fully look into the November 2020 incident. Ms Prestage was questioned about this during cross examination and I accept her evidence, that she went away and asked the store manager about this incident and adequate enquiries were made.

28. The meeting of 21 April was adjourned for Ms Prestage to consider all the issues and make her decision. The adjourned meeting took place on until 22 April 2021 and Ms Prestage gave her decision to the claimant which is that the dismissal decision of Mr Kahn was upheld. This was then confirmed to the claimant in writing by letter dated 22 April 2021.

Relevant law – unfair dismissal

29. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95. In this case the respondent admits that it dismissed the claimant on 20 March 2021.

30. Section 98 of the 1996 Act deals with the fairness of dismissals. Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Secondly, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

31. Section 98(4) 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.

32. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *British Homes Stores v Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563).

Discussion and conclusions – unfair dismissal

33. Misconduct is a potentially fair reason for dismissal under section 98(2). I find that the respondent dismissed the claimant because it believed she was guilty of misconduct and that respondent has satisfied the requirements of section 98(2).

34. The evidence of Mr Khan was clear about why he dismissed the claimant and Ms Prestage gave clear evidence as to why she upheld his decision on appeal; further the dismissal letter and appeal outcome letter were clear in this regard.

35. The claimant's terms and conditions are at page 40 of the bundle and she agreed in evidence that they include the policies on disciplinary/grievance/appeals. At page 47 of the bundle is the section of the respondent's disciplinary policy headed "Gross Misconduct". It sets out several examples of what can amount to gross misconduct, including verbal or physical threats of harm and behaviour negatively impacting on the perception of the respondent. The claimant accepted this in evidence.

36. I find that the respondent's management held a genuine belief that the claimant was guilty of misconduct. Mr Khan in his witness statement confirms the grounds for his belief, that he considered the CCTV and all of the witness evidence obtained during the investigations and on that basis, held the belief that the claimant was guilty of all four allegations amounting to gross misconduct which would warrant dismissal. The claimant did not put forward any evidence that Mr Khan did not hold a genuine belief. Mr Khan was not challenged on cross examination that he did not genuinely hold the belief that the claimant was guilty of misconduct.

37. In my judgment it was reasonable for the respondent to conclude that on 15 February 2021 the claimant did not follow her "Protecting My Personal Safety Training" on the basis that she did not remove herself from the situation and on four occasions returned to approach and engage with the member of the public.

38. In relation to the Personal Safety Training, the claimant said in evidence that she had asked for additional training before the material incident. I find that she did not raise this in the disciplinary or appeal process.

39. In my judgment it was within the band of reasonable responses for Mr Khan to conclude that a single act such as that committed by the claimant during the incident on 15 February 2021 could amount to gross misconduct.

40. In the ET claim form the claimant alleges that the respondent carried out an inadequate investigation into the allegations made and failed to adequately question all statements provided, in particular the respondent seeking to question Mr Ward's statement almost two months after the incident and there being some pressure placed upon him when investigations were done.

41. Mr Rosler confirmed in his written evidence that he carried out a detailed investigation. Witness statements were taken from four witnesses initially, and then further witness statements were taken from Mr Hobson and Ms Keegan.

42. Mr Khan set out in his witness statement how he considered all of the evidence, including the CCTV and the witness statements which included detailed accounts from the managers present during the incident. He was not challenged on this during cross examination.

43. Ms Prestage confirmed in her statement and in evidence on cross examination that she considered all the relevant evidence

44. I find that the respondent did consider all the relevant evidence as confirmed by Mr Rosler, Mr Khan and Ms Prestage in their written and oral evidence.

45. The meeting notes at page 222 of the bundle confirm that Mr Rosler made it clear he was trying not to influence Mr Ward, and Mr Ward replied, "I don't feel influenced at all". Mr Rosler confirmed in evidence that Mr Ward was shown the CCTV and inconsistencies were discussed with him. Mr Ward accepted there were inconsistencies between his evidence and the CCTV and between his evidence and the statements of other witnesses. I find that Mr Ward was not unduly influenced to change his evidence in that meeting.

46. Ms Prestage gave evidence that whether the meeting with Mr Ward was described as an investigation or as a witness statement meeting was an issue of form rather than substance. I find that the meeting being called an "investigation" rather than a witness statement meeting did not influence the evidence and would not have changed the outcome.

47. The claimant says the respondent did not acknowledge how distressing the incident was for her. She referred to a GP fit note at page 245 in the bundle which sets out that she was suffering in April 2021 from depression and anxiety.

48. I find that throughout the disciplinary process Mr Khan did give consideration to and acknowledge that it was a distressing incident for the claimant being attacked by an unknown third party, but this was only one factor in his decision and it was the claimant's conduct and behaviour which ultimately informed his decision to dismiss. I find he gave sufficient weight to all the evidence in the circumstances.

49. I find that the respondent adequately looked into the November 2020 incident which was raised by the claimant at the appeal stage. In my judgment it was reasonable for Ms Prestage to conclude that it was not a comparable incident to the

altercation the claimant was involved in, which was a one-to-one incident outside the store and it was reasonable for Ms Prestage to conclude it should have no bearing on the decision making process.

50. The claimant contended that the managers involved in the November 2020 incident also failed to adhere to their training. I accept Mr Khan's evidence that the failure to adhere to the training was only one factor in the decision to dismiss the claimant, it being one of four factors as are set out in her dismissal letter.

51. The claimant says that throughout the incident she acted defensively and that should have been taken into account in mitigation.

52. I accept that there was a lack of acknowledgement on the part of the claimant as at no point throughout the process did she say she was sorry and I accept Mr Khan's evidence that following his consideration of the witness evidence and the CCTV footage he reasonably concluded that the claimant was not simply acting defensively and further, that the lack of acknowledgement by the claimant did not instil in him any confidence that she would behave differently in the future.

53. In the circumstances I find that the respondent's decision to dismiss the claimant summarily for gross misconduct was within the range of reasonable responses.

54. I find, therefore, that the claimant was fairly dismissed.

Relevant law and conclusions – breach of contract

55. The claimant was dismissed without notice. She brings a breach of contract claim in respect of her entitlement to her notice period.

56. In relation to the breach of contract claim I must decide if the claimant committed an act of gross misconduct entitling the respondent to dismiss without notice, in distinction to the unfair dismissal claim where the focus was on the reasonableness of management's decisions. I must here decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate her employment without notice.

57. The respondent says that she was and it was entitled to dismiss her without notice. The claimant says she was not and is therefore entitled to her notice pay.

58. I find that the claimant was involved in a one-to-one incident with a member of the public at the end of her shift immediately outside of the respondent's store during which the claimant displayed acts of physical and verbal aggression. The claimant failed to follow her personal safety training during the incident in not placing distance between herself and the member of the public and failing to calm down, but instead approaching the member of the public again on four occasions. This conduct clearly amounted to gross misconduct within the respondent's disciplinary policy and was conduct which entitled the respondent to dismiss without notice and the claimant was not entitled to her notice pay. Her complaint of breach of contract fails and is dismissed.

Employment Judge Fearon
Date: 23 June 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
24 June 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.