



EMPLOYMENT TRIBUNALS

Claimant

Mr D Voller

v

Respondent

B & Q Limited

Heard at: Watford by CVP

On: 10 and 11 February 2022

Before: Employment Judge Cowen

Members: Ms S Hamill
Ms S Boot

Appearances

For the Claimant: Mrs Voller (wife)

For the Respondent: Ms Boorer (counsel)

JUDGMENT

1. The claimant's claims for unfair dismissal and age discrimination are dismissed.

EXTENDED REASONS

Background

1. The claimant's claim for unfair dismissal and age discrimination arose from an incident on 18 December 2020 where the claimant was working at the checkout in the respondent's Enfield store. He did not challenge the age of a customer buying a knife. He was disciplined and dismissed for this as an act of gross misconduct.
2. The claim was issued on 6 April 2021 and came before a full tribunal for final hearing. The claimant was represented by his wife and the respondent by Ms Boorer of counsel. We were provided with a joint bundle of documents and witness statements on behalf of the claimant and the respondent's Mr Migliano and Mr Scobie. We heard live evidence on oath from each of them. The respondent's counsel also produced an opening note with a suggested list of issues which we adopted. She also provided a

closing submission which we read.

3. Due to time constraints we agreed to limit this hearing to liability only.
4. The issues in the claim were identified at the start of the hearing as

Unfair dismissal

4.1 What was the reason or principal reason for the claimant's dismissal?

- a) Was it related to the claimant's conduct?
 - i) Did the respondent reasonably believe the claimant to be guilty of misconduct and/or gross misconduct?
 - ii) Did the respondent have reasonable grounds upon which to sustain that belief?
 - iii) At the stage the belief was formed had it carried out as much investigation into the matter as was reasonable in the circumstances?
- b) In the alternative, was it some other substantial reason of a kind as such to justify dismissal of the claimant?
- c) If yes, was the decision to dismiss the claimant fair in all the circumstances and did the decision fall within a band of reasonable responses?

Age discrimination (direct)

4.2 Was the claimant treated less favourably in being dismissed for gross misconduct, namely failing to check the identification of a customer in breach of the Challenge 25 policy?

- i) the claimant relies upon a hypothetical comparator who is under 25 years old.

4.3 If yes, was this less favourably treatment due to age?

4.4 If yes, was such less favourable treatment a proportionate means of achieving a legitimate aim?

The Facts

5. The claimant started working for the respondent in July 2018. At this time he was 62 years old. This was his first job in a retail environment having been made redundant from his career position in the dairy industry.
6. At interview, the claimant had said that he did not want to work on the tills. He was reassured this was not necessary. After about a year in the job, the claimant was taken ill and required heart bypass surgery. He was given the time off to recuperate and his position was kept open for him to return to. When he returned to work, the Covid pandemic had started. The claimant was given marshalling duties to assist with the restricted rules on people entering shops.
7. Around September 2020 the claimant returned to his previous position in hardwares. However, in October 2020 he was told that he had to move to working on the tills. The only training he was provided to do this role was to assist another member of staff for a day and a half. After that, the claimant was allowed to use the tills himself.
8. The claimant had been given training in July 2018 called 'Think 21'. Under this principle the claimant was asked to consider and challenge any customer buying dangerous goods, to consider whether they met the legal age for such a purchase (and restricted sales to those who could prove they were 21 years of age or more). This included the buying of knives and adhesives. A refresher of this training was given in July 2019 and September 2020, by which time the policy had altered to 'Challenge 25'. This reflected the level of seriousness with which the respondent addressed the problem of knives being bought by underage people (the policy became one to ask for identification from anyone under 25 years of age). A further 'huddle' was carried out on 22 October and an e-learning on 23 October to reinforce the message to staff that they must check the age of those buying dangerous items.
9. The claimant was working on the till on 18 December 2020 when a customer approached and purchased a small jab saw, which is a type of knife. There is CCTV of this transaction which was made available to the claimant, the respondent and to the Tribunal and was viewed as part of our consideration of the evidence.
10. The claimant can be seen serving the customer and taking money from him. The customer also purchased a plastic shopping bag. There is no evidence of the customer showing the claimant any identification document during the transaction.
11. On 21 December the claimant was asked to attend a meeting with Mr Carl Davies. Mr Davies told him that there had been a mystery shopper sent by the company to test those in the store on whether they would abide by the

Challenge 25 rules. The claimant had failed to do so. Mr Davies told the claimant that the man buying the knife was 19 years old.

12. The claimant had no prior warning about the meeting with Mr Davies, nor the reason for it. His responses are therefore immediate and prior to a considered view being formed. He told Mr Davies that he did not think the customer was under 25 years. When asked, the claimant said he remembered the prompt which came up on the till screen, but did not consider that he needed to ask the customer. Mr Davies offered him the opportunity to watch the CCTV but the claimant declined.
13. At the end of the meeting Mr Davies told the claimant that he was suspended and would need to attend a disciplinary hearing on 28 December. The respondent hand delivered a letter confirming this to the claimant. We accept that this happened and consider that it was the claimant's letter of dismissal which he did not receive and had to be collected from the store.
14. Mr Davies explained to the claimant that a manager would chair the disciplinary hearing and then a manager from another store would hear any appeal. This communication was not clear and the claimant was therefore surprised to find that Mr Migliano, the deputy manager of the store was the disciplinary officer.
15. The claimant attended the meeting with Mr Migliano and gave him the same responses he had given to Mr Davies, namely that he thought the customer was over 25 years old. He accepted that he had made a mistake. He also told Mr Migliano that he had not wanted to work on the tills. Mr Migliano asked how the claimant could make a judgment about the customer's age if the customer was wearing a mask and whether the claimant knew he could ask him to lower the mask so he could see his face. The claimant admitted he was aware that he could, but said he did not, as it was not necessary.
16. Mr Migliano also asked whether the fact that the customer bought a carrier bag raised his suspicions, but the claimant said it did not. The claimant admitted to Mr Migliano that he 'completely missed this one'.
17. After an adjournment Mr Migliano returned to tell the claimant that he was to be summarily dismissed for gross misconduct.
18. The claimant appealed to Mr Scobie, manager of the Cricklewood store and set out his grounds for appeal in writing. An appeal hearing was held at which each of the points was discussed. The claimant told Mr Scobie that someone else (described in his letter as a young woman), had done the same thing and had only received a warning. Mr Scobie told the claimant that training had now been increased to twice a year and that the other case

had mitigating circumstances. The claimant pointed out that the respondent's response should be fair and equal and that whilst he acknowledged that he broke the respondent's policy, he had not broken the law, as the customer had been of a legal age to buy the knife.

19. The appeal outcome dismissed the claimant's appeal.

The Law

20. S.98 Employment Rights Act 1996

“(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 conduct of the employee,”

21. BHS v Burchell [1978] IRLR 378, sets out the test in misconduct cases. The employer;

- a) must have a genuine belief that the employee committed the act accused of
- b) must have reasonable grounds upon which to base the belief
- c) must have undertaken an investigation which was reasonable in all the circumstances.

22. In considering s.98(4) the Tribunal must be satisfied that the employer has acted reasonably in all the circumstances in treating the reason as sufficient to warrant dismissal. We note that there is no burden of proof and we must consider all the facts in order to reach our own conclusion as to whether the respondent had acted reasonably. This includes consideration of the size

and resources of the respondent.

23. The Tribunal must decide whether the respondent's decision to dismiss lay within the band of reasonable responses. We remind ourselves that we must not replace our own views for those of the respondent and must rely on the facts or beliefs which were known to the respondent at the time.
24. If the Tribunal consider the dismissal was unfair, we must go on to consider whether, if the procedure was unfair and had a fair procedure been properly applied, the dismissal would have occurred in any event. If so, how long would a fair process have taken.
25. Also, if we find the process unfair, do we consider that the claimant contributed to his dismissal by his culpable behaviour.
26. In relation to the claim for age discrimination the Tribunal considered s.13 Equality Act 2010

“13 Direct discrimination

- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
- (2) *If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.”*

27. The test for less favourable treatment is for the Tribunal to consider objectively. The claimant must show to the Tribunal something more than treatment which was different to others in the same situation; Chief Constable of West Yorkshire v Khan [2001] ICR 1065, HL.
28. The burden lies upon the claimant in direct age discrimination to prove facts which show that, if we were to hear no further evidence, we could infer that less favourable treatment had occurred; Laing v Manchester City Council and anor 2006 ICR 1519, EAT.
29. If so, the Tribunal must then look to the respondent as the burden passes to them to prove that the reason for the potentially discriminatory treatment was for a non-discriminatory reason; Anya v University of Oxford and anor 2001 ICR 847, CA
30. In considering the treatment we will look to a comparator, real or hypothetical. The comparator must be similar in all material regards except for the protected characteristic; Shamoon v Chief Constable of the Royal

Ulster Constabulary [2003] ICR 337. In this case the claimant has asserted it to be a hypothetical comparator who is under 25 years.

31. The essential question outlined in Shamoon was whether the claimant was treated less favourably, because of a prohibited characteristic? This is the same as asking the reason why the treatment occurred.
32. In a case relating to age discrimination, the claimant must outline what specific age group he is referring to; s.5 Equality Act 2010.
33. It is also open to the respondent in age discrimination cases to submit that any discriminatory treatment was justified as a proportionate means of achieving a legitimate aim. However, Seldon v Clarkson Wright and Jakes (a partnership) [2012] ICR 715, said that the test in direct age discrimination cases can only be made by reference .

Decision

Unfair Dismissal

34. The reason that the claimant was disciplined was that he failed to challenge a customer on his age when buying a dangerous item. The claimant had been trained to do so. There were prompts during the till process and there were stickers and posters around the store and the till point. The claimant had been trained to carry out this role, and was aware how important his employer considered it to be. In interview he indicated that he did not consider it necessary to challenge the customer, thus showing a disregard for the respondent's campaign to ensure that the law is being enforced within the store. This was therefore an issue of misconduct and a potentially fair reason for dismissal.
35. The investigation by the respondent included viewing the CCTV, the report from the mystery shopper and an interview with the claimant in which he acknowledged that he didn't ask on this occasion, as he thought the customer was over 25. The claimant therefore admitted that he had failed to challenge the customer. The Tribunal is satisfied that there was no other useful investigation which the respondent could have carried out. The breach of the respondent's policy is therefore supported by the evidence.
36. The issue of failure to follow a company procedure is included in the list of actions which the respondent considers may amount to gross misconduct. The Tribunal consider that both Mr Migliano and Mr Scobie believed that the claimant had committed such an act of gross misconduct. There is no evidence to support them having any other reason to dismiss. They relied upon the CCTV, the mystery shopper report, and the claimant's admission. The claimant did not suggest to either of them that there was any specific

reason why he had failed to challenge the customer and admitted he was aware of the need to do so and the potential ramifications of not doing so. The Tribunal were therefore satisfied that Mr Migliano and Mr Scobie had a genuine belief that the claimant had committed the misconduct.

37. In terms of the process applied. The Tribunal were satisfied that the claimant was aware of the nature of the allegation against him when he went to the disciplinary hearing. He had been given sufficient notice of the hearing and was given an opportunity to say what he wanted to say. The claimant believed that he had not been sent the letter before the disciplinary hearing, but the Tribunal concluded that he was mistaken about this. He had to collect his dismissal letter from the store when that did not arrive, but his disciplinary letter was delivered to him. The Tribunal accept that he didn't read it over the Christmas period, but find that there was no detriment to him, as he was aware of the allegation and the date of the meeting, in discussion with Mr Davies.
38. Likewise, any confusion over whether the manager conducting the disciplinary hearing was from his own store or another did not place him at a disadvantage. The claimant did not raise any issue of Mr Migliano not being an appropriate person to chair his hearing. This was a misunderstanding by the claimant, as the respondent did follow their own policy on the hearing officers. The Tribunal therefore concluded that the process was one which fell within the guidelines set out by ACAS and followed the respondent's own process.
39. The Tribunal went on to consider whether the decision to dismiss was within a band of reasonable responses. In doing so we took account of the size and resources of the respondent.
40. Both Mr Migliano and Mr Scobie believed this to be a particularly serious matter due to the potential consequence of young people using dangerous items as weapons. This was reinforced to them by the change in policy from Think 21 to Challenge 25, together with the increased training regime. The Tribunal were satisfied that in those circumstances it was reasonable for both Mr Migliano and Mr Scobie to consider this offence to be one which might attract a dismissal.
41. At the disciplinary hearing the claimant offered the same reason for his failure, which was a mistaken belief that the customer was over 25. This was dismissed by both the disciplinary and appeal officers. The claimant did not raise any issue over the wearing of a mask inside the store and this did not therefore have any impact on the decision to dismiss.
42. The claimant did raise, during both his disciplinary an appeal meetings, that he had not wanted to work on the tills. This was not relevant to the

consideration of the dismissal, as there was no issue that the claimant was not capable of working on the tills and he had acknowledged that he knew what to do under the Challenge 25 policy.

43. Mr Migliano had described the claimant as abrupt in his answers and that he showed a lack of remorse. The Tribunal consider that the claimant's admission and his answer to all of the questions put by Mr Davies, Mr Migliano and Mr Scobie show his willingness to engage in the process. We do not therefore accept that the evidence backs Mr Migliano's assertion that there was a lack of remorse. However, we do not consider that this alone places his decision outside a band of reasonable responses.
44. Mr Scobie's evidence was that the claimant was blasé. We accept that the refusal by the Claimant to watch the CCTV may have come across as such, but we consider the fact that the claimant had admitted the breach of policy should have been taken into account when considering the claimant's reluctance to engage and it did not appear that Mr Davies had done so. We do not consider that this alone places the decision outside the band of reasonable responses.
45. The Tribunal also considered the comparison between the treatment of the claimant and the young woman who received a written warning and whether it was reasonable for the respondent to distinguish between these two cases. The Tribunal recognised that Mr Scobie considered that there was a difference in the circumstances of her actions, as she was in discussion with a colleague at the time. However, the Tribunal considered that in the time between these two events the attitude to selling potential weapons to young people had become more focused within the respondent's business. This led to an increase in training, signage and the increase in age limit all of which indicated a strict attitude by the head office of the respondent who instructed the store to carry out an investigation in light of a potential gross misconduct. The Tribunal therefore accept that the respondent identified a difference in circumstances between the previous incident and the claimant's actions which would justify a difference in outcome.
46. The Tribunal considered whether the decision to dismiss lay within a band of reasonable responses. We considered that the fact that this was a serious issue which had been given an increased level of attention by the respondent in training, signage and increase in age limit, together with the claimant's admission and the CCTV evidence, all of which indicate that this was a matter which could reasonably lead to dismissal. The Tribunal reminded itself that we must not substitute our view of the situation when considering the penalty applied. The evidence of Mr Migliano and Mr Scobie indicated that they did not consider that further training would assist and that they were concerned that the potential consequences of selling a dangerous item were so serious, that they could not take the risk to allow

the claimant to repeat his mistake. The Tribunal accept this and consider that for these reasons the decision to dismiss was within a band of reasonable responses. The claim for unfair dismissal therefore fails.

Age Discrimination

47. The claimant has also claimed that he was treated less favourably than someone under 25 years who did the same as him. The tribunal looked for evidence from which we could infer this contention, but could not find anything that would support this proposition. The claimant had not raised the issue of age in either his disciplinary or appeal process. Whilst he had raised the comparator referred to as a 'young woman' he had not made reference to her age in doing so. He relied purely on the fact that she had breached a policy and not been dismissed.
48. The claimant did not prove to the Tribunal that the young woman, nor a group of people under the age of 25 years had been, or would be treated differently to him, in the same circumstances.
49. The Tribunal accepted that the young woman did not represent a comparator for the purposes of age discrimination as the circumstances of her breach of policy were not the same as the claimant's. We therefore considered the hypothetical comparator.
50. We noted that both Mr Migliano and Mr Scobie said that they would have dismissed even if the claimant had been under 25 years.
51. We therefore concluded that the claimant had not discharged the burden of proof in relation to his age discrimination claim and that claim also fails.
52. The claimant's claim is therefore dismissed.

Employment Judge Cowen

Date: 24 August 2022

Sent to the parties on: 24 August 2022
For the Tribunal Office: GDJ