



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Scales

v

Muller UK & Ireland Group LLP t/a Milk & More

Heard at: Watford

On: 8 July 2022

Before: Employment Judge Forde via CVP

Appearances

For the Claimant: Ms L Suding , Counsel

For the Respondent: Mr T Welch,

JUDGMENT

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.
2. The claimant's claim of breach of contract in respect of notice pay is not well founded and is dismissed.

REASONS

Introduction

1. By way of a claim form dated 8 June 2021 the claimant complains of unfair dismissal arising out of the termination of his employment by the respondent on 19 January 2021.
2. The respondent defends the claim. In summary, it says that following an investigatory and disciplinary process, the claimant who was employed as a Home Delivery Relief and whose duties were to deliver milk and food to domestic and commercial customers, was dismissed on 19 January 2021 for stealing milk from customers doorsteps in or around November 2020.
3. The respondent asserts and it is not disputed that the reason for the dismissal was misconduct. Therefore, the tribunal must determine what was the reason for dismissal, did the respondent genuinely believe that the

claimant had committed misconduct, if misconduct was the reason, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant and was the dismissal procedurally fair. In addition, the tribunal must consider whether the reason to dismissal fell within the range of reasonable responses of a reasonable employer or alternatively, if the dismissal was unfair, what is the appropriate remedy?

Evidence

4. I heard evidence from Mr Mark Sidders who is one of the respondent's Operation Managers and who was the dismissing officer in the case, and the claimant.
5. The parties had prepared an agreed bundle which was referred to from time to time was in front of me during the course of the hearing.

Findings of fact

6. The relevant findings of fact are as follows:-
7. After a period of absence from work, the claimant returned to work for the respondent on 17 November 2020 on a food service route as directed by the respondent. In the course of that month, the respondent received complaints from some customers on another round that the claimant had previously serviced, Round 89, alleging that their milk had not been delivered. One of the customers complained that on 24 November her doorbell camera captured video footage of a glass bottle of milk being delivered to her doorstep by a roundsperson at 04.51 hours but at 06.29 hours another roundsperson that she recognised from previous deliveries had removed it and replaced it with a dirty bottle. She provided the video footage to the respondent.
8. Another customer reported a similar incident on 24 November 2020. IN this case, video footage shows glass bottles being delivered at 04.57 hours ad removed by 06.35 hours. CCTV footage was provided in respect of that allegation also.
9. Following its investigation, the respondent recognised the person removing and replacing the milk bottles in the footage to be the claimant.
10. In due course the claimant was suspended on full pay while the respondent investigated the matters which was confirmed to the claimant by way of a letter dated 26 November 2020. In due course, the claimant attended an investigation meeting with Gary Sherwood, Operations Manager on 1 December 2020. That time the claimant denied taking milk away from the first customer's doorstep but upon viewing the CTV footage he agreed that it was him but asserted that he did not know the reason why. In respect of the second customer who complained, the claimant said he had taken the milk because he had been asked to do so by a colleague.

11. The claimant was invited by way of letter dated 24 November 2020 to attend a disciplinary hearing on 6 January 2021 xxx allegations of misconduct which included that he had followed a colleague on his round and removed the milk previously delivered which amounted to gross misconduct under paragraphs 4.2.18 and 4.2.1 of the respondent's disciplinary policy. The letter warned him that dismissal was a possible outcome and provided the right to be accompanied.
12. He disciplinary hearing took place as scheduled and was conducted by Mr Sidders. The claimant was accompanied by Kevin Gray, a Trade Union Representative.
13. During the course of the hearing, the claimant repeated his claim that he had swapped the milk at the second customer's address but could not explain how that resulted in customer 2 receiving no milk. He repeated his belief that he could not remember going to the first customer's house and that he could have taken milk from other customers.
14. Following the conclusion of the disciplinary process, Mr Sidders determined that the allegations raised against the claimant were well founded in that it was Mr Sidders' view that the claimant had no justification for removing milk, and that the claimant's actions had been deliberate and premeditated and amounted to a serious breach of trust and confidence in the relationship between the respondent and the claimant such that summary dismissal was the appropriate penalty given that Mr Sidders had found that the claimant had committed acts of gross misconduct.
15. The claimant's position in this hearing has been to raise a number of criticisms of the respondent's decision to dismiss. It should be noted that the claimant accepts that it was him who was responsible for taking milk but this was inevitable given the footage before him during the course of the investigation and now before the tribunal. The claimant says that the investigation contained a material procedural defect which arises from the respondent's failure to complete a number of investigations that were prompted by responses given by the claimant during the investigation and disciplinary process. The respondent says that this criticism does not land on the basis that they are "light years away" from amounting to a material defect of the nature that could render the dismissal unfair.
16. Second, the claimant criticises the respondent for its failure to interview potential witnesses at the investigation stage as opposed to what Mr Sidders did was to do this during the course of the disciplinary hearing. However, and it is noted that the line of enquiry that Mr Sidders pursued during the course of the disciplinary process was only alerted to the respondent for the first time during the course of the disciplinary process that Mr Sidders was running and consequently, this is not a criticism which has any bearing whatsoever on the respondent's decision to dismiss.
17. A third criticism is that no notes of what was asked of the witnesses was provided to the respondent.

18. A fourth criticism is that the respondent failed to send the letter to the claimant in which it set out the outcome of the investigation.
19. Fifthly, the respondent did not have a genuine belief of the claimant's guilt. This argument was predicated on the basis that Mr Sidders had misinterpreted the extent of the claimant's injuries which he suffered in a fall at his home which had proceeded the milk theft allegations that the claimant faced which the claimant attributed to his observed behaviour on the CCTV footage captured by the customers who complained.
20. Sixthly, it was put that the respondent should have considered that the claimant's account given during the course of the investigation and the disciplinary in that it lacked sophistication and as such the respondent should have properly considered that account to have been one generated by confusion the claimant was said to have been suffering at the material time caused by the fall that I have mentioned above.
21. I find that the claimant did engage in acts that could readily be interpreted as stealing milk. Further, I find that during the course of the investigation and the disciplinary, the claimant's responses to questions were, at best, inconsistent or, more likely, untruthful.
22. I find the facts factual circumstances which underpinned his dismissal to be of the most bizarre nature, and represent at their highest very clear examples of the type of behaviour which would inevitably lead to a breakdown in trust and confidence between the employer and employee.
23. Accordingly, and in light of the claimant's responses, it was open to the respondent to view the claimant as a thoroughly unreliable historian. I do not find that the claimant was confused to the extent that he was incapable of relaying what he viewed to be the truth of the situation and this conclusion is supported by the claimant's answers to questions to him about the taking of milk both before and after the CCTV footage is viewed.
24. I find that the respondent conducted a fair and reasonable investigation and that the criticisms raised in this respect are trivial, minor and inconsequential in so far as the outcome of the investigation and its result, namely the claimant's dismissal.
25. I find that Mr Sidders demonstrated even-handedness and fairness in the conduct of the disciplinary process. This is evidenced by his readiness to investigate witnesses the claimant had identified as supporting his case. It is not Mr Sidders' fault that these witnesses do not assist the claimant. In addition, I find that while Mr Sidders may have misdirected himself as at the state of the claimant's memory and other related health issues, that misdirection did not affect the decision to dismiss him in any great way.

Relevant law and conclusions – Unfair dismissal

26. Section 98(4) of the Employment Rights Act 1996 ("ERA") confers on an employee the right not to be unfairly dismissed. Enforcement of that right is

by way of a complaint to the tribunal under s.111 ERA 1996. The employee must show that he was dismissed by the respondent under s.95 ERA 1996, but in this case the respondent admits that it dismissed the claimant (within s.95(1)(a)) of the 1996 Act.

27. 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.
28. In this case, it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of gross misconduct. Misconduct is a potentially fair reason for dismissal under s.98(2). The respondent has satisfied the requirements of s.98(2).
29. Section 98(4) then deals with fairness generally and provides that the determination of the reason whether the dismissal was fair or unfair, having regard to the circumstances 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.
30. 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. The tribunal must decide whether the employer held such genuine belief on reasonable grounds 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.
31. I find on the balance of probabilities that the respondent was entitled to dismiss the claimant based upon the respondent's genuine belief that the claimant was guilty of misconduct. Further, I find that the decision to dismiss fell within the range of reasonable responses open to it an employer confronted with the claimant's misconduct. The claimant was advised in unequivocal terms as to the allegations he was facing and the reasons for his dismissal. Therefore I reject the criticism of the respondent in this regard raised by the claimant through Ms Suding.

32. The claimant contends the respondent did not carry out a reasonable investigation but I have found that the respondent did conduct a reasonable investigation and one which fell within the range of reasonable responses of an employer. Accordingly, the claimant's claim of unfair dismissal is not founded and is dismissed.

Relevant law and conclusions – breach of contract

33. The claimant was dismissed without notice. He brings a claim for breach of contract in respect of his entitlement to notice.
34. The respondent says it was entitled to dismiss him without notice for reason of the finding of gross misconduct. In other words, the claimant's conduct was such that it amounted to a repudiatory breach of contract which entitled the respondent to treat the contract as if it was at an end. I find that the acts of the claimant as caught on CCTV by two customers amount to the clearest and most egregious breaches of a duty of mutual trust and confidence. In other words, the claimant's actions as I have identified amount to gross misconduct in my view.
35. Given my findings that the respondent was entitled to reach the view that it did in respect of the claimant's conduct, it follows that the claimant's claim of breach of contract is not founded and is dismissed.

Employment Judge Forde

Date: 5 October 2022

Sent to the parties on:

6 October 2022

For the Tribunal Office