EMPLOYMENT TRIBUNALS

Claimant: **Ms Michelle O'Flynn**

Respondent: **4BG Group**

Heard at: **East London Hearing Centre (by CVP)**

On: **8 September 2022**

Before: **Employment Judge Byrne**

Representation

Claimant: In person
Respondent: Ms Jennifer Linford, of Counsel

JUDGMENT having been sent to the parties on 16 September 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. This has been a remote hearing which has been consented to by the parties. All parties attended the hearing through Cloud Video Platform.

2. At the outset of the hearing, it was confirmed that the Claimant was advancing a claim of unfair dismissal. In essence, her claim was that her dismissal for reasons connected to the alleged falsification of a 'clocking in' record had been unfair. The Respondent's position was that the dismissal of the Claimant was for a fair reason, namely conduct on the part of the Claimant connected to the falsification of a 'clocking in' record. It was explained that the statutory basis for the claim was section 98 of the Employment Rights Act 1996 and the relevant issues were identified with reference to that statutory provision, together with the test set out in BHS Ltd v Burchell [1980] ICR 303.

3. The Tribunal heard evidence from four witnesses for the Respondent, namely: Mr Ray Moakes (Engineering Manager of the Respondent), followed by Mr Luke Twitchett (Direct Line Manager of the Claimant), followed by Mr Andrew Thurlbourn (Managing Director of the Respondent) and, finally, evidence from Mr Gregory

Mazurkewicz (Operations Director of the Respondent). The Tribunal then heard evidence from the Claimant, Ms Michelle O'Flynn. The Tribunal also heard closing submissions on behalf of the Claimant and the Respondent.

4. The Tribunal was referred in the course of the hearing to a bundle running to some 109 pages, together with witness statements put forward by the aforementioned witnesses. The Tribunal also heard closing submissions on behalf of both the Claimant and the Respondent.

Findings of Fact

5. I move now to the findings of fact that I have made in relation to this matter, and I would note that I have arrived only at findings of fact that relate to material issues in the claim.

6. The Respondent company is a manufacturer specialising in plastics and engine parts and employs approximately seventy people.

7. The Claimant was employed by the Respondent as a production operator. She also came to be known as a production planner, but she was employed initially as a production operator on 22 October 2018, and it is agreed that her employment ended by way of dismissal on 2 December 2021, which is the effective date of termination.

8. Until the time of the material events in this claim, the Claimant was held in high regard by the Respondent and was referred to on various occasions in evidence as a key worker on the factory floor. She had a very good knowledge of the Respondent's business and she was someone to whom other employees approached for work-related help and advice. In the autumn of 2021, she was given additional responsibilities along with another employee, together with a small pay rise, albeit there was no change to her job title.

9. The Claimant's contract of employment made clear that gross misconduct could lead to summary dismissal and that the associated employee handbook, which the Claimant accepted was given to her around the time of her initial employment, listed falsification of records as an example of gross misconduct. The Claimant accepted in evidence that 'clocking in' records were important, not only for recording the hours employees worked for pay purposes, but also to have an exact record of employees on the factory floor in the event of an emergency.

10. On the morning of 25 November 2021, it came to the attention of the Respondent that there was an allegation that the Claimant had been clocked in at a time when she was not there, namely 07:17 on that morning. It is agreed that this is what happened and that it was a colleague of the Claimant, Mr Carl Balls, who had clocked her in on that morning. The Claimant accepted in evidence that she arrived at the factory premises later that morning and certainly no earlier than 07:47.

11. There were a series of fact-finding meetings on the same morning. These were conducted by Mr Ray Moakes; one was held with Mr Carl Balls and another was held separately with the Claimant. The Claimant said in her fact-finding meeting that Carl

Balls had clocked her in by mistake on the morning of 25 November 2021. That was also the initial account of Mr Balls in his fact-finding meeting. However, he quickly moved from that account in that fact-finding meeting, and he said in that he had clocked the Claimant in at her behest and that she had asked him to do so on the previous afternoon.

12. After those meetings were conducted, and on the same day, both Mr Balls and the Claimant were separately asked to review and sign the notes from those investigatory meetings or fact-finding meetings.

13. On the same day the Claimant was seen handing Carl Balls a note in which she said: *"We will say that you clocked me in by mistake and told me when I got in but I forgot, then when you said after tea break did I change it - I'd forgotten"*. She accepted in evidence that she gave him a note in those terms.

14. The Claimant gave evidence at the Tribunal hearing of a different sequence of events that involved a prior proposal from Carl Balls the previous day, 24 November 2021, to have the Claimant clock Carl Balls in, in return for him doing the same for her. However, this version of events was never put forward by the Claimant at any stage before the Tribunal hearing.

15. The Claimant accepted in her evidence that she made at least one phone call to Carl Balls on the evening of 25 November 2021.

16. On the following Monday, 29 November 2021, Mr Twitchett requested to have a formal meeting with the Claimant which was in the nature of a further fact-finding or investigatory meeting. The Claimant declined to engage in that meeting because she was of the view that she should have had 48 hours' notice in relation to that meeting. I find that, notwithstanding any confusion over the description of the meaning (there was evidence that it was variously described as 'formal' and as a meeting 'to find facts') that it was also made clear to the Claimant that it was not a disciplinary meeting.

17. On the same day Mr Twitchett suspended the Claimant on full pay. I find that the suspension was not disciplinary in nature and I accept Mr Twitchett's evidence that he had taken the view that it was a necessary step because of his perception at the time of a degree of unrest and disquiet on the shop floor amongst other employees as a result of relevant events that had transpired on 25 November 2021.

18. The Claimant was invited in writing to a disciplinary meeting to take place on 1 December 2021 and she was supplied with notes and evidence in advance of that meeting. The Claimant was advised of her entitlement to be accompanied at that meeting. A request for a different note-taker that was put forward by the Claimant was facilitated. Mr Twitchett conducted the disciplinary hearing on behalf of the Respondent. The relevant issues were made clear to the Claimant at the disciplinary meeting and she was given a full opportunity to give her version of events at that meeting. At no stage in that meeting did the Claimant put forward a version of events entailing allegations against Carl Balls of the kind that were made for the first time at the Tribunal hearing.

19. After the disciplinary hearing Mr Twitchett had a discussion on the same date with Mr Andrew Thurlbourn, the managing director of the Respondent, in which Mr Twitchett reported his findings to Mr Thurlbourn. Following this discussion and upon a review of his findings, Mr Twitchett concluded that the behaviour on the part of the Claimant

amounted to gross misconduct. In arriving at the decision to dismiss the Claimant summarily he had regard to relevant matters, including mitigation points. He had particular regard to the seriousness of the misconduct in question as well as the Claimant's status in the eyes of other employees in the company, and also a precedent that had arisen in the company in connection with a similar, unrelated situation some time previously.

20. On 1 December 2021 the Claimant was advised of her dismissal in writing and that it was to be effective from 2 December 2021.

21. The Claimant requested an appeal on 3 December 2021 and this then took place in front of Mr Gregory Mazurkewicz on 9 December 2021. The appeal was complicated by the Claimant's perception that it was solely an opportunity for her to put questions and raise complaints and I find on the evidence before me that there was a genuine effort on the part of Mr Mazurkewicz to explore the Claimant's complaints further but that matters reached an impasse because of the Claimant's perception that the meeting was solely concerned with her chance to ask questions and raise complaints rather than entail a broader exploration of issues leading to the dismissal, which an appeal procedure would necessarily entail. On the evidence given, I find that it cannot be said that Mr Mazurkewicz brought the appeal hearing to a premature conclusion. On the evidence before me, I find that the Claimant made the decision to end the appeal meeting prematurely.

22. On 15 December 2021 the Respondent issued correspondence to the Claimant in which she was advised that her appeal had been unsuccessful.

The Relevant Law

23. I turn now to outline the relevant law. The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b).

24. If conduct has been shown as the reason for the dismissal, then the Tribunal must decide whether the dismissal was fair or unfair under s98(4) ERA and this '*(a) depends on whether 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.*' This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

25. BHS Ltd v Burchell [1980] ICR 303 sets out guidance for the Tribunal in misconduct dismissals in considering the reasonableness of the employer's action. The Tribunal should consider whether the employer had a genuine belief in the misconduct and whether that belief was based on reasonable grounds and after reasonable investigation in the particular circumstances of the case.

26. The case of Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] IRLR 759 upheld BHS Ltd v Burchell and framed the relevant test as follows:

> *"…once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*
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> *If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."*

27. In Sainsbury's Supermarket v Hitt [2002] EWCA Civ. 1588 it was held that the 'range of reasonable responses approach' applies to the conduct of investigations as much as to the decision of dismissal. A reasonable investigation and procedure generally requires an employer to be even-handed in its approach and where there are serious charges with particularly serious consequences a more scrupulous investigation may be required, depending upon the circumstances, looking as much at exculpatory evidence as evidence put forward to show guilt.

28. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures, which sets out basic principles of fairness to be adopted in disciplinary situations. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

Conclusions

29. I am satisfied that, on the evidence before me, the Respondent has discharged the burden of showing that the Claimant's dismissal was for a potentially fair reason, namely conduct in the form of falsification of a 'clocking in' record.

30. To follow the framework set out in the Graham case, the next question that arises is as follows:

30.1 ***Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?***

I find that, looking at the evidence in the round, a reasonable investigation was carried out. The substantive investigatory meetings were conducted on 25 November 2021 and I find that the Claimant had a chance a fair opportunity to give her account and I find that the additional attempted investigatory meeting on 29 November 2021, which did not get off the ground due to the Claimant's refusal to engage with the meeting, was a reasonable attempt at a further fact-finding meeting in light of the fact that Mr Twitchett had been on leave. I find that sufficient justification has been offered for the non-disciplinary suspension that occurred at that point in time. I find that there was an adequate disciplinary hearing on 1 December 2022. Appropriate written notice was given of that meeting and the Claimant was afforded or given all relevant evidence of materials gathered at that point in time in advance of that meeting. She had a full opportunity to respond to the allegations made against her. She was afforded an appeal hearing after the decision was made to dismiss her and the Claimant, rather than the Respondent, brought that hearing to a premature end. The next relevant question is as follows:

30.2 Did the employer believe that the employee was guilty of misconduct?

I find that the answer to that is in the affirmative in light of what emerged from the fact-finding meetings and the disciplinary hearing. I conclude that the Respondent did believe that the Claimant was guilty of misconduct. The next related question is:

30.3 Did the Respondent have reasonable grounds for that belief?

I find that the answer to that question is also in the affirmative. The representative of the Respondent who made the decision to dismiss had, at that time, the clear evidence of Mr Carl Balls that implicated the Claimant. He also had the note that it was accepted was handed by the Claimant to Mr Balls which, on its face, disclosed an effort on the part of the Claimant to create a narrative that attempted to answer the allegation made against her and an effort to have Mr Balls relate the same narrative to the Respondent. It is very important to note that the Tribunal is not concerned with determining whether the Claimant is actually guilty of falsifying her 'clocking in' card but rather whether there was enough of a basis for the employer to think so at the time and that is what is to be determined. The Claimant has said many times in her evidence, particularly in the later part of the hearing before the Tribunal, that with the benefit of hindsight, she perhaps ought to have advanced the version of events that she advanced at the Tribunal hearing for the first time. However, all that the Tribunal can examine is the nature of the evidence that was put before the employer at the time that the Respondent made the decision to dismiss the Claimant. I find that at the time that the decision to dismiss was made and on the material that was put forward and was before the employer at the material time, there was ample evidence amounting to what could comprise reasonable grounds for the belief that the Claimant was guilty of misconduct. The fourth and final question is:

30.4 Was the sanction of dismissal reasonable?

I find first of all that it was reasonable for the Respondent to conclude that the conduct it believed had been committed by the Claimant amounted to gross misconduct. It was in the employee handbook that falsification of records such as a 'clocking in' card was one type of conduct that could amount to gross misconduct and it was also clear in the contract of employment that gross misconduct could result in summary dismissal. As to whether the decision to dismiss falls within the band of reasonable responses, I have regard to the fact that there are two reasons in particular that were relied upon by the Respondent in taking the view that dismissal was an appropriate sanction. The first was the fact that, up until this incident, the Claimant was regarded as a key worker in the Respondent's business. In this regard, it was particularly pertinent that she herself said that she was someone who colleagues went to for work-related help and advice. She was available to train colleagues. Notwithstanding that there was no specific supervisory word used in her job title, it is clear that, and she accepted this herself, she was a central worker on the factory floor and I think the Respondent was entitled to take account of that. Additionally, the Respondent was also entitled to take account of precedent within the company concerning the sanction imposed in a previous similar, but unrelated, situation within the company in a reasonable effort to try to be consistent. Ultimately, it is not for the Tribunal to substitute its own view of what ought to have been imposed. The question is whether the sanction of dismissal falls within the range of reasonable responses. On all of the evidence I have heard I find that, having regard to the size and administrative resources of the Respondent's undertaking as well as equity and the substantial merits of the case, the Respondent gave proper consideration to material factors in arriving at the decision to dismiss and I find that the decision to dismiss does fall within the band of reasonable responses.

31. I am satisfied that, looking at the evidence in the round, there was no want of procedural fairness or breaches of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

32. Given the findings outlined above, I conclude that the dismissal was fair and that the claim must therefore be dismissed.

Employment Judge Byrne
Date: 2 November 2022