



EMPLOYMENT TRIBUNALS

Claimant: Miss F Martin

Respondent: Tesco Stores Ltd

Heard at: Cardiff via CVP

On: 1, 2 November 2021, 27, 28
July and 30 November 2022

Before: Employment Judge Ward

Representation

Claimant: Mr G Probert (counsel)

Respondent: Mr J Platts Mills (counsel)

JUDGMENT

1. The claim is dismissed.
2. The dismissal of the claimant on 2 December 2019 was fair and not wrongful.

REASONS

The issues

1. The claimant contends that she was unfairly and or wrongfully dismissed on 2 December 2019. It was accepted that the claimant was an employee with the requisite service and had presented her claim in time. The issue for the Tribunal to determine, therefore, was whether the respondent unfairly dismissed the claimant and whether the dismissal was wrongful. The respondent resisted the claim and contended that the dismissal was fair and reasonable in all the circumstances and that the conduct had been committed. The matter came before the Tribunal for a three day hearing that went part heard, was reconvened for a two day hearing and was concluded with a further days hearing for oral submissions.

The applicable law

2. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The respondent states that the claimant was dismissed by reason of conduct; see Section 98(2)(b) ERA. If the respondent persuades me that the claimant was dismissed for a potentially fair reason, I must go on to consider the general reasonableness of the dismissal under Section 98(4) ERA.
3. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.
4. The well-known decision of the EAT in *British Home Stores Limited v. Burchell* [1980] ICR 303 gives guidance on these matters.
5. As the Tribunal hearing the case I am also mindful that I must not put myself in the position of the respondent and assess the reasonableness of its actions by reference to what I myself would have done in the circumstances. It is not for me to weigh up the evidence that was before the respondent at the time of its decision to dismiss and substitute my own conclusions as if I were conducting the investigation. Employers have at their disposal a range of reasonable responses to the alleged misconduct of an employee and it is instead my function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that range.
6. Further in respect of wrongful dismissal, did the respondent prove on the balance of probabilities, that the claimant actually committed the gross misconduct and was dismissed for those reasons.

The evidence

7. I heard evidence from Mr Davies, the Store Manager of the Aberdare store, Ms Morris a People Partner, Miss Rogers the investigating manager, Ms Cannon disciplinary manager, Ms Edmunds the disciplinary appeal manager and the Claimant. The parties provided an agreed bundle of documents of 809 pages (referenced where appropriate in this judgement by a p and the number in brackets) with an additional right to work policy being produced in evidence separately during the hearing.

The relevant facts

8. The Claimant was employed as a lead manager in the Aberdare Store. She has been employed for 18 years and had a clean disciplinary record.
9. As lead manager, the claimant was responsible for recruitment that she undertook herself and those of her direct reports.
10. The respondent is a very large employer with stores throughout the UK they employ a large number of staff that are supplemented at christmas with temporary staff.
11. Recruitment at Tesco is a large part of the business, and they have many policies and procedures. The relevant ones for these purposes are the recruitment of family and friends, christmas temporary workers and the right to work procedures. These are all matters that the respondent takes very seriously.
12. The claimant was investigated for breaches of the recruitment processes for two applicants for temporary christmas work that were her relatives; Martin and Ruth, who were recruited during November 2018.
13. There is nothing wrong with recruiting friends and family, the respondent has a policy on it. They also have a temporary workers recruitment process that involves an interview and if successful an induction, before commencing work
14. Initially the investigation was commenced by a Ms Jones but given concerns raised by the claimant about the manner in which she had conducted the first meeting. Mr Davies, the claimants line manager, asked Ms Rogers to be the investigator.
15. This wasn't a continuation; Ms Rogers started from scratch and conducted her own investigation. Much was made in the hearing about the fact that the statements taken by Ms Jones were never disclosed to the claimant and are in fact no longer in the respondent's possession. Ms Rogers explained that she did look at them when commencing her task but that she did not rely on them and took new statements from the witnesses. Though she did check that there were no inconsistencies with what they had said to Ms Jones and what they said to her.
16. Two of the employees interviewed were direct reports of the claimant; Kristian and Tom, the third was a junior colleague, Hannah. Statements were taken from these three employees as part of the claimant's investigation, they were not investigated themselves for their own failure to follow procedure. This was something upheld as an error by the respondent in the claimant's grievance. Ms Cannon agreed in cross examination that CCTV recordings from the relevant time could have been retained also.

17. Martin and Ruth were not interviewed as part of the investigation process. The respondent's policy does not say that relatives or third parties cannot be interviewed it simply refers to assessing the weight that can be given to such statements. As they seem to be relevant witnesses Ms Rogers was cross examined on this omission and she explained that she did not consider them as they were not in the business at the time and questioned their impartiality as relatives of the claimant. She didn't see that they could add anything to her investigation.
18. Ms Rogers concluded based upon the statements taken, the relevant documents and following four investigation meetings with the claimant that there was a case to answer to four allegations. Those allegations were specified in writing to the claimant (p466).
19. The matter had already come to a disciplinary meeting with Ms Martin but she wasn't happy the paperwork so would not hear the case and remitted it to Ms Rogers. This hearing officer did not articulate exactly what made her unable to hear the matter but Ms Rogers reviewed the paper work and sought HR advise before speaking to those she thought were relevant and interviewing the claimant for a final time.
20. At the time of the disciplinary meeting the claimant had seen all the paperwork. Kristian's statement had not initially been shared as he asked for it to remain confidential, but it had been shared once he had left the business. At the end of the disciplinary meeting the claimant said she had not had copies of the interview forms for Martin and Ruth, though she had seen these during interviews, she was not provided with these until later. It would have been advisable for the respondent to have compiled the documents relied upon and sent these to the claimant when inviting her to the disciplinary meeting.
21. The disciplinary allegations changed during the procedure, this is not unheard of, the clarity is needed when being interviewed and when facing a disciplinary meeting. The letter of disciplinary invite letter (p466) had four specific allegations.
22. The disciplinary meeting took 11 hours and each part of the allegations and the claimant's concerns were discussed and aired. Ms Cannon took time to consider the whole case and decided gross misconduct was made out.
23. The reason for dismissal was set out in Ms Cannon's disciplinary outcome letter on 15 October 2019 (p558) unfortunately the allegations are not dealt with in turn and are dealt with together as a *deliberate disregard for Tesco procedures and falsification of Tesco documentation in relation to the recruitment of two of your relatives in November 2018*. This included asking Kristian to complete an interview form for Martin despite not having interviewed

him, asking Tom to interview Ruth on 26 November 2018 but backdate the interview form, when Tom was on holiday; and asking Hannah to sign a right to work declaration for Ruth without her being present and when she was not the interviewing manager.

24. Kristians statement was clear he had never interviewed Martin but had completed the interview form at the claimant's request. Ms Cannon accepted this evidence and found at the time that the claimant did ask Kristian to falsify the recruitment documents (Ms Cannons rational and conclusion p557). In her witness statement she explained that the fact Kristian had dated the interview on a day he was not working supported what he said in his statement.
25. The claimant admitted to asking Hannah to sign the right to work form knowing it wasn't the correct process, which requires the declaration to be signed in by the interviewing manager and in the presence of the applicant. This made Ms Cannon believe that the claimant was capable of doing what Kristian and Tom had alleged.
26. Tom's statement was clear that he had interviewed Ruth and inducted her on the same day. He was not clear about the date which was altered on the form which raised suspicion with the respondent.
27. The fact the claimant sought to mitigate her actions with Hannah by the fact a people person was in the room Ms Cannon did consider but found that it did not absolve the claimant's own actions.
28. Accordingly, she found the colleagues evidence more plausible than the claimants who in Ms Cannon's view accepted no accountability and sought to find fault in the process.
29. The Disciplinary Policy which applied at the time (p117) lists abuse of Tesco procedures and falsification of documents as serious breaches of Tesco rules/standards are likely to constitute gross misconduct.
30. This was a case of one person's word against another and Ms Cannon found that the statements from the three junior colleagues and discrepancies in the paperwork tipped the balance as to who she believed.
31. In light of the claimant's length of service and clean disciplinary record Ms Cannon, recognising that trust in the claimant had been broken, considered an alternative to dismissal and felt that a lower manager post would be appropriate. The claimant was offered a demotion, but this was declined by the claimant due to the reduction in salary.
32. The claimant was therefore dismissed. Which the claimant appealed and was heard by a Ms Edmunds. No complaints are levelled at the appeal process.

Conclusions

33. The respondent found that the claimant had asked colleagues Kristian, Tom and Hannah to breach recruitment procedures and falsify documents, in relation to her relatives Ruth and Martin as set out in Ms Cannons disciplinary outcome letter (p558). This is a reason related to conduct, which is a potentially fair reason for dismissal under s. 98(2) of the Employment Rights Act 1996.
34. The respondent has therefore proved, on a balance of probabilities, that the claimant was dismissed for conduct as set out in Section 98(2)(b) of the Employment Rights Act 1996 (ERA).
35. I have therefore had to consider the reasonableness of the dismissal. This requires me to consider firstly, whether the respondent carried 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.
36. The claimant's case is that the investigation was not reasonable. I will deal with these challenges in turn in light of the respondent's size and administrative resources.
37. Although it would have been ideal if the statements taken by Ms Jones had been available. As they were not relied upon in the investigation or reasons for dismissal, they do not affect the reasonable of the decisions. I have similar conclusions to the failure to interview the claimant's relatives who applied for the roles.
38. The fact the respondent failed to deal with the three junior employees potential misconduct in the same way as the claimants is not fatal. It was not the same facts upon which they themselves may have breached the policies. It was the fact that the claimant as a senior manager asked them to do so. The respondent was more concerned about the actions of the claimant at the time than their own individual actions. This is reasonable in the circumstances, though I accept the respondent found that ideally all conduct would have been investigated at the same time. This did not mean that the investigation was fatally flawed. It is not inconsistency of treatment as it is not the same conduct that is being investigated, one is asking another to breach a procedure the other is breaching procedure. As I find there was no inconsistency there was nothing to remedy following the outcome of the grievance.
39. The fact the first hearing officer was not happy to proceed does not mean that the hearing could not proceed and Ms Cannon as disciplinary hearing manager was content that she was able to proceed.

40. It is said there was a lack of challenge to the colleague's evidence given to Ms Rogers. That they were not challenged in enough depth to show inconsistencies in what they said and failed to be analytical. A thorough investigation did take place. The investigator asked open questions, as is expected and recorded the answers. Ms Cannon found consistency with what each colleague said individually and collectively.
41. I can see that Tom never alleged that he wrote the date on the interview form, but I am not to put myself in the position and think what I would have done. As a whole Ms Cannon decided that there was sufficient evidence of gross misconduct. There is nothing to suggest Ms Rogers wasn't careful. Ultimately Ms Rogers preferred the evidence of the colleagues over the claimant.
42. Presuming the claimant's guilt was another complaint but I found no evidence of this. The grievance found that Mr Davies had not always acted correctly but he was not part of the disciplinary process.
43. In my view, it is clear that the respondent did have a genuine belief that the claimant had committed an act of gross misconduct and that this was the reason it dismissed the claimant.
44. I also find that Ms Cannons's genuine belief was based on reasonable grounds.
45. Did the respondent carry out a reasonable investigation upon which to sustain that belief? It did.
46. I have ensured that the above three limbs of the *Burchell* test are not exhaustive of my enquiries; I have had regard to the specific statutory provision in Section 98(4) ERA as to whether the respondent acted reasonably or unreasonably in treating conduct as a sufficient reason to dismiss.
47. The respondent found that the acts of misconduct were gross misconduct because they breached trust. This is a reasonable response given the claimant's acts.
48. On this basis I conclude that the dismissal fell inside the range of reasonable responses that an employer can take and that therefore the respondent fairly dismissed the claimant.
49. As to whether the acts actually took place, Kristian and Tom provided accounts that were consistent with Hannah. Kristian and Hannah's evidenced that the claimant asked them to breach normal procedures in relation to her relatives. The claimant admits she asked Hannah to sign the right to work forms without being the interview manager or Ruth in attendance and seeks to mitigate with a people partner being in the room. This does not absolve the conduct and in

itself would be potential grounds for dismissal given the implications for incorrect right to work procedures being followed.

50. The claimant does not admit to asking Kristian to do what he said but when asked why they might fabricate this said in cross examination that they “panicked.” This does not make sense as he is implicating himself in misconduct, albeit with some mitigation. Kristians witness evidence is clear and the interview form is dated on a date when he is not in the business and is so sparse as to raise a suspicion that an interview did not in fact take place.
51. However I do not find that Toms evidence is as strong. His evidence amounts to providing Ruth with insufficient induction as it was on the on the same day as her interview, which would be insufficient for gross misconduct.
52. In these circumstances the respondent has proved on the balance of probabilities, that the claimant; asked Kristian to complete an interview form for Martin when he didn’t interview him and asked Hannah to sign a declaration to work form for Ruth when she was not the interviewing manager and Ruth was not present, which constituted gross misconduct, which was the reason for dismissal.

Employment Judge Ward
Dated:16 December 2022

REASONS SENT TO THE PARTIES ON 20 December 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche