



EMPLOYMENT TRIBUNALS

Claimant: Mr K Piechowicz

Respondent: Anglo Beef Processors UK

Heard at: Birmingham ET (By CVP)

On: 15,16 December 2022

Before: EJ W Brady

Representation

Claimant: Mr Lowe

Respondent: Ms Gyane (Counsel)

RESERVED JUDGMENT

1. The claimant's claim that the dismissal was unfair is well founded.
2. The Respondent shall pay to the Claimant compensation for unfair dismissal of **£23,091.14**
3. The above sum comprises of the following:
 - a. £12,240 Basic Award
 - b. £10,851.14 Compensatory award

Loss of basic salary to date of tribunal £24,391.71

Loss of statutory rights £497.79

Less sums obtained through mitigation to date of tribunal £7,723.48

Total past loss : £17,166.02 (net)

Total past loss: 17,166.02 - 12570 = 4596.02

i. 2596.02 x 20% = 919.20

Total past loss gross = 18,085.22

Less Polkey reduction 40 % (7234.08)

Total Compensatory Loss = 10,851.14

REASONS

Introduction:

1. The claimant was employed as a full time hygiene operative by the respondent. He began his employment with the respondent company in the respondent's depot in Ireland before transferring to the Shrewsbury location in the UK on 14 June 2010. On 4 January 2022 the claimant was dismissed on the grounds of gross misconduct. He claims that his dismissal was unfair. ACAS were notified under the early conciliation procedure on 28 March 2022 and the certificate was issued on 27 April 2022.

2. Claims and Issues:

The claimant has brought a claim for unfair dismissal.

3. The issues were agreed at the start of the hearing and are as follows:

4. List of Issues

5. It is agreed that the claimant was dismissed on 04 January 2022. _

6. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996.

7. It is agreed that the reason for the dismissal was misconduct which is a potentially fair reason for dismissal.

8. If so, was the dismissal fair or unfair in accordance with the ERA section 98(4) and in particular, did the respondent in all respects act within the so-called "band of reasonable responses"?

British Home Stores v Burchell [1980] ICR 303

9. Did the respondent genuinely believe that the claimant was guilty of misconduct?

10. The claimant accepts that the respondent genuinely believed that the claimant was guilty of misconduct.

11. If so, was that belief based on reasonable grounds? (Band of reasonableness)

12. Had the employer carried out such investigation into the matter as was reasonable? (band of reasonableness)

13. *The claimant says that the investigation was not fair and was not objective and that the subsequent decision to summarily dismiss based on the*

investigation that had been conducted was unfair and unreasonable. In particular.

(i) Failure to consider the claimant's response.

(ii)Threatened with police action if he did not cooperate and answer the way they expected him to.

(iii)Failure to request medical evidence

(iv)Failure to consider/ disclose all of the CCTV evidence for the route of the bin

(v)Failure to consider the CCTV evidence on the exterior of the property

14. Did the employer follow a reasonably fair procedure?

15. The claimant says that the notice of the appeal hearing was insufficient, he was unable to arrange representation.

16. If all the above requirements were met was it within the band of reasonable responses to dismiss the claimant rather than impose some other disciplinary sanction?

17. 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 and had a fair and reasonable procedure been followed/ have been dismissed in time anyway – Polkey v AE Dayton Services Ltd [1987] . The respondent says that the Claimant would have been dismissed in any event, therefore any award would be reduced by 100 percent.

18. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable before dismissal pursuant to ERA section 122(2) and if so to what extent? The respondent says that if the tribunal find that the claimant was unfairly dismissed, the compensation should be reduced by 100 percent. (BASIC AWARD)

19. Did the claimant by blameworthy or culpable actions cause or contribute to dismissal to any extent and if so by what proportion, if at all, would it be just and equitable to reduce the amount of any **compensatory** award, pursuant to ERA section 123 (6)? The respondent says that the compensation should be reduced by 100 percent.

Procedure, documents and evidence heard

20. The claimant's first language is Polish. Mr Korbel is a Polish interpreter who was present and interpreted the entire proceedings.

21. The respondent sought to rely on CCTV evidence. 3 extracts of the CCTV evidence had been relied upon in the disciplinary hearing. Those extracts were shown to the witness Mr Owen during his examination in chief and also to the claimant during his examination in chief. A number of other extracts of the CCTV had been disclosed by the respondent to the claimant but did not form part of the bundle and were not seen by the Tribunal. The only extracts that the tribunal viewed were those extracts

that were shown to the witness and the claimant during their evidence in chief and cross examination.

Findings of Fact:

22. Mr Piechowicz was employed as a hygiene operative by the respondent company.
23. On 24 December 2021, he received a letter from the Respondent notifying him that he was being suspended from his duties pending an investigation into the theft of the company product.
24. On 24 December 2021, he was suspended pending investigation.
25. On 29 December 2021 the claimant attended a disciplinary hearing regarding the accusations that had been made against him. The notes of the hearing are contained in the bundle at page 52.
26. The hearing was conducted by Mr Kirk Owen. Mr Owen is the Retail General Manager. He has worked for the company for 7 years and gave evidence to say that he is experienced at conducting disciplinary hearings.
27. Prior to the hearing Mr Kirk Owen had received an oral report about the investigation report from HR and he had received the same letter as the claimant which outlined the allegations to him.
28. At the hearing, the claimant was shown 3 extracts of CCTV which were shown to the Tribunal during the hearing. The CCTV shows the site where the claimant worked. The respondents relied on the CCTV which they say showed the claimant standing near the bin, a colleague placing meat in the bin and the claimant then removing the bin. They said that the claimant and the other employee are in very close proximity and made eye contact and the claimant saw the box being put in the bin.
29. The CCTV shows a person in the palletizing square carrying a box into the vacpac area and placing it in a bin, the claimant can then be seen pushing the bin away and placing it by the rear door. The respondent says that this happened at the same time regularly and relied on this movement to show that the claimant assisted in theft.
30. Once the packaged meat has entered the palletizing square, there is no legitimate reason for it to return to the vacpac area.
31. The CCTV that was shown when Mr Owen was giving his evidence was not clear, the claimant and his colleagues could not be clearly identified, particularly as they were wearing uniforms, overalls, helmets and high visibility jackets. The claimant also made the point that part of the area included tall stainless steel structures that would have partially obscured his view. Mr Owen in his evidence "mis identified" one of the employees which illustrated the difficulties with the CCTV evidence. Mr Owen did say

that when he viewed the CCTV he had viewed it on a 50 inch screen so that made it clearer.

32. In the cross examination of the claimant, Counsel for the respondent showed clearer images to the claimant. Those images showed a person in the palletizing square carrying a box into the vacpac area and placing it in a bin, the claimant could then be seen pushing the bin away and placing it by the rear door. The respondent says that this happened at the same time regularly and relied on this movement to show that the claimant assisted in theft. The claimant says that he has a set routine in his work and that he did the same thing at the same time every day on every shift.
33. The respondent's case was that the box that the other employee was carrying contained packaged meat.
34. In some of the images, the claimant can be seen cleaning a cabinet before he went to move the bin, the respondent claims that this is an example of him waiting for the packaged meat to be put into the bin.
35. The respondent relied on this evidence when deciding that Mr Piechowicz should be suspended.
36. The respondent also relied upon the fact that Mr Piechowicz struggled to push a heavy bin which they say was obviously full of meat and should have raised Mr Piechowicz's concerns and made him look into the bin. The respondent's case was that the claimant pushed an empty trolley more easily than the one that they say contained the meat. The claimant said that the area through which he was pushing the trolley was narrow and therefore he was more careful. The tribunal did not see a noticeable difference between the two examples of Mr Piechowicz moving the trolley.
37. Mr Piechowicz gave evidence to say that his job was to pick up rubbish and to take the bin that had been filled by a colleague and take it outside where he left it. He was employed as a hygiene operative and had never been instructed to inspect the bins. In cross examination, he was asked whether he had a duty to be vigilant to ensure that there was no loss in the rubbish. The claimant says at no time did he ever inspect the bin. I do not find that it was one of the claimant's duties to inspect the bins. I found Mr Piechowicz's evidence to be credible with regard to this. The CCTV did not show Mr Piechowicz obviously struggling with a heavy bin.
38. The disciplinary hearing took place on 29 December 2021. Mr Owen said in his cross examination that he hadn't made up his mind on the final outcome at the start of the hearing and that if he had it would make the disciplinary hearing unfair.
39. The claimant had the use of an interpreter for the disciplinary hearing and the notes of the hearing have been provided. Throughout the questioning of the claimant, the claimant said he did not know that there was meat in the rubbish, he never lifted any boxes and denied taking part in any deception or theft. The style of questioning is oppressive. When the claimant gave an answer that Mr Owen did not agree with, he asked him

again, he also asked him to cooperate and said that it was his last chance before they went to the police. Mr Owen also referred to the claimant's account as "fantasy".

40. The minutes of the meeting illustrate Mr Owen's state of mind at during the disciplinary hearing. Towards the start of the meeting he says, "To prove points", he also says, "its easily provable to the police" and "why you needed extra money". He says "I can prove there is meat in those boxes". "I'll prove you wrong" and "I've given you every opportunity to be honest and come clean". In his cross examination, Mr Owen agreed that if he had made a preconceived decision about the outcome then that would make the investigation unfair. The tone and manner of the questioning of the claimant throughout the meeting make it clear that Mr Owen had a preconceived determination that the claimant had committed the theft and did not entertain the claimant's explanation.
41. The respondent's decision rested solely on CCTV evidence, there was no evidence of any statements from other employees and no investigation report has been produced by the respondent. There is no evidence of what was found in the bin and no CCTV from the rear door area where the bins were taken. Ms Gyane has submitted that if the evidence is conclusive then such a full investigation does not have to be conducted. However, in this case any other possible alternative explanation does not appear to have been considered.
42. On 4th January 2022 the respondent sent a letter to the claimant informing him that Mr Owen had concluded that the allegations were proven and that his employment is terminated without notice for the following reasons:

Causing a serious breach of trust and confidence
Theft of company property
Engaged in actions intended to deceive.
43. The letter states that the decision was made following consideration of the CCTV, the documentation, the claimant's responses and the recurrence of events, however the tone of the questioning and the comments made during the meeting show that M Owen had made the decision before the disciplinary meeting had been held.
44. The claimant appealed by way of letter dated 7th January on the grounds that he believed that the grounds for selection for redundancy dismissal was unfair.
45. On 11th January 2022 the HR Manager invited the claimant to an appeal meeting on Friday 14th January 2022 and explained that he could be accompanied by a colleague or Trade Union representative.
46. On 12th January 2022 the claimant responded and asked if the meeting could be rescheduled as his union representative was not available on 14th February.

47. On 13th January 2022 the respondent sent a second letter rescheduling the meeting to 18 January 2022, the claimant's request to invite his own interpreter was denied but telephone translation was confirmed.
48. On 14 January 2022 the respondent sent a third letter to reschedule the meeting as the Retail General Manger was unexpectedly unavailable for the earlier date. The meeting was rearranged for Thursday 20 January 2022.
49. On 21st January 2022 the meeting was rescheduled to 24th January 2022.
50. In the meantime, emails were exchanged in which the claimant asked to be accompanied by Ana Golata, that request was refused by HR as she is not an employee nor a TU representative. The claimant did not ask for any further postponement of the meeting so that his TU representative could attend with him.
51. The appeal meeting was held on 24 January 2022. Present at the meeting were the claimant, Mr Lees and Tammy Walmsley from the HR department. The translator was present on the telephone.
52. At the start of the meeting the claimant was asked whether he was happy to proceed.
53. In the meeting the claimant said that he believed he had been dismissed because he was an old man. Mr Lees confirmed the reasons for the dismissal. Mr Lees explained that the weight of the meat could not have been mistaken by an experienced member of staff. The claimant replied that he was just a cleaner and didn't work on the packing line so had no idea what's in the bin. Mr Lees says "That concludes the points you raised in the appeal letter" and immediately decided to uphold the original decision.
54. Counsel for the respondent argued that the appeal hearing rectified any procedural mistakes in the disciplinary hearing however the decision was made during the meeting. Although the minutes of the meeting show that each line of the appeal was read out, there does not appear to be any consideration given to the claimant's explanation and the meeting concluded with Mr Lees informing the claimant that his appeal had been unsuccessful.
55. On 24 January 2022 the respondent wrote to the claimant confirming that the appeal had been unsuccessful.

Contributory Fault

56. For the purpose of contributory fault, the tribunal has considered its own view. While there was some evidence of a regular behaviour and some interaction between the claimant and the other employee, this amounts at its highest to some suspicious activity that required further investigation. There was no evidence from the rear door to show what had

been in the bin and no conclusive evidence that there was meat in the bin that the claimant moved.

Law:

57. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 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. 56. In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).
58. Section 98(4) then 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. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *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).

Submissions.

59. I have summarised the main points of the submissions below.
60. Counsel for the respondent submitted that the investigation that had been carried out by the respondents was thorough and she relied on the case of *Shrestha v Genesis Housing Association Ltd* 2015 IRLR 399 CA and the case of *Ilea v Gravett* 1988 IRLR 497 which stated that there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issues is one of pure inference As the scale moves towards the latter end, so the amount of inquiry and investigation

which may be required including questioning of the employee is likely to increase.

61. It was also argued by Counsel for the respondent that although Mr Owen was strong in his language but that it was not a threat to say "I am looking for co operation so I don't involve the police". Counsel also said that the manner of questioning had no bearing on the meeting as the claimant did not change his account, that he had no knowledge of the stolen meat. Counsel also argued that any defect caused by Mr Owen in the disciplinary meeting was rectified during the appeal meeting.
62. Counsel for the respondent argued that the investigation was within the band of reasonableness and that the consequent decision to dismiss the claimant was therefore within the band of reasonable responses.
63. Counsel further submitted that if the tribunal find that the dismissal was unfair, then the claimant would have been dismissed in any event as he was involved in an operation to steal meat and any award should be reduced by 100 percent.
64. Mr Lowe for the claimant submitted that the claimant was performing a simple job that required him to perform 2 simple tasks, cleaning and taking the bins from A to B. He relied on the case of AvB 2002 EAT where it was held that serious allegations of criminal misbehaviour must always be the subject of most careful investigation.
65. Mr Lowe also argued that the respondent had failed to follow the ACAS code and that the disciplinary hearing was a mission on behalf of Mr Owen to prove guilt based on his belief and not fact.
66. Mr Lowe also argued that the appeal meeting should have been postponed to allow the claimant to obtain trade union representation at the hearing.
67. Finally Mr Lowe submitted that if the dismissal was unfair, that there was no culpable or blameworthy behaviour on behalf of the claimant, but that in any event the award should not be reduced by more than 50 percent.

Conclusions

68. The claimant was dismissed on 04 January 2022 for Misconduct. This is a potentially fair reason for dismissal and the claimant accepts that the respondent genuinely believed that the claimant was guilty of misconduct.
69. I have considered the guidance in the case of British Home Stores v Burchell.
70. Was the belief based on reasonable grounds?

71. Had the employer carried out such investigation into the matter as was reasonable.
72. The claimant said that the investigation was not fair and was not objective and that the subsequent decision to summarily dismiss based on the investigation that had been conducted was unfair and unreasonable in particular:
73. **Failure to consider the claimant's response:** I do find that the respondents failed to consider the claimant's response to the allegations. Both the disciplinary meeting and the appeal meeting had a predetermined outcome that was evidenced in the manner of questioning that has been outlined above. When the Dispatch and Warehouse manager made the comments, "To prove points", "its easily provable to the police" "why you needed extra money" "I can prove there is meat in those boxes" "I'll prove you wrong" and "I've given you every opportunity to be honest and come clean", he was not approaching the hearing objectively or with an open mind. When Mr Lees went through the points in the appeal meeting, he read out loud the points raised in the claimant's letter but did not consider the points, he moved straight onto the next point in the letter. I find that there was a failure to consider the claimant's response.
74. **Threatened with police action** if he did not co operate and answer the way they expected him to. I find that the manner that the claimant was questioned was oppressive. He was threatened with police action and his account was described as "fantasy".
75. **Failure to request medical evidence:** The claimant did not raise the issue about suffering a bad back in either the disciplinary hearing or the appeal hearing. I do not find that there was a failure to request medical evidence.
76. **Failure to consider/disclose all of the CCTV evidence for the route of the bin and Failure to consider the CCTV evidence on the exterior of the property:** I do find that there was a failure to provide all of the CCTV. The claimant could be seen pushing the bin to the rear of the doors, but there was no evidence as to what happened to the bin after that.
77. In addition, there were no witness statements taken from any of the other co-workers who were working at that time. Those statements may have assisted either the claimant or the respondent.
78. **Did the employer follow a reasonably fair procedure? Was the notice of appeal hearing insufficient?**
79. The first appeal hearing date was moved at the claimant's request, subsequent changes of date were at the respondent's request. There is no evidence that the claimant requested any further changes of dates and in any event had he done so it is not clear whether the Trade Union representative would have been able to accompany him. For these reasons I find that the notice of appeal hearing was sufficient.

80. The EAT in [Khan v Stripestar Ltd EATS 0022/15](#) held that there is no limitation on the nature and extent of the deficiencies in a disciplinary hearing that can be cured by a thorough and effective internal appeal. Thus even if an investigation is found to be beyond the bounds of reasonableness, a fair appeal process and investigation can cure the deficiencies.
81. However in this case, the result of the appeal process was predetermined and there was no proper consideration of the issues in the case. The respondent did not fully engage in the appeal process and, the claimant was not given an opportunity to expand on the points that he had made in his letter. I do not find that the appeal process rectified the defects in the initial disciplinary hearing.
82. I now have to consider whether the investigation as a whole was within the band of reasonableness. I do not find that it was. These were serious allegations and the evidence from the CCTV was inconclusive. The respondent relied upon that evidence to predetermine the outcome of the disciplinary hearing and the appeal hearing without investigating further. The disciplinary and appeal hearings fell outside the band of reasonableness. The claimant had been working for the company for 16 years, but when he tried to give his account, his explanation was derided as “fantasy”.
83. Consequently, I find that the claim for unfair dismissal is well founded.
84. I now have to consider 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. The CCTV raises some suspicious activities which would warrant some further investigation, but it is not conclusive. I therefore consider that a reduction of 40 percent is appropriate in this case.
85. Then I have to consider whether it would be just and equitable to reduce the amount of the claimant’s basic award because of blameworthy or culpable conduct before dismissal? I have not made any reduction with regard to this as I do not find that the claimant was blameworthy prior to his dismissal.
86. Finally did the claimant by blameworthy or culpable actions cause or contribute to dismissal to any extent and if so by what proportion if at all would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA section 123(6). No reduction.

Remedy:

87. **Basic award £12,240** The basic award has been calculated in the usual way by multiplying the claimant’s gross weekly pay by a multiplier calculated with reference to the claimant’s age and length of service at the time of dismissal.

Compensatory Award:

Loss of Basic salary to date of tribunal $49 \times 497 = 24,391.71$

Loss of statutory rights: £497

Less mitigated loss £7723.48

Loss of long notice is not awarded in this case.
Total past loss : £17,166.02 (net)
Total past loss: 17,166.02 - 12570 = 4596.02
2596.02 x 20% =919.20
Total past loss gross = 18,085.22
Less Polkey reduction 40 % (7234.08)

88. Total Compensatory Loss = **10,851.14**

89. **Total awarded= £23,091.14**

Employment Judge W Brady
Date 22 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
FOR EMPLOYMENT TRIBUNALS