



EMPLOYMENT TRIBUNALS

Claimant

Mr M Midoni

v

Respondent

DHL Services Limited

Heard at: Bury St Edmunds

On: 3, 4 October 2022

Before: Employment Judge K J Palmer (sitting alone)

Appearances:

For the Claimant: In person

For the Respondent: Mr R Dunn, Counsel

JUDGMENT having been sent to the parties on 25 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed as a Warehouse Operative by the Respondents between 6 May 2019 and 17 August 2021, when he was dismissed summarily without notice purportedly by reason of conduct.
2. He presented a claim to this Tribunal on 20 January 2022 and pursuant to a direction given by me on paper, the matter was listed for a two day Full Merits Hearing before this Tribunal. The Notice of Hearing was sent to the parties by letter dated 8 June 2022. Accompanying that Notice were various directions for matters to be dealt with, including disclosure and the filing of Witness Statements and the exchange of Witness Statements in advance of this Hearing.
3. The Claimant failed to comply with any of those directions and the matter further came before me in paper form on 28 September 2022, pursuant to an Application by the Respondents to strike out the Claimant's claim for a failure to prosecute and a failure to comply with the directions. I refused that Application on the basis that I had not heard any, or given any opportunity to the Claimant to explain the failure and indicated that any further Application to Strike Out could be made on the first day of the Hearing.
4. The Hearing was not originally listed before me and fell to me to commence at 2pm on the first day scheduled for it. The Claimant appears in person

and Mr Dunn of Counsel appears for the Respondent.

5. As of the beginning of the Hearing, the Claimant had still not complied with any directions and had not articulated his claim for unlawful deductions by the provision of a Schedule of Loss, nor had he provided a Witness Statement. The Respondents, therefore, were still unaware as to the nature of his claim for unlawful deduction. His ET1 simply indicated that he felt that deductions had been made unlawfully at the termination of his employment and there was no detail specified to enable the Respondents to know the claim they faced. We had no Witness Statement from the Claimant and no proper articulation as to his unlawful deductions claim. His unfair dismissal claim arose out of the summary dismissal of 17 August 2021 and could clearly be dealt with. Mr Dunn decided to withdraw his Application for a Strike Out for the Claimant's failures to comply with the directions sent out on 8 June 2022 and accordingly, we resolved to deal with this Tribunal by way of accepting the Claimant's ET1, a short home made ET1 comprising of four or five paragraphs as his Witness Statement in these proceedings.
6. That still left the difficulty of course of not knowing precisely what the nature of the Claimant's claim in unlawful deduction was. We resolved to proceed anyway and did so.
7. I had before me a comprehensive Bundle running to some 180 pages and a Witness Statement from a Mr Jim French, Quality and Compliance Manager of the Respondents who conducted the Appeal Hearing pursuant to the Claimant's summary dismissal.

Findings of Fact

8. The Claimant commenced his employment as a Warehouse Operative and was provided with a written contract of employment by the Respondents which he signed and accepted, indicating acceptance of its terms. One material term to the issues that are before me in this Tribunal, is paragraph 2, that is headed "Job Responsibilities". It reads as follows:

"You will be expected to carry out the duties associated with your role and any other duties which the company may reasonably require you to perform from time to time. Due to the changing nature of the business, your obligations may vary and develop. The company reserves the right to ask you to perform other duties that may fall outside your normal role responsibilities, but which are within your reasonable capabilities."
9. I heard evidence from Mr French that it was not unusual for Warehouse Operatives to be asked to carry out other tasks; particularly where it was necessary for them to muck in, in the Warehouse. In fact, the Claimant had been reminded of his obligations some months earlier in a discussion he had with a Manager where he had been reminded that he may well be asked to perform other tasks which might include cleaning the Warehouse. This was in May of 2021.
10. The Respondents also have a disciplinary policy and at 1.1 of that Policy is set out a list of misdemeanors which they consider, if proven, could amount to gross misconduct. One of those on the list is a refusal to carry out a

reasonable management instruction. It is worth mentioning that the Claimant was the subject of an existing written warning, which was the subject of an Appeal and that warning for a previous misdemeanor, was down graded from a final written warning to a written warning shortly before the disciplinary process which led to his dismissal.

11. The incident which led to his dismissal took place on 19 July 2021 in the Warehouse, in which the Claimant was working with a team of other Operatives. The shift that had been working in the Warehouse prior to the Claimant's team had been unloading containers which were tipping in the Warehouse. This had left a residue and debris and detritus which required to be cleaned prior to other containers being able to bring their goods into the Warehouse and tip them. It would have been impossible for those containers to have been properly dealt with in the Warehouse had the debris and detritus not been cleaned away from the previous shift.
12. The Claimant and his colleagues were asked by their Team Leader, Steve Adams, to sweep up and clean up in preparation for the arrival of new containers. There were three other colleagues working with the Claimant at the time. The Claimant was the only one to refuse. The other Operatives agreed and effected the clean up. The Claimant refused to do so and in evidence it was established that he refused on no fewer than four occasions when asked by Steve Adams and twice by Scott Campbell, an Operations Manager, who then became involved when Steve Adams approached him and explained to him that he was having difficulties with the Claimant, in that the Claimant was refusing to carry out the tasks that he had been asked to do with his colleagues.
13. When asked, the Claimant initially said that there was no work for him to do and that was essentially his explanation as to why he was not performing the task. He then, somewhat perplexingly, said that he would do it later. He also invited Scott Campbell to suspend him without pay. Ultimately, he was suspended on full pay and a disciplinary investigation was then instigated by the Respondents. This was conducted by Joa Britto.
14. As part of that investigation, the Claimant was invited to give a statement on a pro-forma form. He signed that pro-forma but declined to give any statement in the course of it, simply writing "*Not Applicable*" in every section. Essentially, therefore, he proffered no explanation to go before the Disciplinary Investigation as to why he had refused to carry out the tasks that he had been asked to do with his colleagues, of cleaning up the Warehouse floor to allow new containers to come into the Warehouse. As part of the investigatory process, Mr Britto took a statement from Steve Adams the Team Leader and Scott Campbell the Operations Manager. Both of whom had engaged with the Claimant at the time and had been asking him to perform the task in question and he also took a statement from James Earith a fellow Warehouse Operative.
15. The Claimant was invited to an Investigatory Meeting which took place on 2 August 2021. During that Investigatory Meeting, the Claimant refused to engage properly with the process and proffered no explanation as to why he had refused to undertake the task put to him. He did, however, accept that the contents of the Statements which he had seen from the three

individuals who had been interviewed, were accurate and true. He has continued to accept, before this Tribunal, that those Statements were accurate and true. Perhaps then, not surprisingly, this led to a formal Disciplinary Hearing being initiated by the Respondents and the Claimant was properly invited to that Disciplinary Hearing and it took place on 17 August 2021, before Sahil Masih who conducted the disciplinary process.

16. I had the notes of that Disciplinary Hearing in front of me and once again, the Claimant chose not to engage with the disciplinary process in any meaningful way. He really gave no proper or cogent explanation for his actions, albeit that he did say that he did not consider that being asked to clear up the Warehouse with his colleagues amounted to a reasonable request or reasonable order. He did not, however, explain why that might be the case.
17. Pursuant to that Disciplinary Hearing and in a formal letter written to him by Mr Masih, the Claimant was summarily dismissed without notice on 17 August 2021. The Dismissing Officer, Mr Masih, was not here to give evidence before this Tribunal. One might consider that somewhat unusual, but I understand that he is no longer with the Respondents. Having said that, the documents before me were very comprehensive and detailed and I was able to understand precisely the nature of the process that was followed. The very comprehensive Dismissal Letter also explained the reasons for the dismissal and the thinking behind it.
18. In that comprehensive Dismissal Letter, Mr Masih mentioned that he considered the fact that the Claimant was already subject to a recent written warning, having been downgraded from the final warning as previously mentioned. But on balance, I do not think that this played a significant or material part in the decision to dismiss. Mr Masih felt, on the evidence before him, that it was reasonable to dismiss the Claimant as he believed that he had been guilty of gross misconduct based on the company process and the lack of explanation that the Claimant had given, and the fact that the Claimant had agreed that the Witness Statements of those witnesses that were before the disciplinary process, were accurate and true.
19. The Claimant chose to appeal and there was an Appeal before Mr French, from who I did hear evidence and he upheld that dismissal. It is fair to say also that there was a lack of engagement during the Appeal process and very little was put forward to further the Claimant's case, other than a suggestion that Mr Earith should have been invited to the Disciplinary Appeal process. That is despite the fact that the Claimant had, on more than one occasion, indicated that he accepted that the Statement of Mr Earith was accurate and true.
20. I heard evidence from the Claimant and from Mr French and I am bound to comment on the nature of that evidence. I found the Claimant's evidence to be contradictory and inconsistent. He also went out of his way to evade answering questions which he felt were unhelpful to him and his evidence was almost wholly inconsistent throughout the giving of that evidence. I accept that the Claimant's first language is not English and I have taken that into account. Despite that, his evidence was, in my judgement, not reliable.

The reason I reach that conclusion is as follows.

21. During the disciplinary process, the Claimant failed to engage properly and, in many instances, even at all, with the process and had the opportunity on three occasions to explain why he had refused to carry out the order which Mr Adams and then Mr Campbell had given him. He chose not to do so and in fact, he even avoided the opportunity to set down his version of events in a Witness Statement. Yet, when he issued these proceedings, in his ET1 he alleges that one of the reasons why he did refuse was that the cleaning that he had been asked to do involved cleaning up after other colleagues, including cleaning toilets and offices. He never suggested this at any stage of the disciplinary process and never raised the issue that he had been asked to do this and gave that as an explanation as to why he refused. Quite the contrary in fact, he accepted the evidence of those who had provided Statements and said that their evidence was accurate and true. He also did not pursue this line at all in the giving of his live evidence before this Tribunal. What he said here was entirely contradictory with what he says in his ET1 about being asked to clean toilets. There is absolutely no evidence in the Bundle, nor anything before me to suggest that he was asked to clean toilets and this was never mentioned in his live evidence, save for when I suggested that if this had been the case he might have protested, he suggested that he had. I do not accept that he did.
22. The Claimant also further suggested that one of the reasons he refused the cleaning task was because Mr Adams had no authority over him, to order him to carry out the task. Once again, he never raised this at any stage during the disciplinary process when he would have had ample opportunity to do so. This was also not mentioned in his ET1 either. In any event, he accepted that Mr Campbell had authority to ask him and he accepts that he refused the request when reiterated by Mr Campbell.
23. He also argued, before this Tribunal, that the request to ask him to carry out the cleaning was in breach of a company Policy called "Clean As You Go", requiring employees to clean up after themselves before their shift ends. Yet, there is no mention of this at all throughout the whole disciplinary process or in his ET1; only at this Tribunal.
24. He also said it was not part of his role. But he did not suggest that during the disciplinary process either and put forward no cogent reason why he had refused to carry out the order.
25. Therefore, I must conclude that the evidence from the Claimant before me, is wholly unreliable. The evidence shifted and the Claimant contradicted himself on many occasions, seemingly looking for an answer that might assist him, but that had no basis in fact.
26. Mr French, on the other hand, I found to be an honest witness. Particularly as he was to some extent unfamiliar with the contents of some aspects of his Witness Statement. But when this was pointed out to him, he accepted that he had made a mistake or had misunderstood something. In fact, the principal difficulty he experienced was easily explained and Mr Dunn took him through some of the deductions which related to an earlier month which explained why the figures in his Witness Statement did perhaps not tally

with the most prominent payslip which we had looked at.

27. I accept Mr French's evidence and that he conducted a perfectly reasonable and honest process in conducting the Appeal Hearing.

The Law

28. The Claimant pursues a claim for unfair dismissal. Claims for unfair dismissal are governed by s.98 of the Employment Rights Act 1996 ("ERA"). S.98(1) places the burden upon the employer to show what the reason for the dismissal was. It is then for the Tribunal to determine whether that reason falls within s.98(2), being a reason capable of being a fair reason for dismissal. In this case, the Respondents rely on the reason of conduct as being the reason for the dismissal.
29. If that hurdle is surmounted, then it falls on the Tribunal to determine under s.98(4) ERA 1996 whether that reason amounts to a sufficient reason to dismiss, based upon all the circumstances of the case, including the size and administrative resources of the employer's undertaking and to determine whether the employer acted reasonably or unreasonably in treating that as a sufficient reason for dismissing the employee.
30. In conduct cases, Tribunals are assisted by some previous decided cases or Authorities. The Burchell test, as it is known, comes from the case of British Home Stores v Burchell [1978] ICR303; and in conduct cases Tribunals apply the Burchell test to determine and assist them in coming to the conclusions that they need to come to under s.98(4) ERA 1996.
31. The Burchell test falls into three parts. The Tribunal must ask itself whether the Respondent's belief in the Claimant's conduct, or mis-conduct, was genuinely held. They must also determine whether that belief was reasonably held and whether that belief was arrived at pursuant to a proper and detailed investigation in all the circumstances.
32. Even if the Burchell test is passed by the Respondent, the Tribunal must determine whether a dismissal was fair or unfair under s.98(4) ERA 1996 and have cognisance of the Authority of Iceland Frozen Foods v Jones [1983] ICR17, and determine whether the decision to dismiss fell within a band of reasonable responses open to a reasonable employer faced with the circumstances that the employer was faced with in this case. It is really important to understand that the Tribunal must not substitute its own view for what would have been reasonable in the circumstances. Only whether the employer acted such that the decision to dismiss fell within a band of reasonable responses to the circumstances with which it was faced.
33. Looking at the unlawful deduction of wages claim, this is governed under §.13 and 23 ERA 1996. No detail was given as to the nature of this claim and in fact, detailed explanations were forthcoming during the course of this Tribunal from the Respondents explaining how the Claimant's final two payslips in July and August 2021 had been calculated.
34. The July payslip included a number of deductions which were as a result of the Claimant's failure to attend at work during June of 2021 and as a result

of him leaving early, or arriving late at work on a number of occasions. It is entirely understandable that in circumstances where deductions fall to be made, that they fall into the next month's payslip pursuant to the events which trigger those deductions. The absences were all in June and the deductions were made in the July payslip. When this was explained and put to the Claimant, he accepted it.

35. The other issue, albeit that it is not clear, that the Claimant seemed to suggest formulated part of his unlawful deductions claim, was his final payslip. He had received a payslip in August in respect of which he had been paid just over £72. He did, however, accept that he had received the sum of £996 prior to that; albeit there was no payslip to reflect it. It was explained by Mr French and very articulately, by Mr Dunn during submissions, that the reason that this had happened was that the Claimant having been summarily dismissed on 17 August 2021, was only entitled to be paid monies between 1 and 17 August. Had the Respondent allowed the normal pay roll to run, then the Claimant would have received payment for the whole of August which would have been wrong in the circumstances. The reason for that is that the pay roll is effectively triggered on the 10th of each month and of course he was dismissed seven days after that. It was necessary, therefore, to stop that final payment and effect a wholly separate payment known as a 'same day payment' where he was paid a sum of money to cover the period he worked from 1 August to 17 August 2021. As a result, it was necessary to apply an emergency tax code to that. That tax code meant that a deduction of a higher sum of Income Tax than would normally be the case and the subsequent payslip that he received in August was effecting a balancing charge, or credit to him, essentially refunding him for that excess tax that had been deducted.
36. Essentially, the Claimant had received everything that he was due between 1 and 17 August 2021.
37. He seemed to accept this when it was put to him in evidence and therefore it appears that he is not pursuing a claim for unlawful deduction of wages before this Tribunal.

Conclusions

38. Dealing with the unlawful deduction claim first, it is clear from the evidence that once matters were explained to the Claimant that he accepted them. But if and insofar as he does still venture a claim before this Tribunal, it is dismissed. It is very clear to me from the explanation that I have seen from the Respondents that no deductions were made that should not have been, that the deductions made in July related to absences that took place in June and that these were recorded on the Respondent's time recording system and that appropriate deductions were made. There is no evidence to suggest that those deductions were in any way inappropriate or did not reflect properly the absences that took place.
39. Similarly, the explanation as to the August payslip is very clear and the fact that the Claimant accepts that he was paid £996 prior to that, makes it very clear that he was paid everything that he was entitled to. If and insofar as any claim remains, it fails and is dismissed.

40. Turning to the unfair dismissal claim.
41. The Respondents followed a detailed procedure pursuant to the Claimant's refusal to carry out the work that he was asked to do. In my judgement it is clear from both the Claimant's contract of employment and the working practices at the Respondent, that it was entirely appropriate and within the purview of the Claimant's role that he be asked to clear up and sweep up the debris from a previous shift on the Warehouse floor, to enable new deliveries to be properly effected.
42. His colleagues were happy to do it and he was the only one that refused. I do not accept that there is a shred of evidence to suggest that he was asked to do anything more than that and clean toilets or offices.
43. Therefore, by refusing to do so, he was clearly refusing to do work which it was proper and appropriate for him to be asked to conduct. He seems to have taken great offence at the fact that he was asked to clear up debris that had been left by a previous shift and perhaps in an ideal world, everybody would clear up after themselves. But the explanation which was put in the Witness Statements of Mr Campbell and Mr Adams was that the previous shift had been so busy they had been unable to clear up after them and therefore it fell on the next shift to do that cleaning, by way of preparation for new containers coming in.
44. It seems to me and in my judgement that is entirely within the remit of the Claimant's contract and paragraph 2 of his contract of employment is very clear in that it permits the Respondents to ask him to do work of a different nature and in my judgement, the work that he was asked to do falls fairly and squarely into paragraph 2, which the Claimant accepted when he signed the contract.
45. Moreover, it is clear from general practice that it was something that he would occasionally have been expected to do. Therefore, by refusing to do so, he was clearly in breach and the Respondents were therefore entitled to pursue a disciplinary process against him, which they did.
46. That process was detailed. It included a detailed investigatory meeting, a Disciplinary Hearing before someone who had not previously been tainted with the investigation and an opportunity to Appeal before someone who had nothing to do with the investigation or the previous Disciplinary Hearing. It is difficult to imagine how the Respondents could have conducted a more detailed and appropriate process in the circumstances.
47. The Claimant did not help himself in that he completely failed to engage in the disciplinary process, for reasons best known to himself. Had he raised reasons why he had refused to carry out the work, matters may have been different. The Respondents could only deal with that which was before them and that which was before them was the evidence of Mr Campbell, Mr Adams and Mr Earith with which the Claimant wholeheartedly agreed.
48. The Respondent's disciplinary process and Policy does have as one of the reasons for dismissal by reason of gross misconduct, the failure to follow a

reasonable instruction. That of course does not necessarily mean that a summary dismissal is fair for a failure to follow a reasonable instruction. However, it is in the Policy and the Claimant's non-engagement in the process was key to their decision making. In my judgement, the Respondents passed the Burchell test in that they had a reasonably held belief in the Claimant's guilt after having conducted a proper and detailed investigation in all the circumstances.

49. Moreover, the decision to dismiss the Claimant falls within a band of reasonable responses of an employer faced with a set of circumstances with which they were faced. One of the things that they can take into account, is the reaction or behaviour of an employee during the disciplinary process and explanations given for the misconduct. No cogent explanation was given and therefore, in my judgement, they were entirely reasonably entitled to treat the misconduct as a sufficient reason to dismiss summarily. Therefore, the decision must fall within the band of reasonable responses.
50. For the reason I have set out, the Claimant's claim in unfair dismissal fails and is dismissed.

18 April 2023

Employment Judge K J Palmer

Judgment sent to the parties on

19/4/2023

Naren Gotecha

For the Tribunal office