



EMPLOYMENT TRIBUNALS

Claimant: Mr Jose Pius
Respondent: Cordant Cleaning Limited
Heard at: Watford Employment Tribunal
On: 6th March 2023
Before: Employment Judge Shrimplin

Representation:

Claimant: litigant in person
Respondent: Ms Rezaie (counsel)

JUDGMENT

1. The claimant's dismissal was not unfair within the terms of the Employment Rights Act 1996. The claim is dismissed.

REASONS

Background

2. The claimant was employed by the respondent on 5th February 2015 when the respondent company took over the business of Sasse Limited and transferred its employees. The respondent was subsequently also taken over by Bidvest Noonan UK Limited on 1st December 2021. The claimant was dismissed on 3rd November 2021. The ACAS certificate shows receipt on 1st February 2022 and the date of issue of the certificate was 3rd March 2022. The claim was filed on the 31st March 2022 and was therefore in time.

Hearing

3. The case was heard at Watford Tribunal on 6th March 2023. An oral judgment was given at the conclusion of the case. The Claimant requested written reasons within 14 days of the Judgment being issued.
4. At the hearing, the claimant sought to add copies of "without prejudice" correspondence to the hearing bundle. After hearing from counsel for the respondent, I held that the material was privileged and should not form a part of the bundle.
5. As the claimant did not speak English as his first language, I confirmed that he was happy to proceed without the assistance of an interpreter.

Issues

6. It was agreed that the claimant was dismissed and that the effective date of termination was 3rd November 2021.
7. It was agreed that the correct respondent was Cordant Cleaning Services Limited as the transfer of the company and the transfer of its employees to Bidvest Noonan UK Limited did not occur until 1st December 2021 which was after the dismissal date.
8. There was no agreed list of issues in the case. I have therefore considered the following issues:
 - 8.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. Did the respondent genuinely believe the claimant had committed misconduct?
 - 8.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular
 - 8.2.1 were there reasonable grounds for that belief?
 - 8.2.2 at the time the belief was formed, had the respondent carried out a reasonable investigation?
 - 8.2.3 had the respondent otherwise acted in a procedurally fair manner?
 - 8.2.4 was dismissal within the range of reasonable responses?

The Evidence

9. I heard evidence from and the cross examination of the claimant, who did not call any other witnesses. For the respondent, I heard evidence from and cross examination of Mr Marshall, the Managing Director of Transport Solutions. A hearing bundle of 156 pages was agreed and provided.

Background

10. As noted above, the claimant was employed by the respondent on 5th February 2015 when the respondent company took over the business of Sasse Limited and transferred its employees. The claimant was dismissed on 3rd November 2021 by the respondent company.
11. The respondent is a facilities management company providing cleaning, support and security services for a wide range of businesses. One of their contracts was for a bus depot in Willesden, North London, which provided parking, servicing and maintenance facilities for vehicles. The site is a safety critical environment and client safety requirements are of paramount importance.
12. The claimant was employed by the respondent as a shunter at the Vincent Green site. A shunter is responsible for picking up the client's buses from the road and driving them to the depot for cleaning and refuelling.

13. The claimant was dismissed by letter on 3rd November 2021. The letter set out the reasons for the dismissal which may be summarised as follows: -
- The use of his mobile phone during work in direct breach of a safety alert
 - Refusing to carry out a reasonable management request by not attending any meetings in relation to the disciplinary process
 - Working for one of the company's competitors during a period of suspension
 - That the above had led to a breakdown in the working relationship and the trust placed in the claimant as an employee.
14. The claimant appealed that decision and on the 24th November 2021, he was sent a decision letter informing him that the decision to terminate his employment had been upheld.

Findings of fact

15. The first incident relied on by the respondent was on 1st June 21 when the claimant was challenged by his manager, Ibrahim Kamara, about taking video or photographs of a work colleague. Mr Kamara raised a grievance that the claimant became offended and started swearing and tried to hit Mr Kamara. The claimant denied behaving in that way and also raised a grievance about that incident. The claimant asserted that Mr Kamara had said that he was a troublemaker and "I will make sure you lose your contract very soon". That matter was investigated by Vincent Hazeltine. The investigation obtained statements from four employees who were present at the time and which were included in the bundle (pages 73-80). They each confirmed Mr Kamara's version of events. There was no evidence that Mr Kamara used the phrases alleged to have been said by the claimant regarding the claimant's contract. The claimant did not accept the evidence from these witnesses during cross examination. He did accept that none of the witnesses had any issues with him and said that the witnesses had been forced to give the accounts they had.
16. I find the evidence from the independent witnesses to the incident which was given to Mr Hazeltine to be compelling and am satisfied that the incident occurred in the terms originally alleged by Mr Kamara.
17. A safety alert (number 41) was issued in August 2021 (p100). That set out that "under no circumstances wireless headphones/mobile phones are not permitted whilst working". It also stated, "there are designated areas on each site to have rest, lunch and to use mobiles phones and wireless headphones which can be used DURING BREAK TIMES ONLY ON EVERY SITE" (capital letters used in the notice).
18. The claimant accepted that he received that safety alert. He said he had interpreted it to mean that it was permissible to use mobile phones whilst on a break. I consider that the notice is quite clear that mobile phones were only to be used in designated areas during break times.
19. There was a second incident on 13th September 2021 when the claimant was seen by Mr Kamara and Mr Hazeltine to be taking photographs or video using

his mobile telephone outside the site office where they were having a meeting. The bundle contains witness statements from two other employees (p104-107) which confirm that they also saw the claimant with his phone outside the site office. I note that the summary report at pages 112 to 118 refer to this incident taking place on 13th August but I consider on balance it happened immediately before the suspension.

20. The claimant stated that he was only looking at his phone to find out what time it was.
21. I accept the evidence of the employees and find as a fact that the claimant was using his mobile telephone outside of a designated area.
22. The Claimant was suspended with pay the following day for
 - Failing to sign out and back in when leaving the site (fire register) and
 - Using a mobile phone in the workplace while on duty
23. There followed a detailed investigation by Mr Hazeltine on those two reasons and a number of other matters. As a part of that investigation, he interviewed several people about the September incident and completed a report (p121-118).
24. I heard evidence about the claimant's refusal to sign in and out during break time and to sign the fire register. The claimant said that he telephoned in when he started work and when he finished work, as that was what enabled him to be paid. He said he never signed in by telephone or in a book at any other time. He did not acknowledge the existence of a fire register. He suggested that Mr Hazeltine was making these things up.
25. I also heard evidence about the claimant's refusal to drive a bus when asked to do so by management due to his licence having expired. The respondent's evidence was that the position was checked and it was confirmed that the necessary licences had been extended by a year due to the pandemic.
26. In his evidence the claimant again said that this had been made up by Mr Hazeltine and then added that there had been other drivers present who could have driven the bus.
27. In relation to the claimant's employment by competitor, Mr Marshall accepted that this was a rumour, the information having been passed by a contractor to an area manager and then to him. He added that the other reasons for dismissal would have been sufficiently serious in their own right to merit dismissal. The claimant denied that he had worked for another company.
28. Overall, I find the evidence from the contemporaneous notes and documents from the internal investigation compelling. I find that the claimant used his telephone outside of the designated areas, had failed to sign in or out during break times and had not signed the fire register. I also find that the claimant's licence had been extended due to the pandemic, he had been informed of this and that he was therefore able to drive a bus when asked to do so. I find that the claimant was not working for a rival company at this time.

29. The claimant was invited by Mr Hazeltine to a disciplinary hearing on Thursday 21st October, a day for which he should have been available for work as he was on paid suspension. There was a difference between the evidence of the claimant and respondent. The respondent referred to emails (p120) suggesting that there was a telephone conversation between Mr Hazeltine and the claimant, concerning his attendance that evening. The claimant stated that the call did not take place. The claimant's recollection of this call was confused. I prefer the evidence of the conversation as set out by Mr Hazeltine in his email (p120) and find that the claimant was invited to the meeting.
30. The claimant was dismissed on 3rd November for the reasons set out in the letter which may be summarised as follows: -
- The use of his mobile phone during work in direct breach of a safety alert
 - Refusing to carry out a reasonable management request by not attending any meetings in relation to the disciplinary process
 - Working for one of the company's competitors during a period of suspension
 - That the above had led to a breakdown in the working relationship and the trust placed in the claimant as an employee.
31. There was an appeal process, conducted by Mr Marshall in which the issues raised by the claimant were addressed. On the 24th November 2021, the claimant was informed that the decision to terminate his employment had been upheld.

The Law

32. Section 94 of the Employment Rights Act 1996 (ERA 1996) sets out the right for employees not to be unfairly dismissed and Section 98 of that Act deals with the fairness of dismissals. Determining whether a person has been unfairly dismissed is a two stage process. Firstly, the employer must show that it had a potentially fair reason for the dismissal, that is a reason which falls within s98(2) of the Act. If, and only if, the employer shows that it had a potentially fair reason for the dismissal, the tribunal must consider the matters set out in s98(4) of the Act and decide, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing the employee.
33. For the purposes of this case, section 98 of the Employment Rights Act 1996 provides as follows:
- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
 - (2) A reason falls within this subsection if it –

(b) relates to the conduct of the employee,

34. It is often the case that an employer dismisses an employee for what could be regarded as several “reasons”. In Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

“A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.”

35. Paragraph DI [821] of Harvey on Industrial Relations and Employment Law summarises the position in this way:

“These words, widely cited in case law ever since, were approved by the House of Lords in W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 and again in West Midlands Co-operative Society v Tipton [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the ‘reason’ must be considered in a broad, non-technical way in order to arrive at the ‘real’ reason. In Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns

LJ’s precise wording in Abernethy was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the ‘reason’ for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what ‘motivates’ them to do what they do.”

Conclusion on grounds for dismissal

36. Ms Rezaie submitted that that the grounds for dismissal were those set out in the letter of 3rd November 2021 and that together the claimant’s conduct was such that the respondent had lost all trust and confidence in the claimant. The claimant had therefore been fairly dismissed for misconduct falling within s98(2) of the Act.
37. I am satisfied that, on a balance of probabilities and on the particular circumstances of this case, the reason for dismissal was the claimant’s conduct which falls within s98(2) ERA 96 and is therefore a potentially fair reason for dismissal.

Fairness of the dismissal

38. Having so found, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996 which sets out that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
- (a) depends 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
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
39. I have applied the test in the leading case of Burchell and the respondent was required to follow the three-stage test in British Homes Stores Ltd v Burchell

[1980] ICR 303, namely, to consider whether the respondent acted reasonably in all the circumstances and, in particular,

- whether there was a genuine belief in the reasons for dismissal,
- whether there were reasonable grounds for that belief and
- whether there was a reasonable investigation

40. I have considered whether there was a reasonable investigation by the respondent of the matters in issue. I conclude that the investigation was thorough, and that the claimant was informed of the matters raised against him and had the opportunity to put his case, namely to raise issues, present evidence and make representations. The investigation was procedurally fair and proportionate.
41. I conclude that the respondent had a genuine belief in the reasons for dismissal and that the respondent had reasonable grounds for that belief.
42. The reasonableness or otherwise of the employer's approach, with reference to the above guidance in Burchell, is assessed with reference to the "range" or "band" of reasonable responses test. It is not the role of the Tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed or to substitute its decisions for the decisions made by the respondent. Sainsburys Supermarkets v Hitt [2003] IRLR 23.
43. I have considered whether the decision to dismiss by the respondent was within the band of reasonable responses open to a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed and, as part of that, whether the process followed was fair.
44. I have considered "equity and the substantial merits of the case" and conclude that the dismissal was within the range of reasonable responses which was open to the respondent for the misconduct by the claimant.

Conclusion

45. I conclude that the claimant's dismissal was not unfair within the terms of the Employment Rights Act 1996.

Employment Judge K A Shrimplin

Date: 17 May 2023

Sent to the parties on: 21 May 2023
For the Tribunal Office GDJ