



EMPLOYMENT TRIBUNALS

Claimant: Mr M Sheikh

Respondent: Core Communications Retail Limited

Heard at: Newcastle Civil & Family Courts & Tribunal, Barras Bridge, Newcastle upon Tyne NE1 8QF via CVP

On: 26th, 27th, 28th June 2022

Before: Employment Judge AE Pitt

Representation

Claimant: In Person

Respondent: Mr S Proffitt, Counsel

JUDGMENT having been sent to the parties on 7TH July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim by Muhammad Sheikh in relation to his employment with Core Communication Retail Ltd. He was employed by them from March 2015 until his dismissal on 6th June 2022. I read witness statements and heard evidence from the claimant, Mr Rao, Regional Manager, Investigating officer; Mr Korpool, Director of Retail Sales, the dismissing officer; Mr Joseph, Managing Director, the appeal officer. I had before me a bundle of documents which included minutes from meetings and downloads from a computer software program 'Jarvis.'
2. The respondent is a national company, which distributes mobile phone Sim cards and accessories to shops. The claimant was employed as an area sales manager, it was his role to visit premises in his area to ensure that

goods were displayed correctly and to try and sell Sim cards and accessories to the shop owner.

3. The claimant had originally been employed in the Bradford area but at the time of his dismissal he was living and working in and around the Middlesbrough area. He was allocated a number of shops within his region which was consistent or perhaps slightly lower than others who worked in the same role elsewhere. The employees use an electronic system on their mobiles from which they can access 'Jarvis'. Jarvis is a software package which enables employees to send and receive information about the shops they are to visit, to log a record of the visit including photographs of the products in stores.
4. Clause 5 of the claimant's contract sets out his remuneration. This comprised of a basic salary of £33,300 and performance-based commission of £2500. Clause 4 sets out the normal hours of work as 39 hours a week. 'The working day will fall between 8 am and 6 pm and will be communicated to by your line manager vary from time to time. There may be occasions when you may be required to work outside of business hours' It is clear from these two clauses that the claimant is given a basic salary for 39 hours at which can be improved by commission. Whilst I note the claimant originally worked for six days and at the time of his dismissal he was working five days a week but the number of hours had not changed. There is no reference in the contract to overtime working or increased hourly rate for a Saturday or Sunday.
5. Clause 6 reads 'the company will reimburse you for the cost of fuel only properly incurred during business mileage in line with HMR revenue proof rates provided original receipted mileage paperwork completed in a timely manner.' The relevant mileage rate at the time was 0.35p.
6. I heard from Mr Korpool that the company's practice was not to pay the first £2000 in any year running from October through October. That is £500 in any quarter. This is a legacy issue in relation to working practices when the company was first established. However I am not satisfied that this was communicated properly to the claimant when he commenced his employment. The policy should have been clearly set out either in the contract or in the handbook and it has not been.
7. From the documents I have seen the claimant was only being paid sums in excess of £500. The claimant's case is that he had raised it as a grievance had requested the evidence of these grievances from the respondent. There is no evidence in the bundle. It was not raised in his grievance of April 2022. I concluded that the claimant had not raised a grievance. It is not credible that an employee would wait eight years to make a grievance when he was losing £2000 per year.

8. A new regional manager, Mr Rehman was appointed in late 2021, and it appears on the evidence I have seen that his approach was different to previous managers, he was a little brusque and offhand. This was brought to his attention and addressed, and matters appeared to improve.
9. In March the claimant emailed Ms Langley of the HR Department to raise an issue concerning his targets. On 12th April 2022 the claimant set out in an email five issues he wished to raise in relation to his targets. Mr Rehman as the claimant's line manager was to meet and discuss them with him.
10. Due to Mr Rehman's unavailability a meeting was not able to take place until the 27th April 2020. I accept that during that meeting there was conflict in the general sense of the word between the claimant and his line manager and that the meeting was adjourned without any resolution it was decided that there would be another between the claimant Mr Rehman and Mr Rao who was Mr Rehman's line manager.
11. Mr Rao oversaw a large area, and it was part of his role to make unannounced visits to the shops. On 4th and 5th May 2022, he selected the area the claimant was working in to check his stores. Using Jarvis, he was able to check which stores the claimant had visited and then he called in to the store and in some cases spoke to the member of staff who was present.
12. This revealed that the claimant was not actually visiting stores, although he had recorded them as visited on Jarvis. Mr Rao was concerned about the behaviour of the claimant and therefore asked Mr Rehman to conduct further investigation. This Mr Rehman did so on 10th May 2022 he then emailed the outcome to Mr Rao.
13. As a result of that investigation Mr Rao decided that there should be an investigatory meeting with claimant to establish if any disciplinary action should be taken against the claimant. He also decided this should be dealt with alongside the claimant's issues about his targets as it appeared they were related. Mr Rao's initial view was that the claimant was not hitting his targets because he was not doing his job and not visiting stores should be.
14. A combined disciplinary and grievance investigation meeting was held on 26th May 2022. Mr Rao conducted the meeting because of the apparent issues between the claimant and Mr Rehman. Having listened to the claimant's responses where he raised issues about Mr Rehman's conduct, an email was sent to Mr Rehman setting out the claimant's allegations for him to respond to. On 1st June 2022 provided a response via email.
15. The disciplinary hearing was arranged for the 6th June 2022 and the claimant was sent an invitation letter by letter dated 30th of May. The letter set out the allegations which would be put to the claimant. The allegations were logging visits to shops which had not been undertaken; hand

delivering accessories to shops. That is taking cash for the goods rather than an electronic transfer. Taking unauthorised afternoon breaks for up to three hours. Undertaking other paid employment as a cab driver.

16. At the disciplinary hearing Mr Kapoor went through the allegations with the claimant, which by this time also included not updating point-of-sales. That is when visiting a shop not ensuring the display was properly stocked. I do not consider that this was a quickfire question answer session it certainly was not a case of question being put in a yes/no manner.
17. At the conclusion of the meeting Mr Korpoo took some time to consider the evidence. He concluded that the evidence of some of the matters was concrete and fact based whilst the claimant's response was circumstantial and there was no documentary evidence. In particular he determined that the selling of accessories for cash was very serious as it could amount to a breach of HMRC regulations and had serious implications for the respondent. This itself amounted to gross misconduct, as did falsifying store visits whilst the other allegations were less serious. He determined that the claimant should be dismissed.
18. The claimant was informed of the outcome verbally the same day and an outcome letter was sent to the claimant on 8th June 2022. This letter also set out the outcome of the grievance.
19. The grievance was determined by Mr Rao, he concluded that the claimant had not visited enough shops, had not spent enough time in the shops he did visit and had not completed his point of sale correctly. In addition, he concluded that the claimant was not spending enough time in the field to visit all the shops he was required to, especially taking into account the long breaks he had taken. He therefore did not uphold the grievance.
20. The claimant appealed the decision to dismiss and the decision on the grievance. The reasons for the appeal included that his termination had been planned and it was unfair and biased.
21. Prior to the appeal hearing Mr Rao convicted further visits in relation to other subordinates of Mr Rehman. The information he gathered from them contradicted the claimant's account concerning Mr Rehman's instructions. In particular two field staff said they never logged visits where they had not been, that they had never been instructed to do that in particular that they did not do it because if they failed to make a sale it would impact on their commission and their therefore less salary. The also denied that the item purchased items in bulk which were then sold in cash.
22. The appeal was heard by Mr Joesph on 21st July 2022. Following the meeting Mr Joesph made further enquiries with Mr Rao about allegations

raised by the claimant. Having reviewed this information alongside the answers provided by the claimant he dismissed both the appeal against dismissal and the appeal against the grievance.

The Issues

23. Unfair Dismissal

- 23.1 What was the reason for the claimant's dismissal?
- 23.2 Did that reason remit claims conduct?
- 23.3 Did the respondent reasonably in all the circumstances in treating that is a sufficient reason to dismiss the claimant?
- 23.4 Were there reasonable grounds that belief at the time the belief was formed had the respondent carried out a reasonable investigation had the respondent acted otherwise in a procedurally fair matter manner?
- 23.5 Was dismissal within the range of reasonable responses?

24. Breach Of Contract

- 24.1 Which term of the employment contract has the respondent in breach of if the respondent is in breach
- 24.2 What sums are due to the claimant?

THE LAW

16. Section 98 Employment Rights Act 1996, The Act, sets out the law concerning Unfair Dismissal. It is for the respondent to show the reason or principal reason for the dismissal and that it is a reason falling within section 98(2) of the Act or is some other substantial reason for dismissal. Misconduct may found a fair dismissal. The Tribunal must then apply section 98(4) of The Act and consider whether the dismissal was fair or unfair, which depends on;

Whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and it shall be determined in accordance with equity and the substantial merits of the case.

17. The approach to misconduct cases was formulated by Arnold J in **British Home Stores Ltd v Burchell [1980] ICR 303**. If the reason for the dismissal was misconduct of an employee and potentially fair, the Tribunal must go on to ask itself the following questions.

- i) Did the respondent act reasonably in treating the employee's conduct as sufficient reason for dismissal in accordance with equity and the substantial merits of the case? ii) Did the respondent have an honest belief in the misconduct of the claimant? iii) Did the respondent have reasonable grounds to sustain that belief? iv) Did the respondent undertake as much of an investigation into the misconduct as was reasonable in all the circumstances?

v) Did the respondent follow a fair disciplinary procedure?

18. **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**. In determining the fairness of a dismissal, the Tribunal must consider if dismissal fell within the range of reasonable responses. That is to say, the Tribunal must not impose its view on the dismissal but consider whether a reasonable employer could have dismissed on the facts of the case.
19. By virtue of Section 3(2) Employment Tribunals Act 1996 an employee is entitled to bring a claim against their employer for breach of contract for sums which the employee is entitled to have not been paid. Including, as in this case expenses which have not been paid.
20. The claimant must identify the clause of the contract which he alleges which the employer has broken. Having done that the claimant must establish the sums which are due to him under the contract.
21. The remedy for breach of contract in this type of claim is for the sums lawfully due to be paid to the claimant. Therefore there must be certainty in relation to what sums are being claimed.

Submissions

22. The claimant's case is the grievance and disciplinary should be heard separately. The visits were carried out by Mr Rao because Mr Rehamn was aware of the grievance being raised.
23. The respondent case is that it carried out a perfectly proper procedure.

Discussions And Conclusions

I repeat here for the avoidance of doubt and the understanding of the claimant that it is the role of this tribunal to review the procedure for and the reasons for the dismissal and determine whether his dismissal was reasonable. I am not required to make findings of fact about what occurred during his employment was reasonable. I have not made any determination as to whether or not the claimant was pressurised or threatened or instructed to do the things as alleged, this was a matter for Mr Korpool and Mr Reddy. It matters not what I consider to be fair, it is whether or not a reasonable employer would have acted in the way the respondent did. I have heard a lot evidence about the allegations against the claimant, they are broken down into five separate allegations,

- i. logging visits onto the Jarvis system when a visit had not taken place
- ii. making bulk purchases of accessories selling them for cash
- iii. taking long breaks in the afternoon
- iv. undertaking other work when he should be carrying out work for the respondent
- v. The point of sale not being correctly checked

24. In considering the claimant's complaint that the dismissal disciplinary and grievance procedure should have been held separately, I reviewed the Staff Handbook which is in the bundle which makes it clear that this is permissible for this company. In addition I considered the ACAS code of conduct that also permits the two process to be carried out together.
25. I asked both Mr Rao and Mr Korpoo about adopting this process. Their answer, which was credible, was that the initial complaints made by the claimant in April involved his inability to hit his target. The disciplinary matters appear to shed light on his inability. In addition, insofar as the grievance related to the personal behaviour of his line manager, this was also his defence in relation to the allegations raised.
26. I concluded therefore that not only was it reasonable to conduct the disciplinary and grievance in this way, but a reasonable employer would also conduct such matters in the same way.
27. There was criticism of the meeting with Mr Rao that his English was not very good and should have had an interpreter, I note this was not raised at any time until the claimant gave his evidence. The claimant also challenged the length of the meeting because it was less than one and half hours; I comment here it is good practice to make a note of these so an employer may be able to substantiate timings, but having reflected upon the notes that were produced regardless of how long it took I am satisfied that the matters were discussed fully and the claimant was given an opportunity to present his case.
28. Having determined the matters could be dealt with together it does seem good that there was some blurring of lines it is unclear, and I think it would be unclear to the claimant when his grievance was being discussed and when it was his conduct that was being investigated. To an unrepresented employee this is not good practice. Perhaps the better way would be to go through the disciplinary matters with the claimant and then in the same meeting discuss with him his grievance, that way there is a delineation of matters being discussed.
29. It is clear to me that the claimant was not aware that Mr Rao was dealing with his grievance and Mr Korpoo is disciplinary, and it should have been set out explicitly to claimant.
30. This issue continues in the outcome letter in which it is not clear who made the decision in respect of each aspect of the case. There is a very short section at the end of the outcome letter headed grievance and this may well have played into the claimant's belief that Mr Korpoo had dealt with both matters side-by-side. However, I am satisfied that there were two separate decision makers and any flaw does not have any bearing upon the overall fairness of the procedure.

31. The claimant seem to imply although he never said it directly that the area visit by Mr Rao was because of his grievance, I reject that assertion, I am satisfied Mr Rao unaware of any grievance until after he had conducted his visits.
32. Insofar as Mr Rehman was asked by Mr Rao to undertake visits in May I am satisfied time Mr Rao did so in good faith being unaware of any allegations pending against Mr Rehman. In addition, I am satisfied that Mr Korpool did not consider the evidence produced by Mr Rehman and relied on the evidence of Mr Rao.
33. The handbook which is provided to the employees does set out what the company considers to be gross misconduct. This includes fraud, including falsifying timesheets/expenses, acting against the best interests of the company, bringing the company into disrepute.
34. The invite letter while setting out a narrative of the allegation does not set out whether anyone or all of the allegations may amount to gross misconduct. Both Mr Korpool and Mr Joseph told me that they considered the first two allegations, that is the falsification and selling accessories by hand, were extremely serious. The first because it is a breach of trust between the employee employer the second because it is illegal as tax and/or VAT avoided by people. In relation to the latter three they conceded they were probably minor misconduct.
35. I specifically asked the claimant what he thought might happen in the disciplinary he thought he said he would get in warning, but he did concede he knew that could be in a dismissal situation.
36. I am satisfied that during the course of the disciplinary hearing Mr Korpool gave the claimant and opportunity to set out his case and explain why he acted in the manner he did. It is not suggested, that Mr Korpool had a motive for dismissing the claimant, so insofar as it suggested there was a plan to terminate the claimant I reject this assertion. For there to be a plan it would have to involve Mr Rehman, Mr Rao Ms Langley Mr Korpool and Mr Joseph. That is not a credible argument.
37. Having heard from Mr Korpool he was an impressive witness I am satisfied that he genuinely believed that the claimant had committed an act of gross misconduct, and that was the reason for his dismissal of the claimant.
38. Based on the evidence which was presented to him it was it reasonable for him to come to that conclusion. Mr Korpool has a good working knowledge of the business, he had with factual data to rely upon and an admission by the claimant about one of the most serious allegations of

falsifying Jarvis. In addition, the claimant had admitted the allegation of making hand deliveries for cash.

39. The investigation included asking Mr Rehman for his comments on the allegations raised. I am satisfied that the investigation was proportionate for the allegations against the claimant and was one which a reasonable employer would carry out.

40. I concluded that the reason for the dismissal was a reason relating to the claimant's conduct. Further that Mr Korpool had a genuine belief in the guilt of the claimant. Despite some procedural errors, not separating the disciplinary grievance aspects of the meeting with Mr Rao, not informing the claimant of who was dealing with which aspects of the claims, having decided to deal with them together separating the decisionmaking across to people, not informing the serious nature of the allegations in the invitation letter, that is to say that it was a dismissal offence.

41. I stood back and considered the procedure as a whole process. I asked myself was the claimant able

- i. to understand the allegations against him
- ii. to collate information together in his defence
- iii. at the investigatory meeting, at the disciplinary meeting, and at the appeal was the claimant able to present his case fully.

I am able to answer in the affirmative, the claimant not only understood the allegations against him, but he also understood the serious nature of the allegations. He put together information for his defence. I am satisfied that in all three meetings he was able to put across his account of why these things had happened. The procedure gave the claimant an opportunity to state his case and defend himself.

42. Finally, I considered the issue of the range of reasonable responses to. The two first allegations against the claimant are of fraud and in effect tax avoidance, and whilst there is no benefit to the claimant in relation to these matters it is clearly as Mr Proffitt pointed out a business where trust is of the most importance. Where there is a breach of trust, the employer is entitled to dismiss its employee. In relation to the hand delivery for cash which was potentially an issue of illegality an employer is also entitled to dismiss such behaviour. I cannot say therefore no reasonable employer would not dismiss in this situation.

Breach of contract

The Salary

43. The contract of employment is clear in Clause 4 and 5, that the claimant receives a basic salary for a 39-hour week. Commission is payable in addition. There is no reference to additional sums for overtime. In any event I note that the claimant's working week was reduced from 6 days to

5 days at his own request. There is no clause allowing overtime payments. There is no breach of contract.

Expenses

44. The claimant was entitled to be paid his expenses. I accept the evidence of Mr Korpool that this was only paid once a £500 per quarter target was reached. I am unsure whether the claimant was aware of this criteria. I asked myself to question first has the claimant established that there was a breach of his contract, potentially he is.
45. However, there are two problems with the claimants claim. First, the claim is extremely broadly framed, it is an estimate only. It is framed in such a way that the respondent is unable to properly respond to it. It may be that the estimate is incorrect. There may be occasions when the claimant was properly paid. The claim should identify each occasion when the claimant was not paid, and the claimant has been unable to do that.
46. Further, In the absence of clear evidence that the claimant pursued a grievance, and if had I would expect him to continue raising throughout his employment and at the very latest in his correspondence with Ms Langley which he did not do. I am therefore forced to the conclusion that the claimant not only knew about the term but accepted it. That being the case the claimant affirmed or accepted the breach and is unable to pursue such a claim.
47. The claimant was not unfairly dismissed.
48. There was no breach of contract regarding his salary.
49. There was no breach of contract regarding his expenses.

Employment Judge AE Pit

Date: 27th September 2023