



EMPLOYMENT TRIBUNALS

Claimant: Mr. N M J Doffou
Respondent: Sainsbury's Supermarkets Limited
Heard at: East London Hearing Centre
On: 9 November 2023 and 19 January 2024
Before: Employment Judge Misra K.C.

Representation

Claimant: Miss. Lucy Stock of counsel on behalf of FRU.
Respondent: Miss. Catrin Howells of counsel.

JUDGMENT having been sent to the parties on **19 January 2024** 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. The Claimant complains of ordinary unfair dismissal contrary to sections 94 and 98 Employment Rights Act 1996 ('ERA'). There are no other claims before me.
2. I heard from the Claimant who gave evidence before me on 9 November 2023 and from two witnesses for the Respondent, Ms. Zeibban Shaffi and Mr. Peter Cock. I also heard closing submissions from counsel representing the parties. The Claimant was represented by Miss Lucy Stock acting through the Free Representation Unit or FRU as it is widely known. The Respondent was represented by Miss Catrin Howells instructed by TLT.
3. I am grateful to both counsel for their assistance in ensuring that evidence and submissions could be completed in the day allocated to this case. I wish also to note my gratitude to Miss Stock for appearing for FRU. The timetable did not however adequate allow time for deliberation and judgment, which is why I adjourned until today, which was the first date when this matter could come before me again.
4. The documents I had before me were a final hearing bundle consisting of 187 pages provided by the Respondent together with a judgment bundle, the Claimant's witness statement, witness statements from Ms. Shaffi and

Mr. Cock for the Respondent, CCTV footage which was played in the course of the hearing on 9 November 2023, the Claimant's skeleton argument and the Claimant's Schedule of Loss.

5. As identified on 9 November 2023, the Respondent says that it dismissed the Claimant for the potentially fair reason of conduct; in particular, that he had taken bags for life without paying for them whereas they are chargeable items.
6. The Claimant accepts the reason for dismissal was conduct but says that the dismissal was unfair because the investigation and appeal were procedurally unfair, that insufficient weight was given to mitigation and the dismissal fell outside a reasonable band of responses. I note in particular grounds 1 to 6 of the Claimant's skeleton argument which helpfully distils the Claimant's case on this.
7. The Claimant had the assistance of a French interpreter at the last hearing but was well able to converse in English and to follow the proceedings in any event; though he describes himself as a native French speaker, he has lived and worked in the UK for almost twenty years.
8. Having considered all of the evidence before me and the full submissions made by counsel for the parties, I concluded that the claim for unfair dismissal is not well founded and is therefore dismissed.
9. The relevant statutory provisions are to be found in ss.94 and 98 ERA 1996.
10. I have reminded myself of the well-known authorities: British Home Stores Ltd v Burchell [1980] ICR 303, EAT and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.
11. As the parties agree, and I accept, that the reason for dismissal was conduct, the central legal consideration is s.98(4) ERA 1996 which contains an objective test. It is well established that it is not for the tribunal to substitute its decision for that of the employer.

Issues

12. I considered the following core issues arising from the claim:
 - a. Whether the Respondent genuinely believed that the Claimant was guilty of misconduct;
 - b. If so, whether that belief was based on reasonable grounds;
 - c. Whether the Respondent carried out all such investigation into the matter as was reasonable in the circumstances and
 - d. Whether the procedure and sanction of dismissal fell within a reasonable band of responses in the circumstances.

Facts

13. The Claimant was employed by the Respondent from 22 June 2003 until 16 October 2022 when he was dismissed for gross misconduct.
14. The Claimant had worked at the Romford Sainsbury's Superstore since 13 February 2003. On 29 August 2022, which was during the August Bank Holiday weekend, the Claimant did some personal shopping in the early morning after working a night shift. The Claimant was a Night Shift Assistant and working a night shift was normal for him. This particular night shift had not been unusual in any way save that the Claimant said it was busy. The Claimant had suffered a bereavement in July 2022, but had not informed his employer or sought time off or explained he was not able to work or to concentrate, or tired, for example, by reason of this.
15. He decided to buy food, pillows and bedding in advance of having visitors to his home. The Claimant accepts and contemporaneous CCTV footage and receipts show that he paid for his shopping (worth around £30) but failed to pay for the multiple reusable bags for life that he took to put his shopping in when he used the self-checkout service. That CCTV shows the Claimant making more than one trip to get bags after selecting the zero bags used option and checking his receipt at the end of his shopping.
16. The Claimant accepted under cross-examination that the Respondent had a zero tolerance approach to theft at the material time. He denied that he had intended to steal the bags; instead, his case is that he was tired and was unaware of what he was doing when he took them without paying for them.
17. On 10 September 2022, the Claimant was invited to attend a disciplinary investigation meeting, which he did on 15 September 2022 together with his union representative. During this meeting the CCTV footage was played to the Claimant. He accepted he had taken the bags without paying for them, but said it was not on purpose.
18. The Respondent then invited the Claimant to attend a disciplinary hearing on 7 October 2022 chaired by Zeibban Shaffi, which he again attended with his union representative. The Claimant accepted that the notes of the disciplinary hearing were accurate. The CCTV footage was reviewed with the Claimant again during the hearing. The Claimant was clearly aware of the allegations and that summary dismissal was a potential outcome.
19. Ms Shaffi was the decision maker and she decided to dismiss the Claimant for gross misconduct. She took into account the investigation including the CCTV footage and receipt and the Claimant's explanations, in which he said stress, tiredness and a language barrier had contributed to his error.
20. She concluded that he had not acted in error perhaps absent-mindedly but that he had been dishonest and had deliberately not paid for the bags taking the view, perhaps, that they were low value items that did not really matter. In particular, she formed the view that the Claimant had deliberately selected the zero bags option on the self-checkout knowing full well he would need some to put his bulky shopping in. This in turn she concluded

meant that the Respondent could no longer have trust in the Claimant as an employee even if the bags did not cost as much as his shopping had.

21. The decision to dismiss the Claimant summarily was set out in a letter dated 16 October 2022.
22. The Claimant appealed that decision and his appeal was heard by Peter Cock, a manager who, like Ms Shaffi did not know the Claimant. Indeed, Mr Cock had never met him before the appeal.
23. The appeal was heard on 5 December 2022 and the Claimant was once more accompanied by a union representative. Mr Cock reviewed the decision to dismiss but also the surrounding evidence hence it was akin to a rehearing in many ways. He was satisfied that the decision to dismiss was sound and upheld it because he considered that there was sufficient evidence that the non-payment was deliberate and not a mistake due to stress, fatigue or an inability to understand the prompts for payment on the self-checkout.

Conclusions applying facts to the law

24. I had no hesitation in finding that the Respondent genuinely believed that the Claimant was guilty of misconduct constituted in the act of theft.
25. That belief was based on CCTV footage and a receipt and an investigation meeting with the Claimant and his account at the disciplinary hearing as well. That gave rise to reasonable grounds for the belief.
26. The Respondent carried out a reasonable and proportionate investigation into the alleged conduct and the Claimant was given a full opportunity to respond. The Claimant's explanations were not deemed to be credible explanations and the Respondent was entitled on the evidence to conclude that the Claimant had committed misconduct notwithstanding the low value of the bags taken.
27. Once the decision maker had concluded that the Claimant had acted dishonestly and committed theft, it is very hard to argue that the decision to dismiss fell outside a reasonable band of responses. I find that it was within such a band.
28. I am satisfied that Ms Shaffi considered the Claimant's length of service and the entire matter holistically but considered that no sanction lesser than dismissal that would suffice; that is within a reasonable band.
29. The Claimant was given a fair and thorough appeal. Mr Cock was also entitled to reach his decision to uphold the dismissal for essentially the same reasons as Ms Shaffi.
30. I was satisfied that the Claimant was clear throughout that he was facing an allegation of theft in taking the bags without payment deliberately and the hearings explored his actions and whether they were deliberate. The Respondent was not required to put it to the Claimant in terms of the criminal statutory definition of theft; it was very clear to everyone what was in issue. The union representative did not at any time say that the allegations were

fundamentally unclear and the Claimant did not understand the case against him; the CCTV effectively spoke for itself in many ways and the vital question was what the Claimant had to say about it. There were no other material witnesses to interview.

31. The procedure was also fair with adequate investigation and a disciplinary hearing and appeal at which the Claimant was represented by his union. The CCTV footage and receipt clearly proved to the Respondent that the Claimant took bags for life without paying for them. The key thing was to understand why he did so and that was achieved by allowing him every opportunity to explain his admitted actions. I do not find that any of the criticisms made by counsel for the Claimant, who said all she could in this regard, of the Respondent, either singly or cumulatively rendered the dismissal unfair.

**Employment Judge Misra KC
5 March 2024**