



EMPLOYMENT TRIBUNALS

Claimant: Mr Delson Peter

Respondent: DHL Services Limited

Heard at: Reading **On: 19 and 20 August 2024**
(Tribunal deliberations on 21 August 2024)

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: In person
For the Respondent: Mr Robert Allen, counsel

RESERVED JUDGMENT

1. The claimant's complaints of unfair dismissal, holiday pay, deduction of wages and claim for breach of contract in respect of bonus are not well founded and are dismissed.
2. The claimant was wrongfully dismissed.
3. The respondent failed to pay to the claimant in respect of accrued and untaken holiday at the point of the claimant's dismissal.
4. The respondent is ordered to pay to the claimant the sum of pay and the respondent is ordered to pay to the claimant the sum of £6,500.78 in satisfaction of the claims 2 and 3 above.
5. Pursuant to regulation 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order, the employment tribunal **does not** have jurisdiction to consider the counterclaim.

REASONS

1. In a claim form presented on the 8 July 2023 the claimant made complaints of unfair dismissal, breach of contract (in respect of a bonus payment), notice pay, deduction of wages and holiday pay. The respondent defended the claims and made a counterclaim alleging that the

claimant had been overpaid wages and seeking a repayment of the overpayment (after giving credit for the claimant's holiday pay entitlement). The claimant did not defend the counterclaim and the respondent's evidence in support of the counterclaim was not contested by the claimant.

2. Subject to jurisdiction the respondent would be entitled to succeed on the counterclaim in the sum claimed of £1363.70.
3. The respondent relied on the evidence of Mr M Mukund Patel, deputy general manager, and Mr Mark Devlin, operations manager. The claimant gave evidence in support of his own case. All the witnesses produced written statements that were taken as the evidence in chief, the parties also produced a trial bundle which after the addition of a number of documents produced late by the respondent ran to 228 pages of documents. I made the following findings of fact which I considered necessary to decide the issues in this case.
4. The claimant was an agency worker, contracted to work for the respondent, from 2010 until he became directly employed by the respondent from the 1 January 2012. The claimant's employment ended with the claimant's dismissal on 24 March 2023. At the point of his dismissal the claimant was employed by the respondent in the role of first line manager.
5. The respondent has a contract to carry out the cleaning of British Airways aircraft that land and depart from Terminal 5 at Heathrow Airport. This involves stripping the old linen and replacing it with fresh linen, picking up rubbish from seat pockets, cleaning tray tables, hoovering and other cleaning duties to make the aircraft ready for the next flight. The claimant worked on the night shift.
6. Any lost property that is found as part of the cleaning process is to be collected and placed in a sealed bag accompanied by a pink slip providing brief details of the items found the date and location of where the items were found. The property is then securely stored in a locked cupboard until it can be passed to a third party provider who processes lost property centrally. In his role as first line manager of the night shift it was part of the claimant's role to carry out this process when lost property is found on his shift.
7. It is the respondent's case that on 1 March 2023, various items of lost property were collected by Sneddon Pereira, Airside Shift Manager and placed in a sealed bag accompanied by the requisite pink slip. The respondent's case is that Mr Pereira placed these items into the locked cupboard in accordance with the procedure. The lost property is said to have included three wallets. The respondent's case is that Mr Pereira processed and placed in bags two of the wallets during his shift, but was unable to process the third wallet before the end of his shift so this wallet was placed in the locked cupboard, and as part of the shift handover it explained that the third wallet needed to be processed and documented.

The claimant took responsibility for processing lost property on the next shift.

8. The respondent's case is that on 2 March 2023, Mr Pereira discovered that two of the three wallets that he had placed in a sealed bag in the locked cupboard during his previous shift were missing and that the remaining items had been reprocessed, with a replacement pink slip that had been completed by the claimant. The two missing wallets and the original pink slip allegedly completed by Mr Pereira on the previous day could not be located.
9. MS, a cabin quality manager began an investigation into the lost wallets on the 6 March 2023. They spoke to two employees, one of whom was Mr Pereira.
10. When the claimant came to work on the night shift he was suspended on full pay for alleged theft of passenger property. Between the 6 March and 13 March MS spoke to a number of people who were at work during the night shift with the claimant on 1 March 2023.
11. The claimant was asked to attend an investigation meeting with MS on the 14 March 2023 where the claimant was interviewed in respect of this allegation of theft of passenger property. Following the interview with the claimant MS then proceeded to speak again with two of the claimant's colleagues working on the night shift.
12. In the interview with the claimant there appears the following passage.

MS: We've spoken to everyone who worked that day on the late shift and night shift. They have conformed that there was 1 wallet in the LP cupboard that was not processed and 1 that had been processed, logged and sealed in a bag. These 2 wallets have gone missing. Sneddon has conformed that these were locked in the LP cupboard, and this was witnessed by 2 other managers / Amer has confirmed he gave you the key to do the LP for the night shift. The items that were confirmed as processed, logged and sealed apart from the wallet have been relogged and sealed by yourself that night.

DP: The last bit correct. The other things I'm not aware of.

13. This passage is contested by the claimant who says that the note of the meeting contains a typographical error. The claimant states that he would not have said "*The last bit is correct*". I am satisfied that the claimant did not say that. I accept the claimant's contention that there is contained in the passage of notes an error of recording or typographical error.
14. The purported admission that the claimant "*relogged and sealed*" a wallet

is contrary to what the claimant was saying elsewhere during the investigation meeting and at the disciplinary hearing. In arriving at my conclusion on this point I have considered the claimant's evidence (which I accepted on this point where he denies that he said this) and noting that there is no evidence from the maker of the notes, further taking notice of the fact that the claimant has demonstrated that there are various examples of sloppiness or carelessness in the way that the paperwork relating to this case has been handled by the respondent. I have also taken into account the fact that if the correct note of what the claimant said was "*The last bit is not correct*". It would be entirely consistent with the claimant's case, however as recorded it is entirely at odds with the claimant's case. My conclusion is therefore that the claimant is not likely to have said what is recorded.

15. In a letter dated, 21 March 2023, the claimant was invited to a disciplinary hearing. The letter set out the allegations against him, and stated that if proven, they could constitute gross misconduct and a breach of the respondent's theft and fraud policy. The letter, which was accompanied with all available evidence, advised the claimant of his right to be accompanied to the hearing and advised that that one of the potential outcomes of the meeting could be the termination of his employment without notice.
16. The disciplinary hearing took place as planned on 24 March 2023 and was conducted by Mr Patel.
17. During the disciplinary hearing the claimant questioned the statements from a colleague BM and Mr Pereira which appeared to have been taken at the same time; he pointed out that there was no written process for lost property; the claimant stated that he felt that the statements had been gathered to support the management case to dismiss him and that the claimant was being rushed by GN from HR during the disciplinary hearing; the claimant stated that there had been an ongoing issue with lost property; the claimant pointed out that there was nothing in the statements that proved he took the wallets and that he was being framed; the claimant complained that the decision to dismiss him was predetermined and had already been made before the disciplinary hearing; the claimant pointed out that Mr Pereira had a missing period of time between bagging the items and leaving work which created a blind spot when Mr Pereira or someone else could have taken the property; the claimant denied that he had stolen anything.
18. Mr Patel concluded that the allegations against the claimant had been established and he rejected all the various points that had been made by the claimant. Mr Patel considered that the appropriate sanction was dismissal without notice. The claimant was dismissed by Mr Patel at the end of the disciplinary hearing.
19. The claimant's dismissal was confirmed in writing by letter dated 29 March 2023.

20. The claimant appealed the decision to dismiss him. The appeal hearing took place on 19 April 2023. The claimant's appeal was dismissed and the decision to dismiss the claimant was upheld and the claimant was informed of this decision by letter dated 25 April 2023.

Unfair dismissal

21. The issues that I have to consider are:

21.1 What was the reason, or principal reason, for the claimant's dismissal? Was it as the respondent says his conduct.

21.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular,:

21.2.1 Were there reasonable grounds for that belief;

21.2.2 At the time the belief was formed, had the respondent carried out a reasonable investigation;

21.2.3 Did the respondent otherwise act in a procedurally fair manner; and

21.2.4 Was dismissal fall within the band of reasonable responses.

22. Section 98 of the Employment Rights Act 1996 ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.

23. Where an employer has shown a potentially fair reason 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.

24. The respondent must show that: it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; and at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

25. It is not necessary that the tribunal itself would have shared the same view of those circumstances.¹

26. After considering the investigatory and disciplinary process, the tribunal has

¹ British Home Stores Limited v Burchell [1978] IRLR 379

to consider the reasonableness of the employer's decision to dismiss and (not substituting our own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"². The burden is neutral at this stage: the Tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

Conclusion on unfair dismissal

27. As the respondent stated in closing submissions, "more enquires could always be made" but that does not mean that the investigation was not reasonable. I note that the respondent carried out numerous interviews with relevant people and spoke to some people more than once. There is no indication from the material before me that the investigation was being driven by a finger pointing towards the claimant. On the contrary many of the interviewees made no mention of the claimant. Nobody said anything that directly implicated the claimant with theft.
28. There were obvious failings in the documentation as required by the respondent's system, in that blue, yellow and pink slips that should have been available were not. This in my view however does not assist the claimant particularly as this is what is to be expected if there had been a thief acting as the claimant is alleged to have acted.
29. The evidence before the respondent was such that it established that there were two wallets that had been found and were not accounted for. The persons whom the evidence points to be involved in dealing with the wallets were the claimant and Mr Pereira.
30. The respondent concluded that there had been a relogging of property that had been processed by Mr Pereira and that the claimant had been responsible for this. The evidence supporting this hinged on accepting the evidence of Mr Pereira and what he said about the wallets he dealt with. While I have concluded that the claimant did not accept that he relogged and sealed the property bags even without this evidence it was a permissible conclusion on the part of the respondent.
31. The respondent's witnesses Mr Patel and Mr Devlin concluded that there was a window of opportunity that permitted the claimant the opportunity to take the wallets. In contrast they did not consider that the same opportunity existed in the case of Mr Pereira.
32. I am satisfied that Mr Patel believed that the claimant was responsible and that there were reasonable grounds for that belief.
33. I am satisfied that the respondent has carried out a reasonable investigation in this case. I note that the claimant has pointed out sloppiness and errors

² Iceland Frozen Foods v Jones [1982] IRLR 439

in the administration processing of the claimant's disciplinary hearing. However having considered the nature of those errors, using the wrong forms, mistiming the investigation interviews, typographical errors and the identity of the notetaker in some of the meetings, I am not satisfied that these are mishaps critical to the reasonableness of the investigation. These procedural irregularities do not in my view affect the basis of the conclusions or undermine it so as to make the procedure adopted overall to be unfair to the claimant.

34. The respondent's disciplinary policy, and the respondent's policy on theft and fraud make it very clear that theft is considered to be gross misconduct. In the circumstances of this case the alleged theft involved taking passenger property amounting to some hundreds of pounds. The respondent was in my view entitled, where it found that the claimant was responsible for theft, to conclude that the dismissal of the claimant in the circumstances was an appropriate sanction.
35. The claimant's complaint of unfair dismissal is not well founded and the complaint is dismissed
Wrongful dismissal.
36. In considering wrongful dismissal I am required to decide whether the alleged misconduct actually occurred.
37. In a claim for wrongful dismissal the legal question is whether the employer dismissed the claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily.
38. An employer may dismiss summarily if the employee is in breach of contract and that breach is repudiatory - that is where the employee "abandons and altogether refuses to perform" the contract. For example where the employee does an act of gross misconduct such as theft of passenger property.
39. All contracts of employment contain an implied term on the part of the employer that it will not act without reasonable or proper cause so as to damage or destroy the relationship of trust and confidence which exists, or should exist, between employer and employee, so too the employee may be bound by that term, and is bound by the term that the employee is to provide loyal service to the employer.
40. If an employer, knowing of the repudiatory conduct, dismisses an employee for it, the employer is, by doing so, accepting the employee's breach as terminating the need for it, the employer, to continue to perform its side of the bargain which is the employment contract. If an employee is guilty of repudiatory conduct then except perhaps in the most exceptional circumstances an employer is entitled to dismiss that employee without notice. The employer, by doing so, is not in breach of the contract. It is the employee's breach which causes the termination.

41. I have considered the evidence that was before the respondent. I have also considered the evidence that was presented to me by the parties as to the alleged theft of the wallets.
42. Part of the evidence that I have been presented with comes from the claimant. I have had to assess his credibility. I found him a credible witness, and in my view he was a person genuinely upset at the prospect of losing his role with the respondent. He spoke impressively about his career with the respondent and what it meant to him. I believed him when he said he would not put his own and his family's welfare at risk by stealing as alleged.
43. I recognise that even persons of the most high office and apparent probity can be victims of temptation, or a moment of madness and so I do not decide the question whether the claimant stole passenger property on my assessment of his credibility alone.
44. The position is that nobody actually was able to say that the claimant stole the money. Other people had the opportunity to take the money. That there was a theft of the money in the circumstances of this case was always likely to be discovered. Determining who was guilty of theft in this case was in reality a choice between the claimant and another person. That the claimant was selected and the other was exonerated was decided by Mr Patel who preferred the respondent's other employee. However it seems to me on balance of probabilities that the claimant is less likely to have been the thief than the other person, a fact that is to some extent supported by later events not relevant to this case.
45. Taking into account the state of the evidence and my assessment of the claimant I am of the view that the respondent has not shown that the claimant was in fact guilty of the alleged misconduct. There was no repudiatory breach of contract and the claimant is entitled to succeed in his claim for wrongful dismissal.
46. The claimant is entitled to contractual notice of termination of employment 13 weeks. This is a gross sum of £7864.46. The claimant should however give credit to the respondent in respect of the bonus paid in the sum of £2420.47 which has been paid to the claimant in error (see counterclaim below).

The counter claim

47. The respondent has a discretionary bonus scheme in respect of which employees employed on 1 April are eligible.
48. The claimant was dismissed on the 24 March 2023. The claimant was not employed on the 1 April 2023.
49. The claimant was paid a bonus of £2,420.47 on 1 April 2020 that he was not entitled.

50. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that

4. Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
 - (b) the claim is not one to which article 5 applies;
 - (c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and
 - (d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order

51. The claim in respect of the over paid bonus did not arise, and it was not outstanding on the termination of the claimant’s employment. It was paid to the claimant after his employment had ended. The employment tribunal therefore does not have jurisdiction to consider the respondent's counterclaim under The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

52. The respondent would have the right to seek repayment of the over paid sums from the claimant in the civil courts. I am satisfied however that in assessing what is owed to the claimant I can take into account the overpaid sums (see paragraph 46 above).

Holiday pay

53. The respondent concedes that the claimant was not paid holiday pay in his final pay in the sum of £1,056.77. This sum should be set off against any over payment.³

Final award

54. The respondent should pay the claimant the sum of £6,501.07 this figure is arrived at as follows:

Wrongful dismissal	£7864.48
Holiday pay	£1056.77
Less overpayment (bonus)	£-2420.47
Total amount due to the claimant	£6500.78

³ Mr Corris solicitor for the respondent, after the proceedings, provided an email setting out a different figure for holiday pay. The figure in the this judgment is however that which was set out in the witness statement of Mr Patel.

Employment Judge Gumbiti-Zimuto
Date: 28 August 2024

Sent to the parties on: 2 October 2024

For the Tribunals Office

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