THE EMPLOYMENT TRIBUNALS

Claimant Mr George Walmsley

Respondent Istanbul Meats Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 7th March 2019
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant: in person
For Respondent: Mr A Famutimi of Counsel

JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed

REASONS

1. Introduction and Issues

1.1. The claimant, born 24 September 1977, was employed from mid 2004 until his dismissal with notice effective on 16 November 2018. He claims unfair dismissal only.

1.2. The liability issues are:
1.2.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or if more than one the principal reason, for the dismissal of the employee?

1.2.2. Were they, as the respondent alleges, related to his conduct?

1.2.3. Having regard to that reason, did the employer (a) have reasonable grounds after a reasonable investigation for its genuine beliefs (b) follow a fair procedure (c) act reasonably in treating that reason as sufficient to warrant dismissal?

1.3. The claim and further information provided by the claimant contain many points irrelevant to the above issues. For example, anything which happened during the notice period cannot be part of the reason for dismissal. He also makes several complaints about the conduct of his employer which took place well before the dismissal. They may be relevant if they cast light on whether the given reason for dismissal was genuine. The respondent has replied to many of these points and the claimant has commented on those replies. I will mention them only briefly, for reasons which I will explain in the next section and my conclusions .

2. The Relevant Law

2.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:
"(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 dismissal
(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 relates to ..... the conduct of the employee."

2.2. In Abernethy v Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee.

2.3. Section 98(4) of the Act says:
"*Where an employer has fulfilled the requirements of subsection (1), 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.4. An employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did. It simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable (see British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald)

2.5. In Polkey v AE Dayton Lord Bridge of Harwich said :
in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …

2.6. Ladbroke Racing v Arnott held the standard of acting reasonably requires an employee to consider all the facts relevant to the nature and cause of the breach Previous good character and employment record is always a relevant mitigating factor.

2.7. British Leyland –v-Swift held an employer in deciding sanction can take into account the conduct of the employee during the investigative and disciplinary process, so that if he appears not to tell the truth, it can be a factor in deciding to dismiss. Retarded Children's Aid Society –v-Day held where an employee appeared not willing to change his ways it would be reasonable for an employer to conclude warning him would be futile, especially if he had earlier been warned and done the same again.

2.8. Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt), held the Tribunal must not substitute its view for that of the employer unless the view of

the employer falls outside the band of reasonable responses. In UCATT v Brain, Sir John Donaldson said: *"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.*

2.9. The Court of Appeal in Davies-v-Sandwell Council considered the extent to which a Tribunal faced with a dismissal for which part of the reason was breach of an earlier warning could consider whether the earlier warning was fair. The essential principle laid down was it is legitimate for an employer to rely on a final warning, provided it was issued in good faith, there were on the face of it grounds for imposing it and it was not manifestly inappropriate. Lord Justice Mummery said it is not the function of the Tribunal to re-open the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued . It can only consider whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

3. Findings of Fact

3.1. I heard Mr Atalay Adiguzel a director of the respondent and Ms Leyla Tanriverdi, its office manager . I heard the claimant whose exchanged statement was very short but I also took as his evidence what was in his claim form and emails he had sent on 9 and 16 and a letter on 23 November 2018 (pages 14, 32 and 34 of the agreed bundle).

3.2. The respondent is a manufacturer and wholesaler of kebab meat based in Chester-le-Street, County Durham. The claimant and his partner live together about four miles from its premises. He complains that in January and September 2017 and May 2018 he asked his employer to get him bicycle to travel to work under the "pedal to work scheme" but they refused. He says after his dismissal Darren Smith was given a bicycle but the respondent says no-one has. The scheme is a Government initiative but no employer has an obligation to follow it.

3.3. He also complains he was overlooked for courses. The respondent denies this completely and says the claimant was actually put on a forklift driving course but due to his poor performance failed. He says a Mark Murphy was given a supervisor's job without it being advertised. Both points are irrelevant, even if true, for reasons I will explain in my conclusions.

3.4. In the email of 9 November the claimant refers to arguments in 2005 about him threatening to sue the company for personal injury, an argument between himself and the son of one of the directors in 2006 and an incident where a former floor manager allegedly threw a hammer at him. There was an incident of lateness in May 2008 due to the person who gave the claimant a lift picking him up late over which the claimant says he was taken to task but the driver of the car was not. None of this is relevant either.

3.5. When his third daughter was born on 4 January 2017, he asked for paternity pay and says in his claim form he was forced to use holidays instead . The respondent says

he was told he would be paid statutory paternity pay but when he was told the rate, set by legislation at less than £150 per week , his answer was "*how .. am I supposed to live on that*" . Mr Adiguzel told him he could, if he wanted full pay, take two weeks as holiday, which he elected to do. He was paid in full from 4-17 January 2017. Whatever the truth, it has no bearing on the reasons for his dismissal.

3.6. I accept the claimant's attendance had been good for many years. His third daughter was from birth very ill with suspected meningitis at certain stages. The claimant was absent from work between January and August but many days were counted as authorised absence due to his daughter being unwell. The respondent has kept good records and we were able to go through each occasion upon which he was asked for the reasons for his absence at return to work interviews. On every one where there is a clear link to his daughter's illness, no action was taken. On others the claimant simply said he had slept in and although he says today the respondent should have known that was indirectly a result of his daughter's illness he never said so in return to work interviews.

3.7. By letter of 29 August 2017 the claimant was asked to a disciplinary hearing to address his absences and lateness along with his failure to inform the respondent when he was going to be late or absent. On 31 August 2017 Mr Adiguzel told the claimant how his actions were detrimentally affecting the team and he would have to improve. The claimant was apologetic and promised to change his ways , so by letter of 1 September he was issued with a final written warning. On 31 August 2017, it was found he had been eating sweets at his worktable which contravened the strict "no eating or drinking policy" in the "high care" production area. He was given a formal verbal warning for this. There is absolutely no indication of the respondent looking for reasons to dismiss. On the contrary they appear to have been giving him as much support and leeway as any reasonable employer could be expected to give.

3.8. On 5 January 2018 the claimant was due to start work at 7:45 am but sent a text to a colleague at 2:27 pm stating he had just woken up. By letter of 16 January he was invited to another disciplinary hearing to discuss this, His oversleeping had been due to a domestic argument . Th disciplinary was heard by Mrs Nuran Adiguzel, a director and mother of Mr Adiguzel, on 17 January 2018. By letter the following day she noted the claimant's final written warning but decided to give him one final chance, so he was informed his final written warning would continue for the next 12 months, the respondent expected listed improvements and any further failures would probably lead to dismissal.

3.9. This respondent rightly draws the distinction between absence for a good reason and simple absenteeism and lateness. In his email of 9 November the claimant refers to being refused time off to attend the funeral of a friend who had been murdered in April 2018. The respondent says he was permitted to attend and this absence was not taken into account against him at all. From January to August, he did improve.

3.10. The claimant wanted to take a family holiday at the end of August 2018 The respondent informed him he did not have any holidays remaining but it would allow him to take unpaid leave from 23 -27 August to go to Flamingo Land . The claimant says he told the respondent, he **might** not be back on the 28th. Ms Tanriverdi denies that, but even if he said it to someone, it makes no difference to the reason for dismissal which follows. He says ,whilst on holiday he entered a competition to win two extra days and won. He should have notified the respondent but he did not. I accept he did not have his

mobile phone on holiday but as Ms Tanriverdi said she knows Flamingo Land has phones on reception. He overran the authorised absence by two days with no notification to the respondent. I cannot accept he had a valid reason for not informing them from the time he knew he would not be back on 28th until he turned up on 30th . When Ms Tanriverdi did a return to work interview that day the lack of a phone was the only reason given for not making contact . He also said he did not "*see why it was such a big deal*".

3.11. The respondent sent him a letter asking him to a disciplinary meeting on 31st .At that meeting Mr Adiguzel was told by the claimant initially he did not have access to a telephone but later changed that to say his reason was he did not ring was he did not wish to be shouted at. There is a clear distinction between his responses at this interview and the earlier ones when he was given a warning. Instead of apologising, page 107 shows he started to accuse the respondent of treating him differently from others. He even used the word discrimination. Mr Adiguzel replied they tried their very best to help him in all respects including sending him on courses . The claimant persisted in attack as his method of defence and even said he was going to see a solicitor about bringing a discrimination claim. Mr Adiguzel decided enough was enough so the claimant would be dismissed with notice. He was informed of his right of appeal but chose not to exercise it. He worked his notice period but was given every Monday off to attend training for a new job he had found.

3.12. On 11 October 2018 the claimant commenced early conciliation through ACAS and received his certificate on 16 October. He commenced his proceedings on that day. The text is of his being treated differently from others over many years. it may be others were treated more favourably but for good reason. He makes complaints about being put on cleaning duty during his notice period which is irrelevant to why he was dismissed.

3.13. At no point in his claim or the emails he sent does he address his failure to ring in or the warnings he had received. The email says: "*I had a fair bit of time off last couple of year but there has been days when u felt that low I couldn't go into work and my baby was ill in hospital. they said that was okay at the time and when I was at my disciplinary for time off they didn't take into account that* .

3.14. The email of 16 November refers to 6 November 2018 at 10 am when he asked for time off to be at home for a gas inspection. Mr Adiguzel told him this exemplified the reason it had already been decided to dismiss him. The claimant's partner does not work so could have been present in the house for the gas inspection. The claimant replied she does not like staying in and has better things to do. The claimant says he was treated less favourably than Stephen Smith who needed to take his dog to the vet was allowed to do so. The circumstances are entirely different.

3.15. He makes a potentially relevant point saying Mr Adiguzel told him on 8 November he would be able to reapply for a job (this is denied) which made him think the real reason for getting rid of him was that he was one of the highest paid. He says two Polish people have been hired because they are cheaper labour. The respondent has a complete answer to this. They pay everybody in accordance with a pay scale and took on two British people at the same time on the same pay as the Polish nationals. More importantly the pay scale recognises length of service which is why the claimant's pay was higher. I accept this was no part of the respondent's reason for dismissal.

3.16. The claimant is saying he had valid reasons for some absences, which the respondent accepts, but on exploration of all his emails it is impossible to discern valid explanations for the ones upon which the respondent relies as its reason for dismissal, or more importantly his failures to inform the respondent he would not be at work.

4 Conclusions

4.1. When I have said points are " irrelevant", I have not decided their truth and do not doubt they are very important **to the claimant**. Today he said he ticked the wrong box on the claim form and intended to claim constructive dismissal and victimisation. I explained for constructive dismissal he would have had to end his employment in response to a fundamental breach by the employer, which he did not. For victimisation or discrimination his treatment would have to have some relation to the protected characteristics under the Equality Act 2010 such as sex, race or disability, and they do not. In any event any such claims were well outside the time limits. I wish to reassure the claimant he has not lost this case because he has not ticked the right box but because in an unfair dismissal claim the law does not permit me to conduct a wide ranging review of the fairness of his treatment over the period of his employment. No other claim could have been brought on the facts the claimant alleges.

4.2 The crux of his case was actually that the warnings which preceded August 2018 were excessive sanctions. I do not think they were, but even if I did, the conditions for me to "re-open" them set in Davies-v-Sandwell Council are simply not met . When I announced my decision and a summary of my reasons, the claimant said words to the effect "*so they've gotten away with it , the way they've treated me over 15 years*" .I do not find he has been unfairly treated because I have not gone into everything which may or may not have happened in the last 15 years—the law does not allow me to even if I wished to. However, I give an indication to the respondent that if it is considering applying for costs against the claimant , I do not think they should be awarded. Although this claim would have been seen as hopeless by a lawyer, many people who are not aware of the law think Tribunals can decide whether their treatment over time has been fair. I accept the claimant thinks that, which probably would lead to a conclusion he had not acted in a way which would enable a costs order to be made.

4.3. I accept the claimant was a diligent employee who has done good work. However, even such persons can act in a way which no reasonable employer could be expected to tolerate. I also accept his personal problems from 2017 onwards caused him to struggle. I refer back to British Leyland –v- Swift and Retarded Children's Aid Society –v- Day, The lame excuse for not telephoning by 27th August and the absence of any recognition that when he is avoidably and unexpectedly absent others have to bear the brunt is clear. The respondent does not have to prove it did have such an impact, simply that it believed it had that potential. It has comfortably discharged that burden of proof.

4.4. The facts known to the employer which constituted the principal reason for dismissal were that the claimant had , while on a final warning, had unauthorised absence for no valid cause which he had taken no reasonable steps to notify . That related to his conduct. The respondent had reasonable grounds after a reasonable investigation for its genuine beliefs, followed a fair procedure and its view of what sanction was appropriate was well within the band of reasonable responses. The claim for unfair dismissal therefore fails..

T M GARNON EMPLOYMENT JUDGE

JUDGMENT SIGNED BY THE EMPLOYMENT JUDGE ON 8th March 2019