EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Bithell	**v**	Cooks Delight Limited

Heard at: Bristol **On: 4 and 5 March 2020**

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: In person
For the Respondent: Mr Stephenson - counsel

JUDGMENT

The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

(Having been requested subject to Rule 62 of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed as a depot manager at one of the Respondent's sites, at Swindon. The Respondent is a food wholesaler, involving the production and delivery of a variety of products to catering businesses.

2. The Claimant had worked for the Respondent for approximately three and a half years, until his summary dismissal on 27 March 2019, for alleged gross misconduct, specifically for acting without authority in changing an employee's job role; permitting the same employee to operate a forklift truck, without the requisite licence; submitting a bonus and pay increase request for that employee, for driving duties that he was not performing and engaging agency workers to carry out that employee's role.

3. As a consequence, the Claimant brings a claim of unfair dismissal. The issues in respect of that claim were set out at the outset of the Hearing and are as follows:

    a. Has the Respondent shown the reason for dismissal? The Respondent states misconduct, which is potentially a fair reason, but the Claimant states that the real reason was the Respondent's desire to cut costs.

    b. Did the Respondent have a genuine belief in the Claimant's 'guilt', based on as much investigation into the matter, as was reasonable in the circumstances? The Claimant states that the investigation was '*very poor*' and did not include statements from staff, although they were interviewed and also that evidence he provided was not considered.

    c. Did the Respondent follow a fair procedure? The Claimant states that the procedure was '*not conducted as per ACAS guidelines*' and no minutes were provided of the meetings.

    d. In the event that the Tribunal finds that the dismissal was procedurally unfair, the Respondent relies on the Polkey principle to reduce any award of compensation.

    e. Should any award be uplifted by up to 25%, for any failure to follow the ACAS Code on disciplinary procedures?

    f. Was dismissal within the range of responses of the reasonable employer?

    g. In the event that dismissal was found to be unfair, the Respondent relies on ss. 122(2) & 123(6) of the Employment Rights Act 1996 (ERA), as to contributory conduct by the Claimant, to reduce any award by 100%.

4. There were preliminary discussions as to the contents of the hearing bundle, in that the Claimant felt that the Respondent had sought to exclude documents from the bundle that he considered relevant. Mr Stephenson stated that those documents (now contained in a separate supplemental bundle) were either irrelevant, or had not been before the Respondent's decision-maker at the disciplinary hearing. I agreed to permit the Claimant to refer to documents in that bundle when cross-examining the Respondent's witness, but that I would, at that point, once the context was clear, decide whether or not such document was relevant. In fact, during cross-examination and in my perusal of the bundle, it became clear that the documents were, as Mr Stephenson stated, either irrelevant to his dismissal (being largely based on an attempt by the Claimant to point up unrelated health and safety or other breaches of the law by the Respondent), or statements or documents obtained by him after his dismissal and which therefore cannot have formed any part of the Respondent's decision making.

The Law

5. I referred myself to s.98 Employment Rights Act 1996 (ERA) as to fairness of dismissal.

6. As stated above, the Respondent relies on ss.122 and 123 ERA in respect of contributory conduct.

7. I reminded myself of the Iceland Frozen Foods stable of cases, as to the principles of not substituting my opinion for that of the employer and also the range of reasonable responses test in considering whether dismissal was a fair sanction in these circumstances.

The Facts

8. I heard evidence from the Claimant and for the Respondent, from Mr Andrew Pao, a director of the Respondent, who dismissed the Claimant. The Respondent also provided a statement from a Ms Rita Xu, an HR consultant, who was unable to attend the Hearing, due to self-isolating because of the Corona Virus. The Claimant had no objection to me reading her statement, to which, in view of her not being available to be cross-examined, I gave only limited weight. In any event, however, her evidence proved to be marginal to the issues before me.

9. The Respondent is medium-sized organisation of approximately fifty employees, with the level of administrative and management resources one would expect of such a business, to include access to HR advice.

10. In mid-February 2019, there was an exchange of emails between the Claimant and HR, copied to Mr Pao, in which the Claimant referred to a conversation he had had with HR as to a Mr Harris, one of his drivers, accepting an offer of reduced hours and removal of driving duties, with a related drop in salary. He asked for HR advice. Ms Xu responded, stating that she was '*a bit confused about the situation because I did not recognise that our company has agreed to offer Geoff* (Mr Harris) *a new job different from his current one as a driver. I understand that you mentioned your thoughts about this on 8 February when we spoke on the phone. But I have no knowledge that this has been authorized by our company. Could you please clarify the communication and the authorisation on this?* The Claimant replied, stating that the conversation he was referring to was with Mr Pao and that he was merely seeking advice. Mr Pao then emailed to say that '*the conversation was about Geoff's health and ability to do a job. If he is not fit enough to be a driver, I have no issue with him doing less hours, but he must prove himself fit and able to do said job. And of course he must apply for any new role.'* The Claimant then replied stating that '*he is already doing the job I would like him to do, I would just like to take away the driver side of his job'.* [81&82].

11. This lead to Ms Xu being asked to go to the Swindon depot '*to see how it was operated and to speak to the employees there'*. She did so on 20 February and spoke to several employees, keeping notes of those conversations [96-99]. A Mr Blewitt said (as well as describing his own duties) that Mr Harris could do deliveries whenever needed and was fit to drive. Ms Knight, an admin clerk, described her duties. Mr Hughes described his duties, which included loading and unloading, using a forklift and also mentioned that Mr Harris also carried out those duties and brought trucks for service, when needed. Mr Harris, himself, said that he had started work as a forklift driver in July 2018, while still working as a truck driver, delivering two or three days a week. Since Christmas 2018, he '*occasionally delivered goods to customers as a cover driver when someone was sick or off work.'* He also, when needed, took trucks for MOT and washed vehicles.

12. Ms Xu considered that there was not enough work at the depot to justify both Mr Hughes and Mr Harris loading and unloading and that in any event, as an HGV driver (plus of 7.5 tonnes), Mr Harris was employed to do that role as '*an important member of the driving team in Swindon'*. She raised her concerns with the Respondent's in-house HR and Mr Pao.

13. This lead to the Respondent considering that these matters merited investigation and if appropriate, disciplinary proceedings. On 14 March 2019, the Claimant was handed two letters, one suspending him, pending the outcome of an investigation and the other inviting him to a disciplinary hearing on 18 March [91&92]. Mr Pao accepted, in cross-examination that the sequencing of these letters was not sensible or logical, as, clearly, the investigation had already taken place and that therefore there should just have been one letter, suspending the Claimant and inviting him to a disciplinary hearing.

14. The second letter stated that the Claimant was accused of committing gross misconduct, by changing Mr Harris' role, without authorisation; falsifying records, by proposing Mr Harris for a pay rise and bonuses, in his position as a driver, when in fact he was actually working in the warehouse and finally causing unacceptable financial loss by hiring agency drivers to perform Mr Harris' duties. With the letter, were included various items of evidence, to include Mr Harris' delivery records, payroll records and a copy of the Respondent's disciplinary procedure. The Claimant accepted that he had received those documents, but stated that the 'conversation notes' taken by Ms Xu with the employees had not been included. Mr Pao was unsure if they had, but recalled that they had, instead, been provided at the disciplinary hearing, probably during a break in those proceedings. The Claimant stated that that was the case and it seems likely that his recollection is the correct one. While, clearly, he should have been provided with those notes in advance of the Hearing, he accepted that as, in fact, Mr Pao adjourned the first hearing, re-convening a second one, on 25 March, he (the Claimant) had had ample time to consider them, in the interim and could have raised concerns as to their contents, at that second hearing, if he wished.

15. The Claimant chose to be unaccompanied at both hearings. At the first hearing, the Claimant said that in respect of the allegation as to Mr Harris no longer driving, that in fact he was still a driver, but that he (the Claimant) had given him additional duties. When challenged that Mr Harris' current duties did not match that of his job description [94-95], he said that changes had been made in January 2019, due to Mr Harris having been involved in a road traffic accident and therefore due to '*operational requirements'*, both he and Mr Harris decided it better that he be given additional non-driving duties. He referred to Mr Harris' '*confidence level being low'*. He said that Mr Harris did four hours of forklift driving in the morning and then '*went out doing training and recovery'.* He said that following the accident, he felt that he '*had a duty of care for Mr Harris, who adds value to the team'*. He agreed that he had not informed anyone, including HR, of this change. He went on to say that he thought he had discussed it with Ms Xu '*before the 25th February*', but could provide no evidence of having done so. When challenged as to why he had not informed the Company, or sought authorisation, he said that he'd '*had holiday and a lot of things were going on'*.

16. In respect of the second allegation, as to the Claimant recommending Mr Harris for a pay rise and monthly bonuses, he said that Mr Harris was still a driver and was not warehouse staff, albeit that he didn't drive as much as he had in the past.

17. In respect of the third allegation, the use of agency staff, there was some discussion at the Hearing, but which seemed inconclusive. The Claimant denied that he had ever seen a copy of the Respondent's policy on the use of agency staff, but he is shown as included in the email distribution of that policy, in July 2018 [45].

18. The Claimant said that following the end of the meeting, he had to wait around for an hour or so for the typed minutes to be produced. He was provided with a copy, to which he added amendments, in handwriting (as seen in the copy in the bundle) and signed it. Clearly, therefore, his assertion in his claim that no minutes were provided is unfounded. In both his statement and during cross-examination, he asserted that the minutes were incomplete and did not match the conversation that took place. He was asked, therefore, as to why, when presented with the minutes immediately after the meeting, he had not pointed out such discrepancies at the time, when, clearly, he had made some amendments. He said that there were too many discrepancies to address them all. He was asked if he himself had taken any notes of the meeting that might show such contradictions and he had not and nor had he taken the opportunity to have a companion with him, who could have done so. Accordingly, therefore, apart from the Claimant's assertions in this respect, there is no evidence to indicate that the notes are inaccurate and bearing in mind that there is no requirement to keep a verbatim account of such meetings, I accept them as broadly accurate.

19. Mr Pao considered that he needed to conduct a further hearing, '*to further discuss the allegations and offer you another opportunity to prepare for your case and present your own evidences'* and noted that the Claimant had provided additional evidence in relation to Mr Harris' time attendance, rounds and payroll. Both the Claimant and Mr Pao agreed that these were the documents at pages 126-131. He was therefore invited to the second hearing, on 25 March [106]. He provided a document for that hearing [127], setting out his response to the allegations. In respect of the change to Mr Harris' job role, he asserted that his job description [130] permitted him to make these changes. In respect of the pay rise and bonus point, he said that Mr Harris was not warehouse staff, but a driver (and therefore, by implication, entitled to such pay rise and bonuses). In respect of the cost of agency staff, he disputed the costs alleged.

20. At the second hearing, he largely relied on that written response. In respect of the pay and bonus issue, he continued to argue that Mr Harris wasn't warehouse staff and therefore entitled to a pay rise and bonuses. He confirmed that he had changed Mr Harris' role without notifying the Respondent. He was asked about whether or not Mr Harris had a forklift licence and he said that he had obtained one in December 2018 [93], but that he had had one prior to that date, in any event. Again, following the meeting, the Claimant was presented with a copy of the minutes, which he amended and signed.

21. On 27 March, Mr Pao wrote to the Claimant, summarily dismissing him, for gross misconduct [132]. He concluded, in respect of the change to the job role, that the change had been made in August 2018 and continued thereafter, without the Claimant seeking any authorisation from the Respondent, until his email of 12 February 2019 [82]. It was found, also that he had permitted Mr Harris to operate a forklift without a licence, from August to November 2018. Mr Pao pointed out that any changes to job roles required the authority of the managing director and written and signed agreement was required from any employee so affected, in order to protect the Company from legal risks. In respect of the pay and bonuses, he had falsified his returns to the Company in respect of Mr Harris, omitting his change of role, resulting in Mr Harris receiving a pay rise and bonuses, to which he was not entitled. Finally, it was decided that the Claimant had incurred unnecessary costs, by hiring agency drivers to perform Mr Harris' driving duties.

22. The Claimant did not take up his opportunity to appeal this decision.

23. I summarise the Claimant's evidence in cross-examination, as follows:

    a. He agreed that he had considerable management experience (15-plus years) and understood the importance of obeying company rules and procedures and not acting without due authority.

b. He accepted that his job description did not contain any authority for him to change employee's terms and conditions. He also agreed that s.4 ERA required employers to confirm in writing any variation of employees' terms and conditions. He said, however that in his email of 12 February 2019, he was referring to intended future arrangements.

c. He agreed that the Respondent's disciplinary procedure included falsification of documents, or other serious breaches of company policy, as gross misconduct, which could justify dismissal [38].

d. He denied that he had removed Mr Harris' driving duties. In this respect, he was referred to the records relied on by the Respondent [115-118] and asked to explain how, if that was the case, for the period 1 August 2018 to 28 February 2019, Mr Harris had only carried out deliveries on twenty-seven days, out of an approximate total of 140, or so (depending on how holidays were included or excluded) and said that the details entered on this document had been done manually by somebody else and that therefore he disputed its accuracy. He had not said this in his statement, but only in cross-examination and could provide no evidence to support such an assertion, despite having had the document since completion of the bundle. I therefore accept that the document is accurate. The Claimant, in any event, agreed that Mr Harris was doing less driving than he was contracted to do (as was Mr Harris' own evidence in his 'conversation note'), but said that on that document, when he was listed as 'backup', or '1 drop delivery' (for approximately eighteen days), he would have undertaken driving duties. Therefore, even including such a possibility, the total driving days were approximately forty-five.

e. He had no dispute with the overall conduct of the disciplinary hearings, confirming that he understood the charges against him and had had ample opportunity to put his case.

f. In respect of Mr Harris driving without a forklift licence, he said that Mr Harris had '*historic experience'* of forklift operation and that therefore, if Mr Harris had had an accident, the Respondent's insurance policy would not have been invalidated. When challenged, he agreed that he had no corroborative evidence to support such an assertion.

g. In respect of him putting forward Mr Harris for a £1000 pay rise and bonuses, he said that these were '*not just tied to driving'*. When challenged that on the relevant email from him, in September 2018 [54], he had listed Mr Harris as '7.5' tonne driver (along with other 7.5, Cat C and van drivers), he accepted that the effect of such an email, in entitling Mr Harris to that pay rise and bonus, was misleading and that '*he should have worded the proposal differently'*. He also accepted that drivers were better paid than non-drivers. He accepted that there was a mechanism for

him to change Mr Harris' role legitimately and that, with the benefit of hindsight, he should have followed it.

24. I summarise Mr Pao's evidence (beyond that contained in the documents already referred to) as follows:

    a. He was aware of Mr Harris' accident, but didn't consider it relevant to his considerations.

    b. While he was aware, generally, of Mr Harris intending to retire in late 2019, he was not aware of any loss of his confidence in his driving. He was aware that Mr Harris had had an unrelated medical condition in the past and was placed on reduced driving duties, until he recovered, but was under the impression that Mr Harris had returned to almost his full driving duties in or around November 2018.

    c. He confirmed that the pay rise and bonuses sought were just for drivers.

    d. When challenged that the Claimant's job description [130] did not contain anything that prevented him from changing Mr Harris' role, he said that '*it was common sense, that he could not'*. It was also pointed out by the Tribunal that of course the job description did not include any such express authority and that the fact that it did not, did not, by implication, grant such authority. Mr Pao went on to say that '*we would not be here today if Mr Harris had not kept the same salary'*.

    e. He agreed that in the first disciplinary hearing, he had asked the Claimant whether he (the Claimant) considered that his actions had irreparably damaged relations between him and the directors, stating that the Claimant answered 'no'.

    f. He had no doubts generally as to the Claimant being able to do his job and that he personally had had no problems with him. When challenged that the real reason for the Claimant's dismissal was the Company's wish to cut costs, he accepted that the Company had not been profitable for a time and was rationalising its operation, but categorically denied that this had anything to do with the Claimant's dismissal. He said that in fact the Claimant was a valued member of staff and until his dismissal, a trusted manager. He also held an 'O' licence, essential to run a haulage operation and it was not in their interest to lose somebody holding that qualification.

    g. He said that he considered the additional evidence provided by the Claimant in advance of the second hearing, but didn't consider that it changed his conclusion.

h. He said that he had considered the possibility of a lesser sanction, such as a final written warning, but felt he had no option but to dismiss the Claimant, as the '*tipping point was his covering up of facts'* and putting forward false evidence. He said that '*anybody could make a mistake, but the Claimant had attempted to cover up his mistakes'*, leading to his conclusion that the Company could no longer trust him.

Conclusions

25. Considering the issues I need to decide upon, I find as follows:

a. The Respondent has shown that the reason for dismissal was misconduct, which is clearly a legitimate reason. Apart from the Claimant's assertions as to the real reason being cost-cutting, there was no corroborative evidence whatsoever that the Respondent was motivated in that way. The mere fact that the Company was not profitable is not, of itself, evidence that the Claimant was dismissed for that reason. If the Company wished to save on employees' wages, then they had the option of making redundancies and which they had done in the past.

b. In respect of the requirement for the Respondent to carry out as much investigation as was reasonable in the circumstances, it is difficult to see what other points they could have investigated. They had evidence from Mr Harris himself ('direct from the horse's mouth') that his driving duties were much reduced and that he was instead predominantly driving a forklift, which, it subsequently transpired, he was doing without having a licence. They had records to show that Mr Harris' driving duties were much reduced and the Claimant was unable, either then, or in this Hearing, to adequately challenge those records. And the Respondent had the Claimant's own emailed proposal that Mr Harris be given a pay rise and bonuses, due to him as a driver. While the Claimant belatedly attempted to argue that such benefits were not tied to being a driver, it is clear they were and indeed the Claimant' defence of his actions in this respect was that Mr Harris continued, in fact, to be a driver and therefore, by implication, entitled to such drivers' benefits I can only conclude, therefore that the investigation carried out was reasonable.

c. That investigation inexorably lead to Mr Pao considering that there were reasonable grounds for him to have a genuine belief that the Claimant had committed the offences he was accused of. Indeed, in the disciplinary hearings, the Claimant accepted that Mr Harris' duties were predominantly forklift driving and that he had not sought the Respondent's authority to change his duties, but had nonetheless submitted the pay and bonus proposal. Mr Pau's evidence was straightforward and plausible in this respect and nothing I heard in this Hearing undermined the likelihood of that genuine belief. The Claimant accepted that his pay and bonus

proposal email was misleading and should have been better worded and that he had not sought authority for the change, instead asserting that he didn't need to do so, which was clearly not the case. His assertion that it didn't matter, for insurance purposes that Mr Harris was operating the forklift without a licence was, I consider, disingenuous and potentially placed the Respondent at real financial risk, in the event of any accident. He provided no corroborative evidence to support his assertion as to insurance companies accepting 'historic experience' as an alternative.

d. There was no substantive failure in procedure. The Claimant's assertion that he had not been provided with minutes of the meetings was clearly false. While it was a technical failure of the Respondent not to provide the 'conversation notes' in advance of the first hearing, they were supplied during that hearing and the Claimant had ample opportunity to consider them in advance of the second hearing, thus rectifying that technical failure.

e. Finally, was dismissal within the range of responses of the reasonable employer? As stated at the outset of this Hearing, this is a broad-spectrum test and the mere possibility that some employers may not have dismissed in these circumstances does not mean that dismissal falls outside the range. I had no reason to doubt Mr Pao's evidence that he actively considered the possibility of a final written warning, but that the tipping point to dismissal was the Claimant's falsification of information he had provided to the Respondent and accordingly the damage that did to their ability to trust him thereafter. The Respondent's disciplinary policy specifically considers such offences to be gross misconduct, entitling them to dismiss an employee who has committed them. There is no question that the Claimant's motivation was purely to look after Mr Harris' interests, as one of his staff, but he also had a duty to his employer, to ensure that they were not paying for the carrying out a driving role that was not, in fact, being done. He knew, as an experienced manager that he should have reported the true situation to his employer, but he did not, instead actively misleading them. This breach of trust was compounded by his inability, both at the disciplinary hearing and to a large extent at this Tribunal hearing, to accept that he was at fault, instead continuing to deny that Mr Harris was no longer a full-time driver, or that in any event, he was entitled to make these changes. This was an error on his part, as it lead the Respondent to further mistrust him, as if he couldn't accept that he was in the wrong on this occasion, there was no reason why he would not repeat such behaviour in the future. I am confident that if, instead, he had been honest with Mr Pau, from the outset and confessed his mistake, accepting responsibility that he may well not have been dismissed and even if he had, any subsequent claim for unfair dismissal might well, on this issue, have been considerably stronger.

Judgment

26. Accordingly, therefore, for these reasons, the Claimant's claim of unfair dismissal fails and is dismissed.

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Employment Judge C H O'Rourke

Dated: 5 March 2020

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