



EMPLOYMENT TRIBUNALS

Claimant: Mr N Makani
Respondent: HSBC Bank Plc
Heard at: Leicester
On: 30 January 2017
6 March 2017 (in chambers)
Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: In Person
Respondent: Mr K McGuire of Counsel

JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal is dismissed.

REASONS

1. By a Claim Form presented to the Tribunal on 7 October 2016 Mr Naeem Makani (born 2 November 1983) brings a complaint of unfair dismissal. The complaint in respect of outstanding expenses was withdrawn prior to the hearing.

2. This case was listed for a one day hearing but unfortunately it was only possible to complete the oral evidence and not the submissions or deliberations in the time allocated. The parties agreed to submit written submissions in lieu of closing oral submissions in order to avoid the case going part-heard. It was ordered that parties were to mutually exchange such submissions prior to the reserved decision day on 6 March with an opportunity to each side to comment. The Court of Appeal's observations in relation to written submissions in **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51 was delivered after the decision to undertake this exercise although it has to be said that this case would probably not fall into the category of a "complex case". In any event I am grateful to both parties for their written submissions to the Tribunal.

3. The facts of the matter are relatively straightforward and unless otherwise indicated are not in dispute. In coming to my decision I have taken into account the oral evidence of the Claimant, Ms Kelly Mohritz, a former Regional Director for Small Business at the Respondent ("HSBC") and the dismissing officer in this case. Also giving oral evidence on behalf of the Respondent was Ms Rosie Kidder, Relationship Support Team Leader at HSBC who was the investigating officer and Mr Martin Hanson, Regional Director for Business in the Midlands, who dealt with the appeal.

4. Mr Makani was at the relevant time employed as a Business Specialist Team Leader. Approximately four years ago he was issued with a corporate credit card by HSBC. Such cards are issued to employees who have frequent work-related expenditure. The monthly repayment on these cards is made in the exactly the same way as a personal credit card except that it is expected that the whole of the balance should be cleared each month from personal funds. After incurring any legitimate business expenses the corporate credit card holder can submit a claim for reimbursement of those expenses. The holder of the card receives a statement each month. Items of personal expenditure on the corporate card are not permitted. The card is issued with a set of terms and conditions which make it clear that business and personal expenditure must be kept separate. Cash withdrawals using the corporate card are not permitted unless they are in connection with a legitimate business expense.

5. The prohibition of personal use of the corporate card is set out in a number of documents. This includes the Expenses Policy, the Staff Handbook and the terms and conditions of use. There are nominated staff whose responsibility it is to check monthly statements of corporate credit card holders. The statements have not, it has to be said, until recent events been scrutinised with a great deal of care. A considerable amount of trust is placed on every employee to ensure that the card is used for appropriate purposes only.

6. On 8 January 2016 an e-mail was sent by Ms Kidder to several employees, which included the Claimant, asking them to produce recent corporate card statements for review. Within the email there was reference to a web link which in turn took the recipient of the email to a document. That document reminded users once again that the card should not be used for personal expenditure.

7. The review led to some employees' statements being scrutinised in greater detail than previously. In particular there was concern as to a statement of 4 January 2016 which included, amongst other things, a number of potential personal items purchased using the corporate card. They included spending with a Bowling Ball company, purchase of various golf items and a stay at the Marriott Hotel in Leicester. This expenditure did not immediately cause ring alarm bells to ring although Ms Kidder accepted under cross examination that had she been more thorough she ought to have been investigated the matter further. In the case of some of the items she assumed that expenditure in respect of payment at various eating establishments might have been accounted for as entertainment expenses. The Claimant says that he spoke to Ms Kidder in January 2016 about the way he was using the corporate credit card for personal expenditure and was not told that there was anything wrong. Whilst there may have been a discussion on the subject I do not accept that the Claimant was given any assurance that his practice of personal expenditure on the corporate credit card was acceptable or permissible. Ms Kidder would have no authority to override bank policy.

8. The use of the corporate credit card for personal expenditure appears thereafter to have been the subject of various discussions within the office generally and in particular between the Claimant and his then line manager, Mr Nick Macdona. It is not clear what those discussions were as Mr Macdona has not been called to give evidence but Mr Macdona would, as with Ms Kidder, not have the authority to change the Bank's policy. However it appears that as a result of a combination of discussion between the Claimant and Mr Macdona, and then in turn discussions between Mr Macdona and Ms Kidder, the Claimant's use of his card was the subject of further and more detailed investigation.

9. In March 2016 the Claimant had gone abroad on holiday to the United Arab Emirates. He had used his card extensively at the Dubai duty free as well as a number of other locations. The majority if not all of his expenditure whilst abroad was on items of personal expenditure. He was after all on holiday and not on a business trip. The amount outstanding on his credit card at the end of that month was £1,494.44. Mr Makani usually paid off the full amount of the card each month by direct debit from his personal account. On this occasion however there were insufficient funds in his bank account to meet the payment and the direct debit payment did not go through. The Claimant then made arrangements to clear the account later but by then it was too late. The Claimant was called to a 'fact-find' meeting on 14 April 2016 led by Mr Macdona with Ms Kidder to discuss the situation. Notes of the meeting appear in the bundle which I accept are an accurate record.

10. Mr Makani's explanations at the fact-find meeting are important not least because they are in the main a candid acceptance of his inappropriate use of the card and because he has subsequently sought to challenge some of the admissions he made then. Mr Makani was asked about his understanding of the use of the corporate credit card. He said that he understood it was for business expenses. He was asked whether he had used the card for anything other than business use and he admitted that he had. He accepted that he had used the card to withdraw cash. When asked about the apparent breach of use of the card he said that he had confused his personal credit card (also issued by HSBC) with the corporate card as they were both the same colour. He had mistakenly withdrawn cash from the corporate credit card instead of the personal card. When asked why there were payments on the corporate credit card at Dubai duty free which were not business expenditure he said that he had always paid off the balance. He accepted that he had also purchased personal items on the corporate credit card. He accepted he was aware that he had not followed the correct procedures.

11. At a further fact-find meeting on 19 April 2016 when asked why he had used the corporate card for personal expenditure Mr Makani said that he had not done so deliberately but both cards were of the same colour and he had assigned the same pin number to them. He had pulled out the wrong card on the day and in any event he did not see it as an issue because he paid off the corporate card in full each month.

12. Following the fact-find meetings, Mr Makani was called to a disciplinary hearing on 11 May 2016. The allegations were that the Claimant had misused the company credit card in breach of the expenses policy and also used the corporate card for personal expenditure. It was alleged that both these amounted to a breach of trust and confidence and that they potentially amounted to acts of gross misconduct.

13. At the disciplinary hearing before Ms Moritz, the Claimant was not accompanied. Notes of the meeting were taken by an independent third party, Global Lingo. Although they are not signed by the Claimant, I am satisfied that they are an accurate record of the discussions.

14. Following the disciplinary hearing Ms Moritz wrote to the Claimant on 25 May 2016 to say that her decision was that the Claimant was to be dismissed for gross misconduct. She was satisfied that the allegation the Claimant had misused the corporate credit card was proved. She was also satisfied that the Claimant had used the card in breach of the Bank's expenses policy. She had considered the Claimant's length of service and whether a lesser sanction was permissible but in the circumstances dismissal was deemed appropriate.

15. Mr Makani appealed against the decision to Mr Hanson but the appeal was dismissed. There are no specific issues which arise out of the appeal.

THE LAW

16. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996"), so far as they are relevant, state:

"(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 the dismissal, and
- (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—

[(a) - not relevant]

(b) relates to the conduct of the employee,

(4) Where the 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 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."

17. In applying section 98(4) ERA 1996, I have borne in mind the guidance in **HSBC Bank plc v Madden** [2000] ICR 1283, originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439, namely that:-

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the 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."

18. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out the criteria to be applied by tribunals in cases of dismissal by reason of misconduct. Firstly, the Tribunal should consider whether the employer had an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly, at the stage at which the employer formed its belief the tribunal must consider whether the employer had carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made as to the burden of proof in section 98(4) ERA, the three-stage process is still helpful in determining cases involving dismissal for misconduct.

CONCLUSIONS

19. There is no dispute as to the relevant law applicable in this case. The three-stage **Burchell** test was explained to the Claimant at the outset of the case. The Claimant has until recently been legally represented although he was not represented at this hearing. Mr McGuire submits, and I agree, that this case stands or falls on the proper application of the principles set out in **Burchell** where all three limbs of the test are in dispute.

20. At the commencement of the hearing, and in order to properly understand the Claimant's case, I asked whether Mr Makani was saying that his use of the corporate credit card was (a) accidental (b) that he did not appreciate whether what he was doing was in breach of company rules or (c) he did not believe that there was any misconduct as he always paid off the card in full, albeit late on one occasion. The Claimant confirmed that all of those matters were put forward on his behalf in support of his case.

21. The burden of establishing a potentially fair reason under section 98(1) and (2) ERA 1996 is on the Respondent. I accept that the principal reason for the dismissal was 'conduct'. That is a potentially fair reasons for dismissal under section 98(2)(b) ERA 1996. Having regard to that reason I have then gone on to consider the question of reasonableness under section 98(4) ERA 1996. In doing so I have been careful not to substitute my view for that of the Respondent but instead to determine whether the decision to dismiss fell within a band of reasonable responses open to a reasonable employer.

22. I am satisfied that the Respondent held an honest and genuine belief that the Claimant had been guilty of misconduct in the misuse of the corporate credit card by using it for personal expenditure and in breach of internal rules.

23. I am satisfied that the belief was based on reasonable grounds for the following reasons:

23.1 The rules as to the use of the card are clearly set out in the expenses policy, the staff handbook and the terms and conditions of use. These make it clear that transactions on the corporate card should relate only to approved business expenditure only and there should be no personal expenditure or unauthorised cash withdrawals. The policy makes it clear that misuse of the card may result in disciplinary action being taken up to and including dismissal. These rules were specifically drawn to the Claimant's attention by an email to him and several of his colleagues. The Claimant could not reasonably have been in any doubt as to the position;

23.2 The Claimant was re-issued with a credit card in the latter few months of his employment as he had lost his previous card. The replacement of the credit card was issued with a fresh set of terms and conditions giving Mr Makani a further opportunity to familiarise himself with the rules;

23.3 At a fact-find on 14 April Mr Makani candidly accepted that his understanding of the use of the corporate card was that it was for business expenses only. In using the card for personal expenditure he knowingly breached the rules of use. The fact that he paid off the card each month is irrelevant;

24. It is not disputed that the Claimant has used the corporate card for personal expenditure. The Claimant would have appreciated that items of personal expenditure such as payment of a speeding fine, the hire of a car abroad and cash withdrawal at an ATM could not possibly be legitimate expenditure on a corporate credit card;

25. I do not accept that it can reasonably be the case that the use of the corporate card was accidental. It is possible that the Claimant might have accidentally used the wrong card on one occasion but the number of times it has been used would be inconsistent with it being a simple error. The Respondent's belief in rejecting the Claimant's suggestion that the card was used accidentally was not unreasonable. Moreover, the fact that the Claimant suggests it was an error and he had intended to use his personal card suggests that the Claimant knew he should not use his corporate card for such purposes.

26. The Claimant argues that if he was at fault then so were the Respondents in failing to undertake a periodic six monthly review as they should have done and to inform him of the problem. Had they undertaken their obligations the subsequent problems may never have arisen. That seems to me to be a wholly fallacious argument. It seeks to deflect the blame to the Respondent for not spotting his misconduct earlier. In any event, the Claimant had been told on several occasions, at times in writing, of the Respondent's policies and procedures regarding the use of the card. He had failed to heed those instructions. He had been given fair warning in an e-mail in January 2016 which would have alerted him to the dangers of continuing to use the card for personal expenditure but he nevertheless continued to use it inappropriately.

27. I am satisfied that the Respondent undertook a reasonable investigation at the time they arrived at their conclusions. The failure to notify the Claimant of the seriousness of the matter earlier was due to Ms Kidder giving the Claimant the benefit of the doubt in relation to certain items of expenditure. I am satisfied that the investigation fell within the band of reasonable responses and that the appeal was conducted fairly.

28. Mr Makani's principal argument is really that the decision to dismiss was disproportionate. Given that this was a serious breach of trust by a team leader who was responsible for setting an example for others, that the breach of rules was repeated and sustained over a long period and that it led to a complete loss of trust and confidence, the decision to dismiss was not disproportionate in the circumstances. In coming to its decision the Respondent considered the Claimant's length of service, the seriousness of the matter, whether a lesser sanction was feasible and whether dismissal was the appropriate sanction. At the end of the day dismissal was a decision which fell within the band of reasonable responses open to a reasonable employer.

29. For those reasons the complaint of unfair dismissal is dismissed.

Employment Judge Ahmed

Date: 29 March 2017

JUDGMENT SENT TO THE PARTIES ON

11 April 2017

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FOR THE TRIBUNAL OFFICE