EMPLOYMENT TRIBUNALS

Claimant: **Mr S Morrow**

Respondent: **Wilko Retail Limited**

Heard at: **Nottingham**

On: **Wednesday 4 September 2019**
Reserved to: Friday 4 October 2019

Before: **Employment Judge Blackwell (sitting alone)**

Representatives
Claimant: **In Person**
Respondent: **Mr J Cook of Counsel**

RESERVED JUDGMENT

The decision of the Employment Judge is that:-

1. The claim of unfair dismissal fails and is dismissed.

RESERVED REASONS

1. Mr Morrow represented himself and gave evidence on his own behalf.

2. Mr Cook of Counsel represented the Respondents and he called Mr D Robson who investigated an incident which occurred on 24 January 2019 and recommended disciplinary action against Mr Morrow. He also called Mr H Tottingham whose role was to conduct the disciplinary hearing in regard to the incident on 24 January. He also called Ms L Wathen who conducted the investigation into an incident which occurred on 1 March. Finally he called Mr R Mall whose decision it was to dismiss Mr Morrow.

3. There was an agreed bundle of documents and references are to that bundle.

4. On the day of the hearing I heard oral submissions from both parties and then unfortunately set a hare running by referring the parties to the case of **Gisda Gyf v Barrett** [2010] ICR 1475. Because time had run out I invited written submissions on that case. I am now satisfied having read both parties submissions on that case that it is not relevant to the determination that I have to

make.

The Relevant Law

5. It is for the employer to prove a potentially fair reason for dismissal. Section 98(1) and (2) of the Employment Rights Act 1996 states:-

> "(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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

6. If such a potentially fair reason is proven, and in this case Wilko say it is conduct, then the next question is whether the decision to dismiss was fair and subsection (4) of Section 98 of the Employment Rights Act 1996 is the relevant statutory provision and states:-

> "(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."

7. As to case law, given that this is a conduct case the factors in **British Home Stores Limited v Burchell** [1978] ICR 303 are relevant namely:-

a) Did Wilko genuinely believe Mr Morrow guilty of the misconduct alleged and;

b) did Wilko have reasonable grounds to sustain that belief at the time of dismissal and;

c) did Wilko carry out as much investigation into the matter as was reasonable in the circumstances of the case.

8. Further relevant case law arises from the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439:-

> 1. The starting point should always be the words of section 98(4) themselves;
>
> 2. In applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;
>
> 3. In judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
>
> 4. In many (though not all) cases there is a band of reasonable responses to the employee conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> 5. The function of the Industrial 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."

9. The band of reasonable responses test applies not only to the decision to dismiss but also to the conduct of the investigation.

10. The Claimant's pleaded case is unusual. In his ET1 he says:

> "Whilst on suspension from work over an alleged misconduct since 1 March 2019 and waiting to hear about a disciplinary decision to be taken on 15 March 2019 I received in the mail a P45 dated 27 March 2019 showing my employment with the company had ended on 15 March 2019. Since I did not receive written notification of a sanction of dismissal, nor was offered a period 7 days in order to appeal a decision as required by the company disciplinary policy, I claim my contractual rights of employment were breached and I have thus been unfairly dismissed."

11. He repeats that point in the evidence he gave in his short 6 paragraph proof of evidence at paragraphs 3 and 4 which read as follows:

> "Paragraph 3. My contractual conditions of employment clearly state the outcome of the disciplinary hearing will be notified to the effected person in writing, accompanied by, in the case of a sanction, a notice of right of appeal against the sanction within a 7 day period as well as the form on which to set out that appeal in writing.
>
> Paragraph 4. Since my conditions of employment made clear that all sanctions carry with them a right of appeal and since I was denied that right before a sanction of dismissal against me was made final on 27 March 2019 as the P45 makes plain, I claim unfair dismissal by virtue of the aforementioned breach of my contractual rights."

12. The Claimant throughout did not raise any other ground of unfairness though the contractual provisions on which he relies are doing no more than codifying general rules of fairness.

Findings of Fact

1. Mr Morrow was employed by Wilko as a Customer Service Assistant from 5 September 2016 to 15 March 2019 when he was summarily dismissed.

2. Wilko are a national retailer employing many thousands and with a dedicated Human Resource department.

3. On 24 January 2019 at Wilko's Watford store which was Mr Morrow's regular place of work an incident occurred in which it was alleged that Mr Morrow had called a colleague R Allen a "retard". Mr Allen complained (see pages 42(a) and (b) and Mr Mahmood provided a statement in support (see page 41).

4. As a consequence, Mr Robson was appointed in accordance with the disciplinary policy (see pages 28 to 39) to investigate the complaint.

5. He interviewed Mr Morrow on 6 February and during that meeting Mr Morrow freely admitted to using the term "retard".

6. He then interviewed Mr Allen, the notes of which are at 42(c) to 42(g). Again, Mr Allen repeats the allegation that Mr Morrow had called him a "retard" and said that he had done so more than once.

7. As a consequence, Mr Morrow was invited to a disciplinary hearing to be held on 1 March. The allegation was "that he was in breach of dignity at work". He was warned that the consequence of the meeting might be the issue of a formal disciplinary sanction up to and including summary dismissal. That disciplinary hearing was chaired by Mr H Tottingham. In attendance was Mr B Vassanh who acted as the notetaker. It appears that Mr Morrow had formed the view in the first minutes of the meeting that Mr Tottingham had already made up his mind to dismiss. Mr Morrow accepted in cross examination that he might well have misunderstood Mr Tottingham's opening remarks which were simply following Wilko's template for a disciplinary hearing.

8. It is common ground that Mr Morrow became irate and on Mr Tottingham's evidence Mr Morrow then proceeded to throw his work gloves in Mr Tottingham's

direction. I have seen the CCTV of the incident and that is clearly right. Mr Tottingham by way of reflex threw his hands up to protect himself and the gloves struck the wall behind him but did not hit him.

9. Mr Tottingham also alleges that Mr Morrow invited him to "stick it up your arse you fucking inbred". Mr Morrow was cross examined at length about that allegation and he gave various responses. I am satisfied that he did use words to that effect.

10. Mr Morrow then stormed out of the meeting which led inevitably to a second investigation conducted by Ms Wathen. In the meantime, Mr Morrow had been suspended (see page 56). Mr Morrow was interviewed by Ms Wathen on 11 March and the notes are at pages 58 to 65. At page 59 Mr Morrow is recorded as saying that "he got upset during the meeting and I threw my gloves and left". Mr Morrow conceded "I was childish and immature".

11. Ms Wathen viewed the CCTV footage with Mr Morrow and Mr Morrow denied that the gloves had been thrown in Mr Tottingham's direction.

12. Ms Wathen then interviewed Mr Tottingham and Mr Vassanh. The notes are at pages 67 to 69 and 73 to 75. Ms Wathen met again with Mr Morrow on 13 March (see pages 80 to 86) and during that meeting Mr Morrow accepted that he had misunderstood the opening of the meeting with Mr Tottingham.

13. At that second meeting Mr Morrow was handed a copy of an invite letter to a disciplinary hearing which is at pages 88 and 89 to be held at 11:00 am on 15 March, the allegation was "gross misconduct, breach of dignity at work, aggressive and threatening behaviour".

14. Mr Mall was appointed to hear that disciplinary hearing. Mr Morrow did not attend and provided no reason for his non-attendance.

15. I note that the letter inviting him to the disciplinary hearing both warned him that dismissal might ensue and:

> "Please note that failure to attend the hearing without any prior notification will result in a decision being made in your absence based upon all the available evidence."

16. Mr Mall decided to proceed in Mr Morrow's absence. He reviewed the material in respect of the 24 January incident and the material relating to the incident of 1 March. He also viewed the CCTV. Having reviewed the material he decided to dismiss. In his evidence he said that if the first incident had been all he was considering a sanction less than dismissal would have been imposed. If the second incident had been the only incident he would have dismissed. Taken together, clearly he reached the decision that dismissal was the appropriate sanction. His decision was recorded in a letter of 15 March (pages 99 and 99(a)), he stated:

> "The reason for your summary dismissal is:-
>
> Gross misconduct, breach of dignity at work, aggressive and threatening behaviour

My rationale for the decision is detailed below:-

- Your actions and language were deemed to be aggressive and not living within the Wilko values
- Behaviour deemed to be aggressive to a manager team member not known to you
- Investigation notes show no remorse in behaviour and actions
- Can be seen to be intimidating/making other team members fear working with you."

17. I am satisfied that that letter was sent by recorded delivery to the correct home address of Mr Morrow. I am also satisfied that the Royal Mail attempted to deliver that letter and when unable to do so left a note saying that it could be collected from an address some 2.2 miles from Mr Morrow's home address. Mr Morrow never collected that document, notwithstanding that he accepted he received in the post on or about 27 March, his P45 which showed an end date of his employment of 15 March.

18. It is abundantly clear and never seems to have been contested by Mr Morrow that on 24 January he called a colleague a "retard" on more than one occasion. Secondly on 1 March 2019 he threw his work gloves in the direction of Mr Tottingham and used abusive language against Mr Tottingham.

19. Thus, Wilko had a genuine belief in the misconduct complained of. They had reasonable grounds for holding that belief and I am satisfied that they carried out such investigation as was required in the circumstances.

20. Turning now to Mr Morrow's allegation that the dismissal was unfair because Wilko's were required to confirm in writing the outcome of the disciplinary hearing held on 15 March (see page 30) and grant a right of appeal (see page 31) and they had not done. I accept that Wilko were contractually obliged to confirm the outcome of the disciplinary hearing and were required to offer a right of appeal. I am satisfied that the letter of 15 March was sent as recorded above in paragraph 17 and that that letter complied with both of those contractual obligations given that it confirmed the outcome of the hearing and in its final paragraph offered a right of appeal and enclosed the proforma which Mr Morrow would be required to fill in.

21. Can it be said therefore that the dismissal is rendered unfair simply because Mr Morrow did not receive the letter of 15 March? In my view Mr Morrow deliberately failed to collect the letter and I am satisfied that he knew that the card left by Royal Mail related to a letter of dismissal which he suspected was coming and which suspicion must have been confirmed by the arrival of his P45 on or about 27 March.

22. In my judgment it would be absurd if an otherwise fair dismissal was rendered unfair in these circumstances. Wilko had taken reasonable steps to inform Mr Morrow of his dismissal.

23. The final question therefore is whether the decision to dismiss fell within the band of reasonable responses and in my view it clearly did. I agree with Mr Mall's analysis that the incident of 1 March, which any reasonable person in

Mr Tottingham's shoes would have found frightening, was sufficient on its own to warrant dismissal. Thus, Mr Morrow's claim must fail.

Employment Judge Blackwell

Date: 22 October 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE