EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Ram	**v**	**Midland Food Group Limited**

Heard at: Birmingham **On**: 6 & 7 August 2020 and (in chambers) 9 September 2020

Before: Employment Judge Broughton

Appearances:
For Claimant: in person
Respondent: Mr , consultant

JUDGMENT

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

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Employment Judge Broughton

Date: 9 September 2020

Sent to the parties on: .....

.....
For the Tribunal Office

Reasons

The facts

1. The claimant was employed by the respondent as a security guard from October 2009.

2. It was common ground that, in the early years, he was a good employee. As a result, he was promoted to security supervisor. This involved supervising the other security guards, preparing rotas etc.

3. Again, initially, things went well such that the claimant was given additional duties. Specifically, he was asked to check that the pickers had put the correct order items on the right trucks. He received a "checking bonus" for these additional responsibilities.

4. In 2017, the claimant raised a grievance against Steve Morris, the respondent's Operations Director. The claimant said that he had removed his enhanced payments for working bank holidays.

5. His grievance was successful and his payments were reinstated.

6. The claimant suggested that this was a turning point and that, thereafter, various allegations were made against him in a concerted effort to dismiss him. Other than the timing, there was no evidence to support such a belief.

7. Indeed, there was some evidence to suggest the opposite. It had been Michael Lynch, who ultimately dismissed the claimant, who had suggested that the claimant raise the pay grievance.

8. The Chief Executive at the time of the grievance was no longer with the respondent.

9. Shortly after the claimant's grievance was resolved a number of issues with the claimant's conduct and performance arose. Specifically, it was alleged that he had, on occasion, left his post in the middle of a shift to go to the cash point or to go home without permission. He was also accused of asking colleagues if he could borrow money.

10. The claimant denied these allegations but there was at least some supporting evidence.

11. However, notwithstanding that these were potentially disciplinary matters, the respondent merely issued the claimant with a letter of management instruction, informing him that should there be any repeat, these would be treated as disciplinary matters.

12. It was common ground that, nonetheless, the claimant did occasionally still leave in the middle of his shift to go to the cashpoint or because he said he was unwell.

13. On 9 February 2018 the claimant had failed to complete the rota for security guards to work on the night shift.

14. When subsequently challenged about this, the claimant suggested that it wasn't a problem as they were short of security guards but the guard on the day shift had agreed to stay on and work a double shift, which the claimant said was not unusual.

15. That response, however, was missing the point. It was clearly a serious failing on his part and he did not seem to accept that at all until late in the day before me.

16. It was not, therefore, unreasonable for the respondent to treat the failure to ensure the shift was covered as a potential disciplinary matter and, in giving the claimant a written warning, their response fell well short of being manifestly inappropriate.

17. The claimant appealed the warning which, again, shows his failure to acknowledge any responsibility for his failings. The appeal was heard by Mr Morris and was unsuccessful.

18. A further incident arose on 25 May 2018 when the claimant left the site in the middle of his shift.

19. The claimant had initially said that he was going to the cash point, although he didn't return.

20. The claimant said that he had attempted to call the night manager and that he had told a colleague that he was leaving because he was unwell.

21. This was not, however, fully supported by the investigation and the claimant acknowledged that he had failed to clock out or email or speak to his manager about leaving.

22. Again, however, the claimant failed to accept any responsibility for, at the very least, failing to follow the proper procedures when leaving the site.

23. The claimant was issued with a final written warning on 16 July 2018. He did not appeal that decision.

24. It seems to me that was not an unreasonable outcome and fell well short of being manifestly inappropriate.

25. The respondent subsequently received complaints from a major customer that mistakes were being made with their orders.

26. As a result, Mr Morris sent an email to the claimant on 16 May 2019, asking him to ensure that all late orders, picked by a particular employee, should be checked before they were loaded onto the wholesale vehicles.

27. Late orders included freshly made items such as sandwich fillers.

28. The claimant said that all that he did was to check the sheets to ensure that the picker had ticked to say that all appropriate items had been loaded on the truck. That was not, however, what he had been asked to do.

29. The instruction was clear that he should check the late orders before they were loaded.

30. On 29 May 2019, a significant number of sandwich fillers were again missed off the order for the customer.

31. The claimant was emailed twice that day and asked to explain how this had happened.

32. Having not responded, the claimant was chased by email the following day. It appears that he also spoke to Mr Lynch, the production manager but no response was forthcoming.

33. The claimant was then off for a couple of days, returning on 2 June 2019. He did not, however, reply until 5 June 2019.

34. The claimant gave contradictory explanations for this delay, on the one hand saying that he may not have read the emails but, on the other, at his appeal and before me, that he was awaiting a response from Mr Lynch regarding whether he could copy the owners of the business his reply.

35. It could not have been both, although he was reluctant to admit that.

36. That may suggest that he knew he had made a further mistake and that he was being evasive.

37. It appeared that what had happened was that the picker had been unable to find some of the sandwich fillings and so had assumed that they were already on the truck, ticking the sheet as if that was the case.

38. The claimant had then, contrary to his express instructions, merely checked the sheet and assumed that it was correct.

39. In any event, the claimant replied on 5 June 2019, stating th vat:

> "I will not be held responsible for a loader putting lates on a wagon without my knowledge…..the driver and myself assume it is on the van"

40. The respondent said that there was a further error with the "lates" on the night of 5 June 2019 for the same customer that the claimant had been required to check.

41. That was the evidence of Mr Lynch and Mr Morris, although the other evidence was far from clear. Only one failing appeared to be raised with the claimant and, subsequently, that was all that the appeal officer was aware of.

42. The respondent investigated the matter and the claimant was called to a disciplinary hearing on 20 June 2019, by letter dated 17 June 2019. He was offered the right to be accompanied.

43. The allegation was that he had failed to follow a management instruction, specifically the instructions given in emails prior to the claimant not properly checking the late orders on 29 May 2019 and also the delay in his response when repeatedly asked for an explanation by email.

44. By this stage, the picker responsible had already received a verbal warning for his part in the situation.

45. I also learnt that, as a result of this issue, and the previous errors, the respondent lost this important customer.

46. At the disciplinary hearing, Mr Lynch again put the allegations to the claimant, albeit only in relation to the 29 May issue, and the claimant, again, accepted no responsibility.

47. As a result, and particularly given the claimant's previous warnings and failure to acknowledge any responsibility, Mr Lynch decided that he had little alternative but to dismiss.

48. The claimant had raised the prospect of being demoted but the respondent discounted this on the basis that, because the claimant had not acknowledged any failings on his part, he could not be trusted to continue in employment at all.

49. The claimant was notified of the decision to dismiss by letter from Mr Lynch incorrectly dated 27 July but probably sent on 27 June 2019. The claimant received a payment in lieu of his notice period.

50. The claimant was offered the right to appeal and did so on 1 July 2019.

51. In his appeal, the claimant continued to deny any responsibility, gave the contradictory explanation for his delay in responding to requests for an explanation and also, seemingly, acknowledged that if he had admitted his mistake he would only have received a "slap on the wrist".

52. The reasons for the delay in responding to the emails requesting an explanation for the order errors were investigated at the appeal stage. It seemed clear to me that the conversation with Mr Lynch must have been when the respondent was chasing a response to the emails and, as a result, a few days after the initial requests.

53. In those circumstances, and in accordance with Mr Lynch's evidence, it could not have been the principal reason for the delay.

54. The claimant's failure to accept any responsibility was entirely consistent with him not replying to the emails for a week, despite being chased several times.

55. The appeal was heard by David Tomkinson, head of finance, on 9 July 2019.

56. Following further investigation the decision to dismiss was upheld.

The issues and the law

57. The claimant claimed unfair dismissal.

58. I have to consider the requirements of s.98 Employment Rights Act 1996.

59. The potentially fair reason relied on was conduct and so I have to consider whether, in all the circumstances, including the size and resources of the respondent, the resulting dismissal was fair or unfair.

60. That includes considering the reasonableness of the procedure and the respondent's belief and also whether the ultimate sanction, dismissal on notice, was within the band of reasonable responses available to the employer.

Decision

61. I have already explained that I was satisfied that there were reasonable grounds for the claimant's previous warnings and that there was no evidence of a conspiracy of Mr Morris and others to dismiss the claimant.

62. The procedure followed was fair.

63. That said, there were clearly issues with whether there were one or two failings by the claimant regarding checking the late orders for an important customer.

64. In those circumstances, and given that the claimant was only aware of one and only one was upheld at appeal that must be all that the respondent can rely on.

65. I am satisfied that Mr Lynch, who had previously had a good relationship with the claimant, genuinely believed that the claimant had failed to properly check the order as instructed and had subsequently delayed responding when asked for an explanation.

66. I also accept that he genuinely believed this to be a conduct matter.

67. There was certainly some evidence, however, that the claimant may have misunderstood the instruction and, as a result, some employers may well have been more lenient for a first offence.

68. It may well have been reasonable to offer the claimant a demotion, not least because of his relatively long service.

69. However, because the claimant had clearly

    a. not checked the orders before they were loaded as instructed and
    b. delayed responding to emails and appeared evasive
    c. expressly refused to accept any responsibility or show any remorse or acknowledgment of the seriousness of the situation and
    d. had given an unsustainable reason for his delay

    I cannot say that the respondent's view that they could no longer trust the claimant to remain employed in any capacity was outside the band of reasonable responses.

70. As a result the dismissal was fair.