



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr A Farish

Steinhoff Retail Limited

Heard at: London South
Employment Tribunal

On:

12 February 2020

Before: Employment Judge Hyams-Parish

Representation:

For the Claimant: Ms C Urquhart (Counsel)

For the Respondent: Mr R Lassey (Counsel)

RESERVED JUDGMENT

The claim of unfair dismissal is well founded and succeeds.

The claim of wrongful dismissal is well founded and succeeds.

There shall be a reduction to the basic and compensatory awards of 20% on the grounds of contributory fault.

REASONS

Claim(s)

1. By a claim form presented to the Tribunal on 1 October 2019, the Claimant brings claims of unfair and wrongful dismissal.

Practical and preliminary matters

2. I heard evidence from the Claimant and, on behalf of the Respondent, the following three witnesses:
 - Mr Nicholas Moore, Investigating officer
 - Mr Gavin Huggett, Dismissing officer
 - Mr Gary Brown, Appeal officer
3. I was referred during the hearing to documents in a hearing bundle extending to 177 pages.

Background findings of fact

4. The Respondent is a UK wide retailer which owns and operates the trading divisions of Bensons for Beds, Harveys Furniture and Concorde Logistics. It employs 3,000 staff across 450 stores nationally and at six distribution centres.
5. The Claimant commenced employment with the Respondent on 1 June 1995. He was summarily dismissed on 14 June 2019. At the time of his dismissal, the Claimant was employed as the Store Manager of the Harveys store based in Gillingham (“the Gillingham store”).
6. Against the backdrop of a problem across all stores of returns not being dealt with promptly, on 7 August 2018 a memo was sent to all managers at Harveys stores as follows:

Refunds are an unfortunate part of any Retail business; things happen, and Customers change their minds which results in refunds.

However, we must:

- ***Treat these customers as we would when they are buying; after all they may return in future and will share their experience***
- ***Process these refunds in full, including the invoice on the system, immediately; or on the day goods are confirmed as returned***

Unfortunately, as part of a wider review of refunds and cancellations, that includes working cross functionally to avoid cancellations because of product or service issues, we have found that there are cases of refunds being held back in stores. In some cases, this includes cancelling finance or refunding card payments and not refunding the invoice on the system.

This is unacceptable behaviour that with immediate effect must stop. Going forward we will continue to monitor these and as appropriate investigate and take formal action; after all, holding back refunds is

gross misconduct that results in manipulation of sales and commission.

If you are unsure of the process, please refer to the documents and links below and if you have questions with your line manager or Field compliance team.

7. The email was signed off by Dave Forrest, Head of Retail South and Peter Doyle, Head of Retail North, although during the hearing, Mr Brown said that he wrote the memo, which I accept as fact.
8. On Monday 29 October 2018, a new order management system called Affinity went live across all Harveys Furniture stores. Training on the new system was provided to the Claimant via a manual sent to the store for him to study, as it had for all managers, and a practical training session at Benson for Beds (the Respondent's sister company) was also provided. The practical training was basic and depended on which staff were available and whether there was a spare computer that could be used.
9. On 17 October 2018, the Claimant completed a form designed to establish if store managers working at the Harveys stores felt that they had been adequately trained on the Affinity system. The Claimant scored himself a 5, which is the top score indicating that he was fully competent to carry out tasks on the new system and train others.
10. On 11 February 2019, the Respondent's Field Compliance Manager, Claire Curtis, sent an email to the Gillingham store highlighting three outstanding "bad business" invoices, totaling £3,280.30, that still needed to be processed on the system. The term "bad business" is used by the Respondent to describe invoices that have been raised for purchases by customers but which do not convert into actual revenue for the business because the customer has stated that they wish to return items, which then triggers a refund. The Respondent suggests that if bad business is not promptly processed on the system, it can have a distorting effect on the company's revenues because until such invoices have been processed, they are considered actual revenue.
11. On 1 April 2019, the Claimant blacked out and collapsed whilst at work. This resulted in the Claimant being absent from work until 10 May 2019. In his absence, the store was managed on an interim basis by Mr Collins.
12. On 17 May 2019, Ms Curtis undertook an audit of the Gillingham store whereupon she identified what were described by the Respondent as "serious compliance concerns". The audit was rated 65% whereas the pass mark was 85%.
13. On 20 May 2019, Mr Moore met with the Claimant to discuss the concerns highlighted by the audit. The Claimant was not informed until the end of the meeting that he was being interviewed as part of an investigation that could

lead to disciplinary action being taken against him.

14. The Claimant was asked about seventeen bad business invoices totaling £17,253.00, three of those were the same ones referred to at paragraph 10 above. He was not given any information beforehand as to the areas of questioning and therefore, unsurprisingly, the Claimant could not give an adequate answer to some of the questions. There was a break of twenty minutes during the meeting when the Claimant was given the opportunity to look at some of the invoices.
15. During his interview with Mr Moore, the Claimant was also questioned about taking insufficient levels of deposits from customers. However, this was not pursued at the subsequent disciplinary hearing.
16. Following his meeting with Mr Moore, the Claimant was suspended from work.
17. As part of his investigation, Mr Moore interviewed Ms Curtis on 24 May 2019. The Claimant was then re-interviewed on 2 June 2019 during which Mr Moore questioned him about responses given to him by Ms Curtis. Ms Watkins, assistant manager at the Gillingham store, was interviewed by Mr Moore on 6 June 2019.
18. By a letter dated 11 June 2019 from Mr Huggett, the Claimant was invited to a disciplinary hearing on 14 June 2019. The allegations related solely to eight bad business invoices, totaling £9,458.20, including the three referred to at paragraph 10 above. The Claimant's alleged failings in relation to those invoices were described as follows:
 - Failing to comply with and/or follow procedures which resulted in a financial loss
 - Deliberately falsifying/manipulating system data/records
 - Unsatisfactory and unacceptable performance of duties as a store manager
 - Alleged gross breach of trust between employer and employee
19. The letter went on to state that the allegations were "*potential gross misconduct*" for which the Claimant could be summarily dismissed.
20. During this Tribunal hearing my attention was drawn to a copy of the Respondent's disciplinary procedure which listed the following examples of gross misconduct which the Respondent relied on to justify summary dismissal:

- Failure to comply and/or follow procedures which results in a financial loss
 - Deliberate falsification/manipulation of system data/records
21. A disciplinary hearing was held as scheduled on 14 June 2019. The hearing commenced at 3.15pm and was adjourned at 3.41pm. When the meeting resumed, the Claimant was given the opportunity to read the notes of the meeting to that point. Mr Huggett then announced that he had no further questions and the meeting ended at 4.07pm. The meeting reconvened again whereupon Mr Huggett announced that the Claimant was to be summarily dismissed. He was then escorted from the building. The meeting ended at 4.40pm.
 22. During the disciplinary hearing, the Claimant was asked why he did not deal with the three invoices Ms Curtis requested that he deal with urgently in February 2019. Allowing for the period when the Claimant was off sick, Mr Huggett put to the Claimant that this still gave him 7 weeks to deal with them. The Claimant said that it was a very hectic period due to system problems and they lost the use of the telephone for three weeks. He said that Ms Watkins had provided the paperwork to head office. However, when pressed about how many times he chased the progress on the processing of the returns, the Claimant said that he could not say without looking at the notes. The Claimant said in evidence that a series of notes were kept with the invoices which recorded the process followed, including how many times the Claimant chased up head office. The Claimant was not provided with the notes at the meeting and neither did Mr Huggett look at them following the meeting.
 23. In her interview with Mr Moore, Ms Watkins was asked to comment on the seven-week period during which the invoices had not been cancelled, and she referred to significant issues with broadband and connectivity access to affinity with daily crashes. She also referred to daily issues with failed deliveries as a hangover from Christmas and staffing issues placing pressure on their ability to complete work in a timely manner.
 24. The Claimant was then asked about the remaining five invoices. In the notes of the disciplinary hearing, the Claimant is reported to have said, "*without looking on the screen, I can't comment*". Mr Huggett did not follow this up or provide him with the information necessary for the Claimant to properly explain his actions or defend himself. Mr Huggett did not conduct any further investigation on the back of this comment or provide the Claimant with any further information.
 25. The outcome of the disciplinary meeting was confirmed to the Claimant by letter dated 17 June 2019. Mr Huggett gave his reasoning for dismissing the Claimant as follows: -

Having reviewed all of the evidence and the notes from this meeting, I advised that I believe that whilst there may have been issues with the computer and telephone in store this does not negate your responsibility as a store manager to ensure that urgent actions regarding bad business are resolved in a timely manner and I do not consider 7 weeks (at the time you went off work sick) to fulfill their requests as acceptable. I therefore conclude that you failed to comply with and follow company procedures and this has resulted in a falsification of store performance. As holding on to bad business constitutes gross misconduct, along with your overall lack of management control, I believe that the appropriate action is summary dismissal.

26. The Claimant appealed against his dismissal on 20 June 2019. His appeal was heard by Mr Brown on 2 July 2019. The Claimant was informed by Mr Brown by letter dated 3 July 2019 that his appeal had been unsuccessful.

Legal principles relevant to the claims

Unfair dismissal

27. The test for determining the fairness of a dismissal is set out in s.98 ERA which states the following: -

(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.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

28. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.
29. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in **Gilham and ors v Kent County Council (No.2) 1985 ICR 233** “*The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness*”.
30. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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.
31. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

32. The Court of Appeal in **London Ambulance NHS Trust v Small [2009] IRLR 563** warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In **Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82** the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.
33. Whether an employee's behaviour amounts to misconduct or gross misconduct can have important consequences. Gross misconduct may result in summary dismissal, thus relieving the employer of the obligation to pay any notice pay. Exactly what type of behaviour amounts to gross misconduct is difficult to define precisely and will depend on the facts of the individual case.
34. The ACAS Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal (paragraph 24). The Code suggests this might include theft or fraud, physical violence, gross negligence or serious insubordination. Although there are some types of misconduct that may be universally seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organisation and what it does. A failure to list certain types of behaviour as gross misconduct may mean that the employer cannot rely on them to dismiss summarily. Conversely, a dismissal will not necessarily be fair, just because the misconduct in question is listed in the employer's disciplinary policy as something that warrants dismissal.
35. In an unfair dismissal case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. When considering whether conduct should be characterised as gross misconduct, employers should also bear in mind whether the dismissal also amounts to a wrongful dismissal.

Wrongful dismissal

36. Cases involving repudiatory breaches by employees typically rely on serious misconduct by the employee, such as dishonesty, intentional disobedience or negligence. They often speak of 'gross misconduct' and 'gross negligence', but the underlying legal test to be applied by a Tribunal is whether it amounts to a repudiation of the whole contract. This is a question of fact, and the courts have generally been hesitant to hand down hard and fast rules as to what amounts to conduct justifying summary

dismissal.

37. An employer faced with a repudiatory or fundamental breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation and terminate the contract, which results in immediate — i.e. summary — dismissal. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.

Adjustments to compensation

38. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.
39. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (**Polkey v A E Dayton Services Limited [1988] ICR 142.**)
40. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

41. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.....

42. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111.** It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Legal submissions

43. At the conclusion of the hearing, I heard oral submissions by both legal representatives which I considered carefully before reaching my decision below.

Analysis, conclusions and associated findings of fact

Unfair dismissal

44. I find that the reason the Respondent dismissed the Claimant was on the grounds of his misconduct. No alternative reason was suggested by the Claimant.
45. For the reasons set out below, I find that the dismissal fell significantly outside the range of reasonable responses open to an employer to take in these circumstances. I do not find that a reasonable employer, applying its mind to the evidence, would have concluded that it was reasonable to treat the allegations against the Claimant as gross misconduct entitling them to dismiss.
46. In its dismissal letter, the Respondent relied on four reasons to dismiss the Claimant. The first was that the Claimant failed to comply with and/or follow procedures which resulted in a financial loss. Yet, neither during the investigation meeting, or the very short disciplinary hearing, was the issue of loss caused by the failure to comply with procedures even mentioned. I find that there was no information before Mr Huggett during the disciplinary hearing which set out conclusively what the loss was, or whether there had in fact been any loss at all. Neither during the disciplinary hearing, or in the letter confirming his dismissal, was the subject of financial loss discussed with the Claimant. During the Tribunal hearing, when questioned about the losses, Mr Huggett could only refer to the charges incurred from having to collect goods for which refunds had been given. He could give no specific detail or point to documents in the bundle which proved what the losses were, and the Claimant's evidence directly contradicted Mr Huggett's evidence on this point. I was not persuaded by that part of Mr Huggett's evidence, but in any event, I have to look at what Mr Huggett considered at the time. I find that the subject of losses was not discussed with the Claimant and there is no evidence from which I could conclude that Mr Huggett addressed his mind to the issue of losses and how it affected the decision he had to make.
47. Secondly, it was said that the Claimant had deliberately falsified or manipulated the systems data. No evidence was put to the Claimant that he had falsified any documents or manipulated any data. I do not believe a reasonable employer, faced with the same evidence, would have concluded that the Claimant's failure to process cancelled orders could amount to a

deliberate falsification or manipulation of records. In the dismissal letter, there was a complete lack of any evidence referred to which might support such an allegation.

48. Thirdly, the Respondent justified its decision by saying that the Claimant "*held on to bad business*". I do not believe a reasonable employer would have concluded, on the evidence before Mr Huggett, that the Claimant held back bad business. At worst, the invoices were not actioned, but this is not the same as holding them back. There was no evidence that this was deliberate and in any event the Respondent failed to investigate whether the reasons put forward by the Claimant for the delay in processing cancelled invoices were backed up by notes on the invoices or held on the system.
49. Fourthly, the Respondent referred in their dismissal letter to a "*gross breach of trust between the employer and employee arising from the above*". Again, I find that a reasonable employer faced with these set of facts could not have concluded that there was a gross breach of trust, particular absent any dishonesty or evidence of deliberate manipulation of documents.
50. I find that a reasonable employer would not have dismissed the Claimant for what, at most, was a failure to follow procedures, particularly bearing in mind the mitigating circumstances put forward by the Claimant, together with the fact that the Claimant had been employed with the Respondent for 25 years and had a clean disciplinary record. Given the length of the disciplinary hearing, the lack of questioning of the Claimant on the issues which were subsequently set out in the dismissal letter, and the inadequate investigation, I consider it more likely that Mr Huggett had effectively made up his mind about the outcome of the hearing before he started. I find that Mr Huggett gave the Claimant's long service little or no weight.
51. I find the investigation was itself so flawed as to render the dismissal unfair. Neither during the investigation or the disciplinary hearing, when the Claimant was asked about the eight invoices, was he provided with the additional information relating to those invoices, on screen or by way of notes, that he specifically referred to. It did not trigger any further investigation or enquiries, yet they would have provided Mr Huggett and Mr Moore with a more rounded picture of what happened, and importantly, evidence which may have supported what the Claimant was saying. I find that the failure to conduct these further enquiries fell outside the range of reasonable responses by an employer.
52. For all the above reasons, I conclude that the claim of unfair dismissal is well founded and succeeds.

Wrongful dismissal

- 53. I find that the Respondent failed to establish that the Claimant had committed a repudiatory breach of contract entitling them to summarily dismiss him. They were unable to point me to a term in the Claimant's contract of employment that he had breached. I was also not satisfied that the Claimant had acted in such a way that breached the implied term of mutual trust and confidence.
- 54. For the above reasons, I conclude that the claim of wrongful dismissal is well founded and succeeds.

***Polkey* and contribution**

- 55. I have considered whether any *Polkey* reduction should be made in this case and I have concluded that it should not. The dismissal was substantively unfair. Had the Respondent acted within the range of reasonable responses, the Claimant would have been given a warning at most, and it is impossible to predict what might have happened with the Claimant's employment beyond that point.
- 56. I find that the Claimant did not deal with cancelled invoices in line with the Respondent's procedure as quickly and as efficiently as he should have done. I am therefore satisfied that there is some degree of culpability on the part of the Claimant, but because of the mitigating factors at paragraphs 22 and 23 above which I find as fact, any reduction should be at the lower end of the scale. I therefore assess that any compensatory award should accordingly be reduced by 20%. I believe it just and equitable that the same reduction should also apply to the basic award.

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Employment Judge Hyams-Parish
09 April 2020