



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Niroshan Dassanayake

v

Ladbrokes Betting & Gaming Limited

Heard at: Watford
On: 10 and 11 April 2024

Before: Employment Judge Alliott

Appearances

For the Claimant: In person

For the Respondent: Miss S David, Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent on 27 May 2013. By 2023 he was a Market Place Manager running two betting shops in Edgware and Burnt Oak, London. He was summarily dismissed on 4 May 2023 with the reason given as gross misconduct. By a Claim Form presented on 6 July 2023, following a period of Early Conciliation from 28 – 30 June 2023, the Claimant presents a claim of unfair dismissal.

The Issues

2. The issues are as follows:-
 - 2.1. What was the principal reason for dismissal and was it a potentially fair one?
 - 2.2. Did the Respondent genuinely believe in the reason for dismissal and was that belief based on reasonable grounds following a reasonable investigation?

2.3. Was the decision to dismiss fair in all the circumstances and, in particular, was it within the range of reasonable responses of a reasonable employer?

3. Issues relating to contribution and / or Polkey may arise.

The Law

4. Section 98 of the Employment Rights Act 1996 provides as follows:

“98. General

- (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)...
- (2) A reason falls within this subsection if it-
 - (a) ...
 - (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.”

5. As per the IDS Employment Law Handbook 'Unfair Dismissal' at the following sections:-

“6.3 Establishing reason for dismissal.

It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in British Home Stores Limited v Burchell [1980] ICR303, EAT, a three-fold test applies. The employer must show that:

- it believed the employee guilty of misconduct;
- it had in mind reasonable grounds upon which to sustain that belief, and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.”

And, at:-

“6.13 Nature of conduct.

Conduct does not have to be blameworthy to fall within the ambit of s.98(2) although blameworthiness could be relevant when considering the dismissal’s fairness. This was stressed by EAT in Jury v ECC Quarries Limited EAT241/80, where it rejected J’s argument that behaviour could not be “conduct” unless it was reprehensible. That said, the EAT in Kilduff v Mind in Bradford EAT0568/04, made it clear that an honest or reasonable mistake was a relevant factor when considering the question of what conduct took place and how open to criticism that conduct was.”

And, at:-

“6.14

The EAT in Philander v Leonard Cheshire Disability EAT0275/17, confirm that misconduct can be deliberate or inadvertent. Gross negligence, as well as deliberate wrongdoing, can amount to misconduct and can constitute repudiatory conduct even where the behaviour is not wilful, or even blameworthy.

...

The Tribunal in Chin v ARIVA London North Limited ET Case Number: 3300259/17, noted that the consequences of negligent conduct are capable of being relevant to the reasonableness of the decision to dismiss but also acknowledged that accidents happen.”

And, at:-

“6.25

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 (see para. 24)... Although there are some types of misconduct that may universally be seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organisation and what it does.

... If an employer views certain behaviour as very serious and capable of amounting to gross misconduct because of the nature of the business but that behaviour might not be viewed in the same way elsewhere, it is particularly important to include it in the disciplinary rules so that employees are well aware of that fact.

And, at:-

“6.103

Minor, one off or first breaches of the company rules.

After reference to a case where a decision to dismiss was outside the range of reasonable responses, the following is set out:-

“However, there may be circumstances where single breaches of the rules may be found a fair dismissal. This was the case in AAH Pharmaceuticals Limited v Carmichael EAT0325/03, where the employee was found to have been fairly dismissed for breaching company rules on leaving pharmaceutical drugs in his delivery van overnight. The EAT commented: “in any particular case, exceptions can be imagined where, for example, the penalty of dismissal might not be imposed, but equally, in our judgement, when a breach of a necessarily strict rule has been properly proved, exceptional service, previous long service and / or previous good conduct may properly not be considered sufficient to reduce a penalty of dismissal.”

6. Dealing with the range of reasonable responses test I take into account the summary of the Law as set out in Iceland Frozen Foods Limited v Jones [1983] ICR17 EAT, set out at 3.43:-

“We consider that the Authorities established that in Law the correct approach for the... Tribunal to adopt in answering the question posed by s.98(4) is as follows:-

- (1) The starting point should always be the words of s.98(4) themselves;
- (2) In applying the section a 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 a 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’s conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) The function of the 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.”

7. In addition, issues relating to contribution pursuant to §.122 and 123 of the Employment Rights Act 1996 may arise along with Polkey, namely if and insofar as the procedure has been defective then it is open to the Respondent to submit that had a fair procedure been adopted the Claimant would have been dismissed in any event. The parties can make submissions on these issues at the remedy hearing.

The Evidence

8. I had Witness Statements and heard evidence from the following:-

- 8.1. Mr Ryan Fahy, Area Manager responsible for the Claimant's betting shops and therefore his Line Manager at the time (albeit that he was on annual leave at the relevant time);
 - 8.2. Mr Kishor Kanbi, an Area Manager who conducted the Investigation;
 - 8.3. Mr Edwin Watson, an Area Manager who dismissed the Claimant;
 - 8.4. Mr Nathan Pringle, Regional Operations Manager who conducted the Appeal Hearing; and
 - 8.5. The Claimant.
9. I had a Hearing Bundle of 231 pages. During the course of the Hearing I was supplied with a document that indicated when the 'Hard Stop' threshold had changed in December 2022.

The Facts

10. The Respondent is a well known company that runs a large number of betting shops across the UK.
11. The Respondent is regulated and governed by the Gambling Commission. Each individual shop is licensed by the Local Authority and the Respondent has to abide to certain Licensing Objectives, one of which is to protect the young and vulnerable. Failing to do so could expose the Respondent to losing its Licence or being fined.
12. The Gambling Commission reviews whether the Respondent is upholding the Licensing Objectives as part of Audits it undertakes. These include Safer Gambling Affordability and Anti-Money Laundering concerns.
13. Mr Pringle was a Regional Operations Manager at the time and he held a Personal Management Licence from the Gambling Commission to ensure compliance.
14. The Gambling Commission's Licence Conditions and Codes of Practice require the Respondent to put into effect Policies and Procedures for customer interaction where the Respondent has concerns that a customer's behaviour may indicate problem gambling. In evidence before me, "Responsible Gambling (RG) concerns" is a phrase used and understood by all in the same context.

The Respondent's Systems

15. The Respondent has a document entitled "Shop Operating Procedures", which is 92 pages long, parts of which I have been provided with.
16. The Respondent has three Trading Grades for customers, namely Red, Amber and Green. All newly monitored and unmonitored customers are rated Amber. In Section 6.1 the following is set out:-

“There are key Trading Principles to adhere to in your shop, to ensure we comply with our Regulatory obligations. Trading Principles fundamentally revolve around our Monitored Customer policy and Permission to Lay (PTL) Procedures.”

And,

“It is vital that customers are accurately monitored and logged on the till system, to ensure an accurate risk assessment can be completed, whether that be from a Regulatory or Trading perspective.”

And,

“A customer should be monitored on the till system with a GDPR compliant name and the Amber grade allocated if any one of the below triggers occurs;

...

* If you receive authorised instructions from a Head Office function to monitor a customer on the till system.”

Examples are then given of the type of information that should be entered on the customer profiles such as name and appearance.

17. Dealing with the PTL procedure the following is set out:-

“The monitored customer policy works in conjunction with the Retail PTL Chart, where we have different limits in place that determine if PTL is required. These vary by a customer’s grade, sport and market.”

18. There is then set out a section “Your PTL Responsibilities”. As far as this case is concerned, for an Amber grade customer, placing a bet of £2,001 or above on a horse with short odds of 5–1 or less required PTL to be selected on the system. The bet would be referred to the Trading Insight Team which would then decide how to proceed. It could accept the bet, reject the bet, or offer different terms as to amount or odds. The bet was referred by clicking the “send to PTL” button.

19. The Policy goes on to state as follows:-

“Breaches of the PTL Chart are identified by the Trading Insight team which are recorded for audit purposes and shared with line management for appropriate action.”

20. I observe at this point that the Policy does not state that if for any reason a qualifying bet has been accepted but not referred to PTL, then the Manager should escalate the matter to Trading Insight or Customer Due Diligence Team immediately or at all. I was told that any PTL breaches were normally picked up by Trading Insight on the next day.

21. Section 9.5 deals with when to monitor a customer, but as the Claimant did so I do not set it out here.

22. Section 9.6 deals with “Safer Gambling Interactions”. This sets out the following:-

“We must identify, interact with and evaluate customers who may be experiencing harm from gambling.”

And,

“Behavioural triggers,

Behavioural triggers are things customers do that suggest they may not be in control of their gambling.

Examples include:-

- Chasing their losses;
...
- Frequently spending all their money they have brought with them.”

And,

“Physical triggers

These are triggers that are measurable by our shop systems. For these two triggers we must have an Affordability Interaction.

- (1) Customer does a £500+ transaction either MLC [Manager Loaded Cash] or OTC [Over the Counter]; and
- (2) When a customer’s debit card declines.

For these two physical triggers colleagues are ONLY directed to record them via Omnia if following the interaction there is additional concern related to gambling.”

(Omnia is the software used by the Respondent)

23. The section goes on later to state:-

“Once you have carried out an affordability interaction, you should record this via the exception report against the customer’s record, as well as recording as an RG interaction on your till as normal.”

24. I note there seems to be some confusion as to whether or not an Affordability Interaction necessarily needs to be recorded on the system.

25. Section 9.7 deals with how to have an Affordability Interaction. The following is set out:-

“An Affordability Interaction is simply a conversation with the customer about whether their current gambling spend is affordable to them.”

26. Also in the SOP document there is a section, “Source of Funds” at 9.10. This states:-

“All Operators must ensure that gambling is fair and open, not linked to crime and does not lead to harm. Like banks, we must collect customer information for age, identity and funds verification.

This means we sometimes need to ask customers to confirm their identity or show they have sufficient funds to support their gambling activity. We may need the information before further bets can be accepted or paid out.

We do this by giving the customer a letter and leaflet explaining what is required.

The retail AML & RG Team will send an email out to relevant shops and your Area Manager and in some instances will contact the shop by phone directly.”

27. The evidence I had was that this would normally happen on the following day, if, for example, it was picked up that a “Hard Stop” loss limit had been reached.
28. I have been provided with a Training Slide entitled, “Reminder of Current Customer Touchpoints”. This stipulates a “Hard Stop” if a net loss of £5,000 is reached in the first 28 days of a customer being monitored. Further bets should be refused until source of funds documentation has been produced by the customer. The limit of £5,000 had been changed from £10,000 in December 2022. There was a £10,000 limit for last 28 days and £15,000 for last 365 days.
29. The potential problem of the “Hard Stop” process was, I find, clearly known to the Respondent as it was in the process of introducing a new system that would action limits being breached in real time and not the next day. In a “Coming Soon” slide, the following is set out:-

“Live OTC Hard Stops.

At present all source of funds conversations are reviewed and requested the following day. This allows customers to go well above the thresholds we set if they continue to bet on the same day. [my underlining]

In Q2 we will launch OTC Live Hard Stops in Omnia. This will present a live message to you where a customer exceeds a threshold.”

30. The Respondent’s evidence was that at the time it relied upon the Shop Manager to pick up on responsible gambling triggers and to be aware of how much a customer was betting to apply the Hard Stop. The system could be accessed by the Manager if he/she wanted to in order to see a running total of a customer’s losses.
31. I have not been provided with any Staff Handbook or training documentation that sets out that failures to apply the Hard Stop or escalate PTL breaches constitute potential gross misconduct due to the potentially serious consequences.

The Claimant’s Employment

32. The Claimant was employed in May 2013. By 2023 he was Market Place Manager for two betting shops in Edgware and Burnt Oak, London.
33. He was clearly good at his job and was awarded regular bonuses. He had no disciplinary matters recorded against him.
34. Due to six or eight members of staff having been dismissed, the two shops were under-staffed and the Claimant was having to work much longer than his contractual 40 hour week. The Respondent required two members of staff to be on duty after 2:30pm. The shop closed at 10pm. The Claimant worked two days a week at Burnt Oak and three days a week at Edgware.
35. Consequently there would be times when he was not at Edgware and would have to rely on other members of staff.

22 April 2023

36. On the 22 April 2023 the Claimant was at the Edgware shop. With him was a Mr Rudra who he had trained and had about five months' experience. Also working was a trainee with about four days experience.
37. At around 2:30pm a customer, Mr C, came to the shop along with a friend. He had previously placed a bet and came in to collect his winnings. Over the next three hours Mr C placed 19 bets, wagering a total of £33,300. He had one winner returning him £8,400 and so lost a total of £24,900 (one bet of £200 may have been placed by Mr C's companion). The bets were laid as follows:-
 - 37.1. At 14:30 - £400 cash bet taken by Niroshan;
 - 37.2. At 14:41 - £400 cash bet taken by Niroshan;
 - 37.3. At 14:52 - £400 card bet taken by Niroshan;
 - 37.4. At 15:00 - £200 cash bet taken by Niroshan;
 - 37.5. At 15:08 - £2,000 card bet taken by Niroshan;
 - 37.6. At 15:16 - £600 cash bet taken by Niroshan;
 - 37.7. At 15:23 - £2,000 card bet taken by Niroshan;
 - 37.8. At 15:29 - £2,000 card bet taken by Rudra;
 - 37.9. At 15:37 - £1,000 card bet taken by Rudra;
 - 37.10. At 15:48 - £1,000 card bet taken by Rudra;
 - 37.11. At 15:51 - £3,000 card bet taken by Rudra;
 - 37.12. At 16:01 - £3,000 card bet taken by Rudra;

- 37.13. At 16:09 - £4,000 card bet taken by Rudra;
- 37.14. At 16:22 - £4,000 card bet taken by Rudra;
- 37.15. At 16:34 - £4,000 card bet taken by Rudra;
- 37.16. At 16:49 - £2,000 card bet taken by Rudra;
- 37.17. At 16:57 - £1,000 card bet taken by Rudra;
- 37.18. At 17:22 - £1,800 card bet taken by Rudra; and
- 37.19. At 17:33 - £500 card bet taken by Rudra.
38. When the £2,000 bet was laid at 15:08 the Omnia system automatically instructed that the customer should be monitored. The Claimant correctly started a Customer Profile having spoken to Mr C. The Claimant told Mr Kanbi in the investigation that Mr C had poor English but the Claimant got his name from his bank card. He also stated in the investigation that he interacted with Mr C around what he did for a living for KYC (“Know Your Customer”) and that Mr C seemed okay for the bet stakes and that he was a shop owner. The name, description and shop owner status of Mr C were entered onto the Customer Profile. The Affordability Interaction, such as it was, was not entered onto the system and the Claimant accepted that it should have been. However, the Claimant stated that he did not have Responsible Gambling concerns and, as such, due to the ambiguity surrounding recording in the SOPs, I find that that was not serious.
39. The Claimant accepted a £2,000 bet at 15:23. This would have taken Mr C over the “Hard Stop” threshold at £5,000 losses in first 28 days. The bet should have been refused and a Source of Funds leaflet given to Mr C.
40. Thereafter all bets were taken by Mr Rudra. The £3,000 laid at 15:51 should have triggered a PTL Referral. Mr Rudra did not do so. The Claimant picked up on this and CCTV stills show him brandishing the PTL Chart at 15:54:57 with Mr Rudra in attendance. The Claimant told me and I find, that he showed the Chart to Mr Rudra and talked him through it.
41. The Claimant did not report or escalate the PTL breach as he thought it was too late.
42. At 15:56 the Claimant left the shop, 34 minutes before he was due to leave at 16:30. At that time, Mr C’s losses stood at £13,000 which is above the Hard Stop for last 28 days threshold. Mr C went on to stake a further £20,300 winning only £8,400.
43. The next day on 23 April 2023, the Trading Insight Team sent an email changing Mr C’s grading from Amber to Green. Given the “Hard Stop” thresholds, this is surprising as, with access to the figures, Trading Insight should have appreciated that this was not appropriate. On 25 April 2023,

the CDD Retail Team did suspend Mr C pending Source of Funds information.

44. The Claimant was suspended on 26 April 2023 and an Investigatory Interview held by Mr Kanbi on 26 April 2023. The Claimant was invited to a Disciplinary Hearing on 4 May 2023 in a letter dated 2 May 2023. The allegations against him are general and are put as follows:-

“... the following allegations can be discussed:-

- Breach of Shop Operating Procedures – Safer Gambling;
- Breach of shop Operating Procedures – Bet Acceptance.”

45. The Claimant was provided with the Investigation Summary Statement and Notes. The Summary Statement identifies the SOPs 6.1, 9.5, 9.6 and 9.7. However, the Hard Stop threshold was discussed with the Claimant during the Investigation Interview along with leaving the shop early with the two colleagues left in charge, so I find that he was aware that those issues were to be dealt with in the disciplinary process.

46. Mr Watson held the Disciplinary Hearing on 4 May 2023. It is clear from the Notes and Dismissal Letter that four issues were relied upon to support the finding of gross misconduct and summary dismissal:-

“1. PTL breach not reported or advice sought following breach.”

47. The failure to refer the 15:51 bet to PTL was Mr Rudra's. The Claimant picked up on it and reminded Mr Rudra of the PTL Chart. The written documentation states that PTL breaches would be picked up by the Trading Insight Team and actioned. This would generally take place the next day. Nowhere is it directed that a PTL breach should be escalated as soon as discovered, or what the consequences could be if it was not. Mr Fahy told me that across his 22 shops he would estimate that there are about two PTL breaches a month and that, whilst every case is dealt with on its merits, they would not normally merit disciplinary action and would be dealt with by a recorded discussion, or verbal discussion and possibly coaching and training. I find that not reporting one PTL breach by a CSM (Customer Service Manager) was not that grave an error.

“2. Leaving the shift early without authorisation, leaving a new starter in the shop alongside an inexperienced colleague who showed failings”

48. The Claimant left 34 minutes early. He was due to leave at 16:30 and the shop would have been in the care of the two other members of staff in any event until 10pm. The Claimant had already worked 50 hours that week and was due to work all of Sunday. He told me and I accept, that he had left early on many occasions and did not seek authority to do so. I find that leaving early is not reprehensible in the circumstances. It was not the Claimant's fault that the shop was short staffed and that he was having to work long hours. I find that asserting he should have remained after Mr

Rudra's PTL error is the application of hindsight. The Claimant had reminded Mr Rudra of the PTL Chart.

“3 Failure to adhere to company values concerning Safer Gambling”

49. The Claimant did begin to monitor Mr C. The Claimant stated in Interview and the Disciplinary Hearing that he did interact with Mr C and had no RG concerns. The Respondent points to various triggers that it says should have raised concerns. Changing from cash to card, the Claimant stated was a common occurrence and the card was not declined, indicating the Claimant spent with no concern. As a matter of fact, £11,000 had been spent on the card by the time the Claimant left which is indicative of a high daily spending limit afforded by Mr C's bank. The Claimant indicated that the escalating value of stakes was of no concern to him. I accept that using up cash and turning to a card, escalating the value of stakes, the amount and frequency of betting and only betting on favourites may indicate an individual is chasing losses and so is indicative of RG concerns. However, in my judgement this is fundamentally a judgement call for the Manager. The Claimant did not ignore Mr C. The Claimant did engage with Mr C. In his Disciplinary Hearing he stated there was no behavioural changes but acknowledged that on reflection he should have been more focused. I find any error in picking up on these potential triggers was not that serious.

“4 Failure to adhere to procedures as set out in SOP”

50. Although not an SOP, I treat this as concerning the Hard Stop issue. The Claimant accepted that he had the wrong threshold in his head and this was an error. Firstly, he mistakenly thought it was £15,000 and not £5,000 loss in the first 28 days. The Claimant had had relevant training and so should have known of the correct threshold. However, he explained that he was not keeping track of his [Mr C's] spend in real terms. I have taken into account that the shop was not that busy at the time. Customers were using the machines but it appears that it was only really Mr C who was placing bets over the counter. I find that the Claimant must have been aware in a general sense of the high level of bets made as he personally took the first seven to a value of £6,000. He told me he did not appreciate that the bets were all losses as customers do not necessarily collect winnings instantly. He did not monitor whether Mr C was winning. He did not access the system to check the running loss total. I find that the Claimant must have been aware that Mr C was betting increasingly large stakes and that he ought to have realised that he had therefore missed the Hard Stop. However, the context is that this all happened over one hour and twenty minutes and not over the more usual weeks or months that the Respondent's system would expect to pick up on. The Respondent itself recognised the possibility of a customer exceeding limits in a day. I find that the Claimant expected any Hard Stop to be notified the next day by CDD in the usual manner. I find that this, combined with the lack of any advance warning concerning the potential consequences of missing a Hard Stop, could not constitute gross misconduct.

51. The Claimant Appealed on 14 May 2023 and the Appeal was heard by Mr Pringle on 16 May 2023. Once again the situation was discussed and the Claimant gave his account. The Appeal was rejected.

Conclusions

52. I find that the reason for the Claimant's dismissal was gross misconduct and that this is a potentially fair reason. I find that the Respondent genuinely believed the Claimant had committed gross misconduct and that the Respondent conducted a reasonable investigation. I find that the conclusion that the Claimant was guilty of gross misconduct was not on reasonable grounds. I find that no employer acting reasonably would have treated the circumstances as a sufficient reason to dismiss the claimant.
53. The evidence shows that leaving early, not escalating one PTL breach and the limited picking up of RG triggers were relatively trivial matters. I find that missing the Hard Stop was a clear error, but one that the Respondent itself appreciated could happen and that the consequences were not spelt out to employees. The circumstances of a customer wagering such large amounts in such a short period of time were highly unusual and atypical and should have been taken into account in any decision. Of the £24,900 net lost by Mr C, the figure was 'only' £13,000 when the claimant left the shop. It was the 8 subsequent bets that nearly doubled the loss figure and, of course, the claimant did not take the bets, was not there when they were accepted and did not know about them. Consequently, I find that it could not constitute gross misconduct.
54. In addition, I find that the Claimant's long service, exemplary record and the fact that this incident was on one occasion and was not deliberate conduct were not sufficiently taken into account.
55. I find that the decision to dismiss was totally outside the range of reasonable responses of a reasonable employer. I am not substituting my view for the employer's view on the basis that the decision was harsh. Whilst I appreciate that the consequences of what happened on that day had potentially serious implications for the Respondent, when analysing what the Claimant actually did wrong, in my judgment, it falls far below being sufficient to warrant dismissal. As the Claimant wryly observed, had Mr C won two or three of his bets he doubts if he would have lost his job. I agree.

Employment Judge Alliot

Date:14 May 2024

Sent to the parties on: 15/05/2024

For the Tribunal Office.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>