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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr U Sivagnanam	**AND**	Tesco Stores Ltd

Heard at: London Central **On**: 17 November 2016

Before: Employment Judge Palca (Sitting alone)

Representation
For the Claimant: In person
For the Respondent: Mr R Ryan, of Counsel

JUDGMENT

The Claimant's claim that he was unfairly dismissed is dismissed.

REASONS

1. The Claimant was employed by the Respondent as a customer assistant. The Respondent is a very substantial company employing around 36,000 people. On 21 May 2016, the Claimant began proceedings against the Respondent claiming that he had been unfairly dismissed. He sought reinstatement. In its response, filed on 17 August 2016, the Respondent claimed that the Claimant had been appropriately dismissed on the ground of misconduct, arising out of unauthorised absence from work.

Evidence

2. The Claimant gave evidence. Evidence was given on behalf of the Respondent by Mr Sahil Ralhan and Mr Meraj Shaikh, respectively the Manager and Deputy Manager of Tesco Express in Acton. There was an agreed bundle of documents, to which was added details of the Claimant's mobile phone bill for February 2016 and the Claimant's wages slips for 2016.

3. All witnesses had produced witness statements. The Claimant produced a witness statement the day before the hearing which was the same as his

previous witness statement but with an addition relating to alleged complaints made recently by various employees at Tesco Express Acton about the Manager. That evidence was hearsay, and post-dated the events in question. The Tribunal therefore used the original witness statement produced by the Claimant, redacted so as to remove evidence of without prejudice discussions.

Issues

4. The Tribunal is required to determine:

(1) The reason for the Claimant's dismissal and whether or not that is a potentially fair reason.

(2) Whether or not a fair process was followed in relation to the dismissal.

(3) Whether dismissal was within the range of reasonable responses available to the Respondent.

(4) If appropriate, remedy including whether or not reinstatement is an appropriate remedy.

Facts

The Tribunal found that the material facts were as follows:

5. The Claimant was employed as a Customer Assistant by the Respondent at its Acton Tesco Express branch. This is a relatively small branch with some 13 or 14 members of staff, with only about three or four on duty at any one time. The Claimant's employment began in August 2011 and the Respondent believes he was dismissed by letter dated 29 February 2016. It is that dismissal which has prompted this claim. The Claimant worked part-time for the Respondent as he had another job in a competitor supermarket. By the time of his dismissal he was working 12 hours for the Respondent, having worked longer hours beforehand. His absence record was such that, during the six months prior to his departure, he was absent on the basis of sickness for approximately 13.46% of days he should have worked, and in total he was absent for 31.46% of the time that he should have worked. The difference between the two figures relates to the Claimant having taken a number of days off work for, amongst other things family reasons.

6. The Respondent has a sickness policy. This is in its handbook, with which the Claimant had been provided. It notes that absence puts colleagues under pressure and effects the quality of service that Tesco is able to provide and requires staff who know they cannot come to work to phone the Duty Manager at least two hours before the shift is due to begin. Fit notes are required from the doctor if absence is likely to last for more than one working week. There is also a Guide for managers in relation to store absences without leave. This provides a staged process. The first process is that the manager should telephone the individual to find out the reason for any absence. On the fourth day of non-

notified absence, if the employee fails to make contact or attend an agreed meeting, a letter should be sent by first class post in standard form to reschedule any meeting giving at least 48 hours notice. The policy then says that on seventh day of non-notified absence, if the employee has not made contact or does not attend the rescheduled meeting, a disciplinary meeting should be conducted. The store manager and the personnel manager should be present, as well as another employee (ideally a union representative) who could validate that the meeting was held. A letter should then be sent to the employee confirming the decision, including summary dismissal from the company.

7. As noted above the Claimant had quite a significant record of absence. His actions indicated, however, that he was familiar with the Respondent's processes in relation to reporting absences and providing sick notes. In 2014, for example, there was an issue in relation to the Claimant's alleged non-return from work following a holiday. He was summoned to a disciplinary meeting but in fact evidence showed that the Claimant had not overstayed his holiday.

8. On 9 December 2015, the Claimant injured his knee. He went to hospital. He took the unusual step of photographing himself on crutches at the hospital entrance. That evening he emailed his manager, Mr Ralhan, telling him that his knee was locked and ligaments swollen, that he might need to be in bed for three weeks and would try to send a sick note as soon as possible. The following day the Claimant sent in a sick note which said that he was unable to walk or fully extend his knee and therefore would not be available to work from 10 December to 31 December 2015. He obtained another sick note signing him off for work until 15 January 2016 which he forwarded to the Respondent on 23 December 2015.

9. On 6 January 2016, the Claimant's son was born. On 8 January he emailed his store manager telling him that he had had an MRI scan on 4 January and was awaiting the results, reminding the manager that his sick note ran out on 15 January 2016 and requesting paternity leave of two weeks from 15 January 2016 followed by two weeks of holiday. The store manager did not respond to the Claimant on this but noted the paternity leave and holiday in the appropriate records. So far as the Respondent was concerned the Claimant was due back to work on 15 February 2016. On 6 February 2016, the Claimant emailed his store manager again saying that his wife's left hand was suffering from carpal tunnel syndrome so that she could not hold their baby for more than two minutes. He said he needed to support her for a few weeks "I still got a few weeks holiday. Can you please let me have these holidays continuously with my paternity to support my wife?" Mr Ryan gave evidence that he read this email as a repeat request of the previous email to take holiday following his paternity leave, and not as a request for additional leave. The text of the email is indeed ambiguous and it was not unreasonable for Mr Ralhan to have construed in that fashion.

10. On 15 February 2016, the Claimant did not arrive for work and Mr Ralhan telephoned him to find out why. There was no response. On 17 February 2016, Mr Ralhan texted the Claimant congratulating him on the birth of the

baby and asking the Claimant to contact him as soon as possible to discuss his return to work. The Claimant responded by text that he could not talk. During the course of 18 February 2016 Mr Ralhan and the Claimant exchanged a number of text messages and telephone conversations. Mr Ralhan informed the Claimant that he did not have any holiday left, and asked the Claimant to come into the store to discuss the issues. The Claimant replied that because he could not drive he would need to be accompanied and that his friend was only free on Saturday. This was not suitable for Mr Ralhan as he was not due to be working that day and he invited the Claimant to attend a meeting on 22 February at 3.30pm. The Claimant said that he would do his best to attend.

11. At a subsequent telephone call at 13.45pm Mr Ralhan asked the Claimant to attend a meeting on 22 February at 3 and told him that he did not have any holiday left. The Claimant agreed to try to attend the meeting.

12. On 22 February 2016, at 11.04 the Claimant telephoned the Acton Store's Deputy Manager, Mr Shaikh, directly. The Claimant said that he had called the Deputy Manager because he was the only person in the store. However, even though the Tribunal had the Claimant's February phone records before it, there was no evidence before the Tribunal that the Claimant had attempted before this either to telephone the store itself or to telephone Mr Ralhan. There is a dispute over what was said during this conversation. The Claimant states that he informed Mr Shaikh that he was unable to work and requested time off until the third week of March. The Claimant's evidence was that Mr Shaikh agreed that he could have this time off and said that there was no need for the Claimant to provide any sort of sick note. Mr Shaikh's evidence was that the Claimant had sought probably three month's time off and that Mr Shaikh had informed the Claimant that he would have to discuss this with the Store Manager. Mr Shaikh told the Tribunal was that, whether the Claimant had been seeking three weeks or three months time off, he still did not have the power to authorise the leave, as this was within the remit either of Mr Ralhan, or in Mr Ralhan's absence, of the Respondent's HR department. The Tribunal prefers Mr Shaikh's evidence on this point. The Tribunal finds it extremely unlikely that, knowing that the Claimant had been summoned by his Manager to a meeting to explain his absence, Mr Shaikh would have agreed that the Claimant could take additional time off, and told him that a sick note was unnecessary. Mr Shaikh's evidence was that he told the Claimant that he should discuss the issue with Mr Ralhan, and the Tribunal accepts this. Mr Shaikh told the Tribunal that he informed Mr Ralhan of this conversation. Mr Ralhan does not remember this.

13. The Claimant did not attend the meeting during the afternoon of 22 February. Mr Ralhan decided, in accordance with Tesco's policy, that the next stage should be to invite the Claimant to a meeting. Accordingly, on 22 February 2016, Mr Ralhan wrote to the Claimant noting that he had been absent from work since 10 December 2015 and stating that this absence was unauthorised from 15 February 2016. It invited the Claimant to attend a meeting to discuss the reasons for his absence. The letter stated "*clearly unauthorised absence is in breach of company policy, which could result in disciplinary action, up to and including*

dismissal." The letter invited the Claimant to call the store in person to inform it of reasons for absence before 14.30pm on 25 February 2016.

14. This investigatory meeting was attended by Mr Ralhan and Mr Shaikh, but not by the Claimant. Following the Respondent's policy, Mr Ralhan and Mr Shaikh concluded that they should send the Claimant an invitation to a disciplinary meeting. On 25 February 2016, Mr Ralhan wrote a second letter to the Claimant informing him that he had not attended the meeting scheduled for 25 February and stating that the meeting was now going to be rearranged for 29 February at 3pm. The purpose of the meeting would be to discuss unauthorised absence and why the Claimant had not been in contact with the Respondent. The Respondent was told of his right to be accompanied and that absence without notification was considered to be a fundamental breach of contract which could result in summary dismissal. He was also informed that a decision might be taken in his absence. The evidence from Mr Ralhan was that he personally posted the letters of both 22 and 25 February 2016 to the Claimant in a post box not far from the Tesco store. The Tribunal accepts this evidence. The Claimant stated that he had not received either of those letters. The Tribunal notes with some surprise that two letters had not been received by the Claimant, both of which had been appropriately addressed, but has no evidence that the letters had indeed been received by the Claimant. What is certain is that the Claimant did not attend the disciplinary meeting on 29 February. The meeting took place. Mr Ralhan presided. Mr Kirit Patel was appointed as representative for the Claimant. Mr Melnik attended as note-taker. The meeting was very brief. It was noted that the Claimant had not attended. Mr Ralhan concluded in the circumstances that dismissal was the appropriate sanction. This was confirmed to the Claimant in a letter dated 29 February 2016 which informed the Claimant that he had been dismissed for a fundamental breach of his contract for failing to attend work without authorisation or to provide a reasons for his absence. The Claimant was given a right of appeal. One of Mr Ralhan's colleagues posted this letter by first class "signed for" post receiving a receipt for this. The Claimant has stated that he did not receive this letter.

15. On 14 March 2016, the Claimant emailed the Acton Store Manager stating that he had had a second MRI scan on 1 March, and that he was going to have knee surgery in the coming week and would require six weeks of bed rest following that. The letter stated "*Thanks for letting me have my holiday continuously and then due to my wife's condition let me having off from work till third week from March 2016. Thank you for supporting me in my difficult time. I will update my condition. After my sickness you asked me over the phone to have meeting at our Tesco or you like to come to my home. I said I can come and have meeting but you didn't arrange any meeting after that or you didn't visit me as well.*" In response to this Mr Ralhan emailed the Claimant informing him that a disciplinary meeting had been held on 29 February and a letter posted straight after that and that he had been dismissed from Tesco. The Claimant was invited to contact a representative of the Respondent's HR team. He did so but apart from receiving some documents was not informed again of the reason for his dismissal. He did not appeal.

<u>Submissions</u>

16. The Claimant claimed that he had been unfairly dismissed. He had followed appropriate procedures, reporting that he was sick and requesting appropriate leave. The Deputy Manager at Tesco Express in Acton had given him permission to take time off as unpaid leave. It was therefore inappropriate for them to dismiss him. He had also never had any warning in relation to absenteeism in the past.

17. The Claimant argued that the Respondent's process was wholly in adequate – he had never been sent any letters inviting him to disciplinary meetings and there was no proof that the invitations had been posted. No attempt had been made to check that the Claimant had received the letters.

18. There was no barrier to reinstatement: the Deputy Manager no longer works at the Tesco Acton store, and the Claimant had been told by third parties that the Manager was likely to be moved on shortly. The Claimant had good relationships with his other colleagues.

19. Finally the Claimant said that he had not appealed against the decision to dismiss because he was waiting to receive information from the Respondent about the reason for his dismissal, and he thought that an appeal was an issue for his solicitor.

20. The Respondent submitted a written skeleton arguing that the Tribunal should follow the guidance laid out in **BHS v Burchell [1978] IRLR 379**, namely that the employer must have a genuine belief that the employee is guilty, based on reasonable grounds after having carried out as much investigation into the matter as is reasonable in the circumstances. The Tribunal should not substitute its judgement for that of the employer but should consider whether or not dismissal was within the range of reasonable responses **(Post Office v Foley [2000] IRLR 827 & Others)**. The burden of proof on the part of the Respondent was to prove on a balance of probabilities that the Claimant had been guilty of misconduct.

21. The Respondent had argued that the Claimant was well aware of the position in relation to reporting absenteeism. Disciplinary proceedings had been begun against him in 2014 for unauthorised absence from work. His actions when he suffered and injury in December 2015, reporting the injury, with photographic evidence, and providing appropriate fitnotes, was a further indication that he was aware of the appropriate process. The Respondent invited the Tribunal to believe that it was inconceivable that Mr Shaikh had approved the Claimant's absence during a telephone call on 22 February 2016.

22. The Respondent's representative argued that the Respondent at the time of the dismissal genuinely believed that the Claimant's absence was unauthorised, following a reasonable investigation. Dismissal was within the band of responses particularly in light of the background facts, for example the Claimant's history of absence. From the Respondent's perspective, the process as a whole was fair. The Respondent also relied, should the Tribunal find that

the dismissal had been unfair, on **Polkey** and contribution arguments and argued that reinstatement was not an appropriate remedy.

Law

23. Employees have the right not to be unfairly dismissed. Section 98 of the Employment Rights Act 1996 sets out a number of potentially fair reasons for dismissal including reasons relating to the conduct of the employee. Section 98(4) of the Employment Rights Act 1996 provides that if the employee has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair:

> "(*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) should be determined in accordance with equity and the substantial merits of the case*."

24. **British Home Stores Ltd v Burchell [1978] IRLR 379**, EAT provides that the employer should not act on the basis of mere suspicion but must have a genuine belief that the employee is guilty of the misconduct in question, based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances. It is not for the Tribunal to substitute its own view for that of the employer, but to determine whether or not dismissal was within the range of reasonable responses available to the employer in the relevant circumstances (**Foley v Post Office [2000] ICR 1283, CA**).

25. ACAS Guidelines in relation to Discipline and Grievances at Work (which are not binding) state that there may be occasions when an employee is repeatedly unwilling to attend a meeting and that employers will need to consider all the facts and come to a reasonable decision on how to proceed, including any rules the organisation has for dealing with failure to attend a disciplinary meetings; the seriousness of the disciplinary issue under consideration; the employee's disciplinary record, general work record, work experience, position and length of service; medical opinion on whether the employee is fit to attend the meeting; and how similar cases in the past have been dealt with. Where an employee continues to be unavailable to attend a meeting the employer may conclude that a decision will be made on the evidence available. The employee should be informed when this is to be the case.

Conclusion

26. The Respondent has argued that the reason for the Claimant's dismissal was misconduct, namely unauthorised absence. During the course of the hearing the Claimant cast doubt on whether or not this was a fair reason or the real reason, claiming that it might have been that the Acton Express Tesco branch was keen to get rid of him because of his performance record. There was

no evidence for this. The Tribunal therefore accepted that the reason for dismissal related to the Claimant's conduct.

27. In order for the dismissal to be fair, the Respondent must pass the test set out in **BHS v Burchell**. The first issue for the Tribunal to determine is whether or not the Respondent conducted an appropriate investigation. There was no dispute over the absences from work on the Claimant's part. The issue related to the reason for those absences. The Tribunal concluded that the Respondent had made reasonable attempts to obtain evidence from the Claimant as to the reason for his absence. He had been invited to a meeting orally which he had not attended. He had received two written invitations to investigatory and disciplinary meetings, which he had not attended. The Claimant claims not to have received these letters. That may well be the case but from the Respondent's perspective the invitations had been sent, to the correct address, and the Tribunal accepted that the letters had been posted to the Claimant. The Tribunal considered whether or not the Respondent should have called the Claimant when he did not show up at the meetings, to see if he was attending. This obviously would have been a counsel of perfection but the fact of failure to call does not, in the Tribunal's view, invalidate the fact that letters had been sent and that it had been reasonable for the Respondent to believe that the Claimant had received them. Looking at the issue in the round therefore, the Tribunal concluded that the Respondent had conducted as much of an investigation as was reasonable in the circumstances.

28. Taking all this into account, the Tribunal decided that it was reasonable for Mr Ralhan to have concluded that the Claimant was taking unauthorised absence from the Respondent. The Tribunal considered that he had a genuine belief in this fact. The Tribunal reviewed whether it had been reasonable for the Respondent to take the decision to dismiss the Claimant in the Claimant's absence. Bearing in mind the fact that the Claimant did not come to the meeting discussed by telephone, that he had not responded to the two letters he had been sent, that he had a bad attendance record, that Mr Ralhan was complying with Tesco's guidelines, and that in the final letter to the Claimant inviting him to a disciplinary meeting, sent on 25 February, he had been informed that a decision might be taken in his absence, the Tribunal concluded that it had been reasonable for the decision to have been taken in the Claimant's absence.

29. Turning to the issue of whether or not dismissal was within the range of reasonable responses available to the Respondent, the Tribunal concluded that it had been. The Acton Express Store is a small branch and therefore non-attendance makes a material difference to the store's other employees working on the relevant shift and to customer service. This, coupled with the Claimant's previous history of absenteeism, even though there had been no warning, made the Tribunal believe, acknowledging that it must not substitute its own view for the decision of the Respondent, that dismissal had indeed been within the range of reasonable responses.

30. There is an issue in relation to the date of dismissal. The dismissal letter had been sent to the Claimant by first class signed for post. It therefore should have been deemed to have arrived on 2 March 2016. It could be argued that the

Claimant's email to the Respondent of 14 March 2016 is rather defensively worded, indicating that perhaps he might have been aware of the position in relation to his employment. While it may be thought surprising that three correctly addressed letters to the Claimant, one of which was sent via "signed for" post, did not arrive at their destination, the Tribunal makes no finding of fact as to whether or not the dismissal letter was actually received by the Claimant. What is undoubtedly the case is that by 14 March the Claimant had been informed of his dismissal by Mr Ralhan. The date of dismissal makes no significant material difference in the current circumstances because at the material time the Claimant was not being paid for his absence, his holiday having expired.

31. In conclusion, the Tribunal determines that the Claimant's dismissal was fair. His claim is therefore dismissed.

Employment Judge Palca
9 December 2016