EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Nadarajah	**v**	**Tesco Stores Limited**

Heard at: Watford **On:** 23 January 2017

Before: Employment Judge Smail

Appearances:

For the Claimant: Mr B Sivakumaran, Friend
For the Respondent: Miss C Petrucci, Solicitor

JUDGMENT having been sent to the parties on 24 January 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 9 August 2016 the claimant claims unfair dismissal. He was employed by the respondent between 18 May 2002 and 24 May 2016 as a customer assistant. He worked night shifts at weekends only, 15 hours a week. He was dismissed ostensibly for gross misconduct. This took the form of sending his manager a text in the following terms on Saturday 30 April at 11.54 am:

> "I know you try to do something go ahead but just follow the Tesco rules otherwise you'll see."

The law and the issues

2. The tribunal has had regard to s.98 of the Employment Rights Act 1996. By sub-section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason or if more than one the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason. By s.98(4) where the employer has fulfilled the requirements of sub-section (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."

3. This has been interpreted by the seminal case of British Home Stores v Burchell [1978] IRLR 379 EAT as involving the following questions:

3.1 Was there a genuine belief in misconduct?

3.2 Were there reasonable grounds for that belief?

3.3 Was there a fair investigation and procedure?

3.4 Was dismissal a reasonable sanction open to a reasonable employer?

4. I have reminded myself of the guidance in Sainsbury's Supermarkets v Hitt [2003] IRLR 23 Court of Appeal that at all stages of the enquiry the tribunal is not to substitute its own view for what should have happened but judged the employer as against the standards of a reasonable employer bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 EAT to the effect that the starting point should always be the words of s.98(4) themselves than implying that in applying this section an employment tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the employment tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course for that of the employer. 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 whilst another quite reasonably take another. The function of the employment 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 is outside the band, it is unfair.

Findings of fact

5. The background to the text is the absence policy. It seems that the claimant would occasionally not attend work. Following Saturday 16 April the claimant was given counselling after a period of absence without leave. He attended counselling about the need to telephone the store absence phone number at least two hours before the shift. He was absent again over the weekend of 23-24 April 2016 and did not, so the respondent found, telephone the absence phone number. He was sent a letter on 25 April that this matter would be discussed at his next shift on 30 April. That matter was confirmed by the personnel manager by telephone on 25th and again on 29th and then on 30th the claimant sent the text in question.

6. The claimant has maintained that he did actually notify his manager, not by using necessarily the store phone number, but by texting his manager's personal phone and he produces today text evidence to an extent consistent with that text which were capable of examination in the disciplinary process. The first text on 16 April at 20:36 said: "Hi it's Thiruchelvan. Can you please answer me. I need a day off as I am away from London. I'll cover this day when you want."

7. Then on Saturday 23 April at 19:13 he texted his manager: "Hi it's Thiruchelvan. I am sick. I was calling the Tesco number it was going to voice sms. I will sms to the machine as well." The respondent on investigation found no attempt to telephone or use the stipulated store number.

8. The claimant it seems was upset by his understanding that his manager was ignoring him and was setting up, as he saw it, the opportunity to dismiss him. The respondent had reasonable grounds in my judgment for finding that the claimant had not attempted to use the stipulated phone number but the claimant has produced evidence today of some attempt at contacting his manager through the non-stipulated route of texting. Be that as it may, that is the non-stipulated route.

9. In investigation of the matter, the claimant made clear his position repeatedly that he was upset that his manager had essentially ignored his communication. It seems that that then prompted the text on 30 April when he said that he knew the manager was trying to do something, the manager should go ahead but just follow the Tesco rules, otherwise he would see.

10. Mr Daley, the then store manager at the relevant store, which was the Hoover Store in Greenford, found that was - and was intended to be - a threatening text. He rejected the claimant's account that what was being threatened was an escalation of internal procedures. He rejected that because the personnel manager had in any event arranged for there to be a meeting on 30 April with the line manager concerned who was Mr Panneer Selvan. Mr Daley concluded the matter did amount to gross misconduct. He found that the threat involved a threat of violence.

11. On appeal Mr Basquil felt he needed to investigate that. He was concerned as to whether that finding was an appropriate finding. After the preliminary appeal hearing he conducted a further investigation with the line manager and was satisfied by the line manager, Mr Panneer Selvan, that he genuinely interpreted the threat as one of physical violence. Accordingly, the dismissal was confirmed on the basis that the text was a threatening one.

12. In terms of an investigation, it is my judgment that the respondent reasonably investigated this matter. There was an investigation meeting on 14 May 2016, a disciplinary hearing on 23 May 2016, there was an appeal hearing on 17 June 2016 and a subsequent appeal investigation on 20 June 2016 when, as I say, Mr Basquil sought to check that this could reasonably be regarded as a threatening text. At all times the claimant had full opportunity to state his case.

13. The managers have had in mind the provisions of the Disciplinary Code of Conduct. Gross misconduct examples are given in the usual way, said to be non-exhaustive in the usual way. Analogous provisions that seem to me capable of being invoked are: any serious acts outside work that brings Tesco into disrepute or affects internal relationships, it is the latter bit of that that arises; physical or serious verbal abuse of other employees, managers or customers, it seems to me that abuse over texting falls within the spirit of that; there is a catch-all phrase "any other action" which on a common sense basis is considered a serious breach of acceptable behaviour. There is also reference to the Colleague Handbook which defines assault as threatening to harm someone, which is how the managers in this case interpreted that text.

14. It seems to me that that is a matter for them, that that finding is within the band of reasonable findings. However, were one uncomfortable with interpreting the text as threatening harm on any view, it seems to me, that the text was grossly insubordinate and threatening whether or not it threatened harm as such. Accordingly, it is my conclusion that the finding that this amounted to gross misconduct meriting dismissal was a finding open to management. The relationship between subordinate and manager was irreparably harmed.

15. Several matters of mitigation have been raised. First of all the considerable length of service, 14 years. That was taken into account by both managers and to an extent it was said it went against the claimant because the claimant should know after such length of service that he cannot threaten his managers.

16. An attempt was made on appeal to suggest there was inconsistency of treatment with comparable cases. Two matters were raised: an incident on the shop floor, a fight between employees. A bottle was raised apparently, night managers resolved it. Names were given for the first time, I think, today as to who was involved; but on any view this was a matter between employees and did not involve a subordinate threatening a manager so not a like case. Another case was raised, being an example of a manager swearing at another customer in the presence of the area manager. Even though there was a dismissal, that person had managed to find work at another store. But again, this was not a really comparable or relevant example because the individual it seems had been dismissed. There was no comparable case raised involving insubordination such as in this case.

17. The final point made was that Mr Basquil actually is at the same level of manager as Mr Daley and so how could it be that he could hear the appeal. Well that was explained in evidence. Mr Basquil has been licensed to hear appeals. He has had specific training. Unfortunately, there appear to be so many appeals and grievances in West London that a new tier of management has had to be trained to deal with them. That, I am told and it is not disputed, has the agreement of USDAW, the union, so in those circumstances I do not find it was procedurally improper for Mr Basquil to hear the appeal. On the contrary it seems as though it was entirely proper.

Conclusions

18. So in short, whilst I understand the claimant's position that he did send some messages to his line manager about absence, it seems incontrovertible that he did not do it in the stipulated way. Even if he is right that he did not threaten harm, it was open to the Respondent to conclude that he did. In any event, this text was grossly insubordinate, and unfortunately the Claimant has exposed himself to a fair dismissal, it being open to this respondent to dismiss for such gross insubordination if that was all it is. The reason for dismissal was misconduct. The facts were established by a reasonable investigation pursuant to a fair procedure. The grossly insubordinate nature of the text meant that dismissal was affair sanction open to the employer. It is difficult to see how the relationship between manager and subordinate could reasonably continue.

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Employment Judge Smail

Date: 08 February 2017

Judgment sent to the parties on

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For the Tribunal office