



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Crooks

v

**Ladbrokes Betting and Gaming
Limited**

Heard at: Watford

On: 18 October 2017

Before: Employment Judge Skehan

Appearances

For the Claimant: In person assisted by Mr N Solomon

For the Respondent: Mr B Frew, Counsel

JUDGMENT

The claimant's claim for unfair dismissal is unsuccessful and dismissed.

REASONS

1. The reasons for this judgement were provided following the hearing on 18 October 2017. At the commencement of the hearing we identified the issues to be determined by the employment tribunal with the assistance of both parties. The issues were:
 - a. What was the reason for dismissal? At the outset, it was accepted by the claimant that the reason for dismissal was the alleged misconduct in allowing a person into the staff secure area.
 - b. Did the respondent have a genuine belief that the claimant was guilty of the misconduct of which he was dismissed and did the respondent have in his mind reasonable grounds on which to sustain that belief? Was that belief formed after a fair and adequate investigation? In reaching the decision to dismiss, did the respondent follow a fair procedure in accordance with the ACAS code where applicable?

- c. Was the dismissal within the band of reasonable responses open to an employer in the circumstances?
- d. In the event that the dismissal was unfair due to the respondent following an unfair procedure, should the compensatory award be reduced or limited to reflect the chance of the claimant being dismissed in any event and that the employer's procedural errors would have made no difference to the outcome and this commonly referred to as a Polkey reduction following the case of Polkey v AE Dayton Services Ltd [1987] IRLR 503.
- e. Did the claimant cause or contribute to the dismissal, and if so by how much should the basic and/or compensatory award be reduced?

The Law

- 10. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. There are five potentially fair reasons for a dismissal under section 98 of the ERA: conduct, capability, redundancy, breach of statutory restriction and "some other substantial reason of a kind as to justify the dismissal" (SOSR).
- 11. If the respondent shows such a reason, then the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.
- 12. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of Burchell v BHS [1978] IRLR 379. The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response. I was referred to the case of Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, noting that a tribunal may find a dismissal outside the band of reasonable responses without criticism and highlighting the effect of disparity on fairness.

13. A claim for unfair dismissal is a claim to which section 207A applies and the relevant Code of Practice is the ACAS Code of Practice on disciplinary and grievance procedures. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) provides:-
“If, in the case of proceedings to which this section applies, it appears to the employment tribunal –
(a) the claim to which the proceedings relate concern a matter to which a relevant Code of Practice provides,
(b) the employer has failed to provide with that Code in relation to that matter, and
(c) that failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
14. Section 123(6) of the ERA provides that:
“Where a tribunal finds that a 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.” The contributory conduct must be conduct which is 'culpable or blameworthy' and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which he or he has become involved: Bell v The Governing Body of Grampian Primary School *UKEAT/0142/07*.
- 16 In relation to the facts, I heard evidence from Mr Gabsi on behalf of the respondent and from the claimant on his own behalf. Witnesses statements were adopted and accepted as evidence in chief and the witnesses were cross-examined. I also received a witness statement from Mr Hughes. As he was not present to give evidence and face cross-examination, I explained to the respondent that I could give limited weight to that witness statement.
- 17 As is not unusual in these cases, the parties have referred to in evidence of a wider range of issues that I deal with in my findings. Where I fail to deal with any issue raised by the party or deal with it in the detail of which I heard, it is not an oversight or an omission but a reflection of the relevance of that particular piece of evidence. I made findings on the balance of probability, taking into account the witness evidence in considering it alongside the available documentary evidence.
- 18 By claim form lodged at the employment tribunal on 22 July 2017, the claimant claimed unfair dismissal. The claim was defendant and the respondent lodged their response on 22 August 2017.

The Facts

1. The claimant was employed by the respondent as a shop manager, he was initially employed on 7 April 2009 and prior to the incident in question he had a good disciplinary record with the respondent. The claimant was the

manager of the respondent's betting shop in Palmers Green. There is no dispute about the facts given rise to these allegations and I refer to both the claimant's and Mr Gabsi's statement. On 14 April 2017, the claimant allowed a customer to enter the secure staff area in his Palmers Green shop. This customer was shown the dartboard and the claimant allowed him to throw three darts and thereafter escorted him back to the public area. The customer was in the staff area for approximately 30 seconds.

2. The claimant said that on 14 April 2017, he returned from the toilet to find a regular customer waiting at the counter. The claimant was the only member of staff on duty and there was only one customer in the shop at the time. This customer queried where the claimant had been. The claimant told the customer that he had been in the staff area playing darts. The claimant always advised his staff that even if they were "out the back" they must not alert customers to this. The claimant told the customer that he was in the staff area all the time. The claimant said that partly for reasons of banter and to reassure the customer, he allowed the customer into the staff area, showed him the dartboard and let him throw three darts and immediately escorted him out. The claimant considered that there was no risk of assault or robbery. He stated that there was a very low risk of the customer gaining sensitive information. The claimant said that the counter area, where money was counted, was screened off from the access to the staff area and the claimant had assessed that there were no security implications. The claimant stated that it was part of his role as duty manager to grant authorisation for visits to the shop. The shops have a number of trade people and affiliates coming behind the counter on a regular basis and the claimant is authorised to use his discretion at all times. The claimant referred specifically to security personnel or area managers who on occasion have no valid ID. The claimant said he had previously questioned a new area manager, and not allowed him access to the staff area until he had satisfied himself as to identity. It is common ground between the parties that prior to the incident in question, the claimant had an unblemished disciplinary record.
3. In 2015 the claimant was awarded the accolade of Champion Shop Manager of the Year, South Division. He had been nominated and selected by colleagues and upper management based on consistently excellent performance and conduct. The claimant was originally employed by Metro Bet Ltd and transferred to the respondent by way of a TUPE transfer on 11 July 2012. The claimant's role as shop manager included being fully accountable for the shop he manages and ensuring adherence to policies and procedures, opening and closing, training employees, managing sickness and absence, managing staff, liaising and speaking with customers and serving customers. A copy of the claimant's contract is provided at page 29 of the bundle.
4. The customer in question informed another manager, Debbie Doyle, who was visiting the shop, that he had been allowed into the staff area to play darts. Ms Doyle reported the incident to Head Office for investigation. Ms Doyle initially spoke to the claimant in respect of the incident. No written statement or note prepared by Ms Doyle could be located by the respondent. The claimant has

not seen a copy of this statement or note. The respondent conducted an investigation into the claimant's alleged actions and the claimant attended and investigation meeting on 14 April 2017. The notes of this meeting are contained at page 52 of the bundle.

5. The notice headed "Investigation, Reason: failure to follow correct security procedures by allowing a customer to come inside the staff area." The meeting was held on 14 April 2017 at approximately 8.00pm and lasted 35 minutes. The claimant was asked during the investigation whether he realised it was a serious breach of the company's security procedures. The claimant responded that he understood. He added that there were different types of breaches. The claimant was asked what could the customer have done once inside the staff area. The claimant responded, that he could have assaulted the claimant or seen sensitive information. The claimant was asked why he allowed a customer access to the staff area. He responded that he did it "for a bit of fun and to show him the dartboard". The claimant added that he tried to create a positive environment. The claimant reiterated at the end of the meeting that all he tried to do was to have a bit of fun with the customer to create a positive environment. The claimant accepted that he had breached the company's security procedures; however, he felt it could have been handled in a less formal way. The claimant felt a bit disappointed.
6. At a further investigation meeting conducted on 21 April 2017, the note states, "Jamie knows it was wrong, he noted that the customer was a regular well liked customer aged about 75 years old. Jamie was trying to create a positive experience. Jamie realised he shouldn't have done it and won't do it again..... Jamie is aware of the risks of other customers finding out and asking to look. Jamie accepts that there is always a risk, but this was a judgment call. He thinks it was a success as the customer was happy and joked about it with other staff afterwards. No other staff were present when it happened. Jamie feels what he did was trying to create an air of community in the shop.... Jamie was trying to get a relationship with the customer and accepts his judgment let him down".
7. The claimant said that he was very tired on the day of the first investigation meeting. During cross-examination, the claimant described the investigation as both reasonable and thorough. The claimant was unable to point to any further steps that the respondent could have taken in respect of the investigation.
8. The claimant was invited to a disciplinary meeting by letter dated 24 April 2017. This letter states inter alia; "you are required to attend a formal meeting..... so that matters concerning failure to follow safety and security procedures and putting company assets and colleagues at risk, in relation to permitting a customer to enter the staff area can be discussed." Prior to the meeting the claimant was provided with CCTV images showing the customer in the staff area and the notes of the two investigation meetings. The disciplinary letter also notes that as this meeting may result in disciplinary action being taken against you, which could include dismissal, you have the

right to be accompanied by appropriate Ladbrokes employee or Trade Union official.....”

9. The meeting was conducted by Mr David Gabsi. The claimant alleged that Mr Gabsi, at the outset of the meeting, made a comment saying he had only looked at the documentation 20 minutes prior to the meeting. This was denied by Mr Gabsi. Although, I did not hear from Mr Hughes, I note that his statement corroborates that a comment relating to 20 minutes was made by Mr Gabi at the commencement of the hearing. I accept the claimant’s evidence that Mr Gabsi said at the outset that he had only reviewed the papers 20 minutes beforehand.
10. The respondent refers to the documents contained at page 42 of the employment tribunal bundle being a continued list of matters potentially constituting gross misconduct, from the employee handbook. This includes “Breaching the safety/security regulations and/or procedures as outlined in ‘Safe and Secure’. At page 47 is a section which relates to a sub-paragraph of the respondent’s policy called “Safe and Secure”, part 3 contains robbery prevention advice and is headed, “counter area, colleagues security”. It states; “where shops are fitted with a secure counter. It is important that you control entry to the staff area to authorised persons only and always lock the counter door after use. Check written authority if in doubt contact Central Security and Safety control”
11. I refer to the notes of the meeting as conducted by Mr Gabsi contained at page 58 to 61 of the tribunal bundle. As the notes confirm, Mr Gabsi adjourned the meeting at 16.20 and recommenced the meeting at 16.45, where he confirmed that he had considered the matter and the claimant’s employment was summarily terminated. I note Mr Gabsi’s oral evidence. I note that in particular Mr Gabsi explained that in the respondent’s industry this lapse on the part of the claimant was considered gross misconduct because of the amount of robberies that the respondent suffers, the serious anti-social behaviour occurring in the shops and in particular in the Palmers Green North London area. Mr Gabsi reported that betting machines are commonly smashed in shops and the shops often report anti-social behaviour of the customers. Mr Gabsi noted that the distance between the door to the staff area and the till where monies were kept, was less than two metres. It would take less than five seconds to travel that distance. Mr Gabsi said that the back area contained details on customers that were barred, customers that were self excluding, there would also be on the white board details of gross wins and profits of the shop including shop performance and financial performance.
12. The claimant denied that sensitive information was contained on the walls of the staff area. Mr Gabsi in responding to the claimant’s contention that the threat was minimal due to the person in question being a regular elderly customer highlighted the instance of fraudulent customers and the possibilities that individuals may team up. Mr Gabsi was aware of the situation where a father and son had teamed up and the father in question was in his seventies. Mr Gabsi stated that in any event, should the customer

tell people that they were allowed to play darts or should other customers find out it would create a serious security risk. This could make the shop at target. In this case the customer in question did tell Debbie Doyle that he had been allowed to access the staff area to play darts. It was also possible that any such customer could have a concealed weapon or a gun. Mr Gabsi was cross-examined comprehensively in relation to his perception of the risk in respect of the particular allegation against the claimant. Mr Gabsi was clear in his response as he considered any act allowing a customer into the secure staff area was a high risk action by the claimant.

13. Mr Gabsi noted that claimant was a senior employee; Mr Gabsi stated that should the claimant's actions become in any way acceptable within the company, there would be an extremely bad outcome for the respondent's staff with a high likelihood of robbery or assault in a short period of time. Mr Gabsi said that in consideration of all of these matters, he concluded that the allegation was capable of constituting gross misconduct. Mr Gabsi noted that he had been robbed twice at gunpoint and the claimant's actions potentially made his own shop a target.
14. Mr Gabsi said that he considered the claimant's clean disciplinary record and long length of service. He also acknowledged that the claimant has co-operated throughout the process and had admitted throughout that he was guilty of the conduct as alleged. There was some confusion as to whether Mr Gabsi knew or did not know that the claimant's wife was pregnant. Mr Gabsi confirmed that to his recollection, he did not know, however it would not have made a difference to his outcome in light of the seriousness of the allegations and the potential loss and damage to the respondent. Mr Gabsi explained that there was a delay in forwarding the dismissal letter to the claimant following the claimant's dismissal. Mr Gabsi was on annual vacation until 13 May and thereafter it took ten days for him to liaise with his internal human resources department and provide the final outcome letter.
15. The claimant appealed against his dismissal and this appeal was dealt with by Mr Adam Hughes. I received a statement from Adam Hughes, however he was not present at employment tribunal as he no longer works for the company. I also considered the appeal letter as contained within the bundle.
16. The claimant's complaint in relation to the appeal was that Mr Hughes was not an independent person and that there was bias on his part due to the fact that he was Mr Gabsi's line manager. The claimant also notes that Mr Hughes was from the Coral side of the business and claims that the decision would be different had the matter been dealt with by a "Ladbroke's" manager.
17. During the delay between the claimant's dismissal and his appeal, the claimant contacted the respondent's HR department on numerous occasions. The claimant was informed during these discussions that the physical copy of the handbook that was in his possession dated 2011 was the up to date handbook. This handbook contained a double appeal process. At the appeal meeting the respondent confirmed that the handbook had been updated in

2013 and the new policy applicable to the claimant contained a single appeal policy and no further appeal would be made available to the claimant.

Deliberations

18. What was the reason for the claimant's dismissal. At the outset of the hearing the claimant's representative confirmed that it was accepted that the alleged misconduct was the reason for the claimant's dismissal. It is clear from hearing the evidence that the claimant was dismissed for allowing a customer into the staff secure area. There was a mention within the claimant's witness statement that he suspected that there were ulterior motives for his dismissal and the respondent may be searching for reasons to reduce staff headcount. There was no evidence produced in relation to any such allegation. I heard detailed oral evidence from Mr Gabsi and I am satisfied that the reason for the claimant's dismissal is related to the claimant's misconduct and in particular his actions in allowing the customer into the staff secure area.
19. Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which he was dismissed? Were there reasonable grounds to sustain that belief and was the belief formed after fair and adequate investigation?
20. In the circumstances, there is no dispute between the parties in relation to the claimant's actions. The investigation meetings were carried out promptly after the incident and accurately reflect what happened. I am unable to identify any further issues that could potentially be investigated by the respondent. Further, when the claimant was asked whether there were any deficiencies within the investigation itself, he was unable to identify any particular deficiencies within the investigation and he described the investigation as both reasonable and thorough. I note that the initial notice prepared by Debbie Doyle was not produced to the claimant. I note however that this was not relied upon by the respondent. I find that the absence of this particular document is irrelevant to the process and the investigation.
21. I have considered whether in reaching the decision to dismiss, did the respondent follow a fair procedure? The claimant complains that the disciplinary was a short meeting and that Mr Gabsi only examined the documentation 20 minutes beforehand. The claimant claims that this shows that Mr Gabsi had not given sufficient thought to the matters prior to bringing the claimant's employment to an end. Whilst I have accepted that Mr Gabsi made the comment in respect of reviewing the papers 20 minutes before the hearing, I do not believe that this in itself would constitute a procedural flaw sufficient to give rise to an unfair dismissal. From reading the notes I suspect that the context of Mr Gabsi's comment was to relay any fears on the claimant's part of any pre-existing prejudice on Mr Gabsi's part. However such a comment does give rise to reasonable questions on the claimant's part. Even the impression of haste in a serious dismissal matter is far from ideal, particularly in light of the respondent's considerable resources.

22. I also note that the disciplinary letter is not as detailed as it potentially could be in respect of highlighting the specific policy said to be breached by the claimant. This is a potential flaw, but from the documentation and the notes from the investigation, the disciplinary and appeal hearings there is no confusion whatsoever as to the allegation on the claimant's part. The dispute on the claimant's part appears to be the level of seriousness that should be attached to the claimant's actions and the appropriate reprimand.
23. During the course of the employment tribunal hearing, the claimant put forward the argument that when looking at the wording of the policy, the customer was an 'authorised person' as he had been authorised by the claimant to enter the staff area. The claimant simultaneously acknowledged that he had breached the respondent's policies. I do not accept the claimant's argument that the customer was an "authorised" person or that the claimant believed him to be so. This argument was not put forward during the disciplinary process and it is clear from the notes and evidence of both the claimant and Mr Gabsi that their understanding during the disciplinary process was that the admission of a customer to the staff area was an inappropriate action on the part of the claimant rightly considered as a disciplinary matter. I do not consider this scenario to be akin to where an employer had been previously content to rely on a senior managers skill and experience as in Newbound.
24. I have considered whether the failure on the respondent's part to specifically set out the section within their policies on which they relied in the disciplinary letter, was a potential flaw in the procedures sufficient to justify a finding of unfair dismissal. Again in these particular circumstances, I have found that there was no misunderstanding between the parties. While the failure on the respondent's part to set out the policy in detail or provide a copy of it to the claimant prior to disciplinary hearing was a flaw within the process, the claimant was not in any way disadvantaged by this failure. I consider that the procedural failure taken either individually or cumulatively are not sufficient to constitute an unfair dismissal. I note the delay between the notification of summary dismissal and the actual letter sent by the respondent to the claimant confirming his summary dismissal. Again, whilst this delay is regrettable, it does not prejudice the claimant and I do not consider it to be a flaw capable of constituting or contributing to an unfair dismissal.
25. In relation to the appeal, the ACAS code provides that where possible an appeal should be dealt with by a more senior manager than that who conducted the original hearing. This was the case and Mr Hughes was a more senior manager than Mr Gabsi. I do not consider that the respondent has a duty to provide a manager from a different part of the company or a different historic arm of the business in these circumstances.
26. I have accepted the claimant's evidence that he was told that an older version of the handbook applied and therefore he expected to have a double appeal process. This information was incorrect as the respondent had updated its handbook and reduced the appeal process to a single appeal in 2013. The claimant had been given this information at the time. The issue to be

determined however by this employment tribunal is an issue of unfair dismissal and unfair dismissal is determined in accordance with statute supported by statutory codes of practice and case law. In the circumstances, the requirement of a double appeal process is not something which is provided for within the ACAS code of practice and therefore its absence does not lead to a finding of unfair dismissal.

27. Was the dismissal within the band of reasonable responses open to an employer in the circumstances? This was the area where there was most dispute between the parties. The claimant considered his misdemeanour to be a minor one, whereas the respondent considered it to be gross misconduct. I refer that the evidence as given by Mr Gabsi and noted above. I found Mr Gabsi to be a credible and thorough witness in respect of this aspect, he was open and willing to explain his actions. I accept his evidence in respect of the gravity with which he considered the allegation. This allegation must be viewed within the context of the respondent's industry and the problems that the respondent commonly faces with burglaries and anti-social behaviour. I note Mr Gabsi's own personal experience with robberies and the seriousness with which he takes security issues and the risks that he had identified with the claimant's actions. I note in this particular circumstance although the claimant identified the risk to be minimal, this customer did tell others about his experience of playing darts in the staff area and as such I accept that this in itself has the potential to make this particular shop at target. I consider Mr Gabsi's view of the seriousness of the claimant's misconduct to be one which would fall within the band of reasonable responses. I have also considered the case of Newbound but it does not assist me and I do not consider the arguments in respect to disparity of treatment to apply in these circumstances.
28. I note that the claimant suspects that his mitigating factors in relation to a previous good record and length of service and his personal circumstances were not taken into consideration. I accept Mr Gabsi's evidence that he took the claimant's length of service and previous good record into account. I note that he did not recall having any information in respect the claimant's wife and during the hearing he confirmed that this information would not have changed his decision.
29. In looking at the evidence as a whole, I conclude that although the respondent's actions may be considered harsh, and a different employer may have imposed an alternative disciplinary sanctions short of summary dismissal in response to such an allegation, however I conclude that the respondent's actions are within the band of reasonable responses open to a reasonable employer.
30. If I am wrong in relation to the procedural aspects and the procedural flaws as identified above to the extent that they constitute an unfair dismissal, it is plain to me that there was a substantial chance that the claimant would have been dismissed in any event and that the procedural errors identified on the part of the respondent made little difference.

31. Further if I am wrong in relation to the unfair dismissal, I note that the claimant's actions have contributed to his dismissal. The claimant allowed a customer into the secure area of his shop. This was genuinely and properly considered by the respondent to be a serious security breach and as such the claimant has contributed to a large extent to his predicament.
32. In conclusion I confirm that the claimant has been fairly dismissed in accordance with the provisions of the ERA and his claim for unfair dismissal is dismissed.

Employment Judge Skehan

Date: 4 December 2017.....

Sent to the parties on: 04/12/2017....

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For the Tribunal Office