



EMPLOYMENT TRIBUNALS

Claimant: Mr N J Waters
Respondent: Age UK Trading Cic
HEARD AT: Bury St Edmunds **ON:** 6th & 7th February 2017
BEFORE: **Employment Judge Postle**

REPRESENTATION

For the Claimant: Mr M Judkins (Solicitor)
For the Respondents: Ms D Marshall (Employee Relations Manager)

JUDGMENT

1. The Claimant was not unfairly dismissed.

REASONS

1. The claim before the Tribunal is one of unfair dismissal. The Claimant's reasons for asserting this dismissal was unfair are set out at paragraph 38 of his particulars of claim.
2. In this Tribunal we have heard evidence from the appeal officer Mr S Wooldridge, the disciplining officer, Ms S Bunton, and the Claimant's line manger, Ms T Wilmshurst, all giving their evidence through prepared witness statements. The Claimant gave evidence, again through a prepared witness statement; the Tribunal also had the benefit of a bundle of documents consisting of 382 pages.
3. The Claimant was employed as an Area Sales Manager. He commenced his employment on 13th August 2012 until his employment

was terminated on 18th March 2016 for gross misconduct. At the outset of the Claimant's employment it is clear that he underwent training which included expenses processing as well as other documented areas of training within the charity.

4. The Respondent's expenses claim policy and procedure state quite clearly that the authorising manager is responsible for ensuring that they understand the policies and procedures and are familiar of what can be claimed. The procedure also clearly states that passing for payment a claim which does not comply with the policies and procedures and results in an inappropriate payment may be a disciplinary offence. The procedure also goes on to state that the travel to and from the normal place of work is not a legitimate expense for reimbursement, no matter what means of transport is used.
5. The Respondent's disciplinary procedures provide that a misappropriation of cash or property or fraud or falsification of timesheet, or knowingly receiving payment for work or services not performed or expenses claims or serious breach of trust and confidence can all amount to acts of gross misconduct. The list of examples of gross misconduct in the Respondent's policy and procedures is not considered exhaustive.
6. The Respondents first became aware of alleged conduct concerns when Clive Smith, the Payroll and Expenses Administrator, raised a concern with the Claimant on 4th January 2016 and we see that at page 185. Apparently Ms Reynolds, a direct report of the Claimant and a Shop Assistant at the Age UK Biggleswade shop, had submitted an expenses claim that Mr Smith needed to query on the basis that the claim was unsigned and didn't contain details of Ms Reynolds base shop i.e. her normal place of work. The claim was for travel from her home to Biggleswade for maternity cover. However, Mr Smith noticed that Ms Reynolds place of work on the payroll system was Biggleswade, so therefore she would be unable to claim for this ordinary commute. The Claimant provided what was later discovered to be an untruth by stating that Ms Reynolds was covering at an alternative shop, namely Letchworth, and that she was indeed based at Biggleswade.
7. As part of the enquiries Mr Smith spoke with Ms Reynolds who described this claim and others as a special arrangement between her and the Claimant and that she had been told not to disclose it to anyone else, (page 184). Mr Couldwell, a Stock Operations Manager, was then appointed as the investigating officer and he conducted a review of the expenses claims submitted by Ms Reynolds and approved by the Claimant. He found in contravention of the expenses claim policy and HMRC guidelines that the Claimant had allowed Ms Reynolds to claim for her private mileage from home to work from December 2014 which was the date that Ms Reynolds transferred to that shop. That equated to £24.75 per day and cost the charity in the

region of £3,900.00. In addition the Respondent had to declare the payments to HMRC and meet the tax obligations to mitigate the risk posed in the event of an HMRC inspection or audit. Mr Couldwell's investigation involved interviews with Mr Smith, page 194, Ms Reynolds page 197, Ms Wilmhurst, page 241 and Mr Armbruster at page 238. The Claimant was also informed of the investigation, page 191, and attended an investigatory meeting on 27th January and we see that at page 202.

8. A disciplinary investigation report was completed and dated 10th February and made recommendations that the Claimant attend a disciplinary hearing to consider allegations formally. Ms Bunton, a Divisional Sales Manager, was asked to hear the disciplinary and she therefore wrote to the Claimant on 17th February, page 252, to invite him to a disciplinary hearing, providing him in that letter with details relevant to the investigation together with the investigation report. The Claimant was informed of his right to be accompanied at the hearing and was warned that one possible outcome of the hearing could be dismissal. The allegations were set out as follows:
 - i) Falsely organising inappropriate expenses claims,
 - ii) Being dishonest by deliberately telling the Payroll Officer, Clive Smith, in an email that Lynn Reynolds was based a Biggleswade but to pay her as she covered Letchworth and Welwyn for sickness cover and holidays for a period of time,
 - iii) Bringing the charity into disrepute by introducing financial and reputational risk to the business by breaching HMRC regulations regarding home to work travel expenses,
 - iv) Agreeing payment beyond authority for travel leading to an additional approximately £4,000 in costs against the Biggleswade store which was a potential misuse of company money resulting in an additional payment to HMRC.
9. The first disciplinary hearing was scheduled for 26th February, however, the Claimant emailed on 22nd February, page 254, saying he couldn't attend the disciplinary on the grounds that he had not had time to arrange for his companion to attend with him. The Respondent accepted this and rearranged the meeting to be held on 4th March and an email was sent to the Claimant to confirm the new date and time on 23rd February, at page 256. Thereafter the Claimant submits a statement of fitness to work declaring him unfit (page 259) because of stress and that was for 1 month. The fit note did not suggest he was unable to attend any disciplinary hearing, nor did the Claimant provide a note from his doctor that due to his stress he would be unable to attend a disciplinary hearing.
10. On 3rd March a further letter was sent to the Claimant providing him with a third meeting date for the disciplinary matter. Given the fact at this stage there was no clear likely duration of the Claimant's absence, and since the Respondents considered the disciplinary matter was

serious, it was felt that the matter should proceed without further delay. The Respondents therefore provided the Claimant with a number of possible adjustments in order to make a meeting more accessible to him. These adjustments were to include: having a meeting at an alternative location; allowing the Claimant to respond to the allegations in writing; and allowing the Claimant to make any suggestions for adjustments that he would require for the meeting. The letter made it clear that suggested adjustments were not limited in nature. The Claimant was now failing to take calls or provide any details as to the likely date, either of his return to work or attend a disciplinary hearing, therefore on 8th March a further letter was sent to the Claimant to confirm that since this was the third attempt to hold the meeting it would now be going ahead in his absence and he was urged to contact the Respondents. A letter was received from the Claimant on 9th March simply stating that he was signed off unfit for work and that he would not be attending any meetings during this period and suggested that all meetings be rescheduled for when he was able to return to work. Again, at no point does the Claimant offer an alternative date or any idea as to his likely duration of absence.

11. The Respondents therefore took the decision to proceed with the disciplinary hearing in the Claimant's absence on 11th March and despite the fact that questions were provided to the Claimant in advance of the hearing for his response, the Claimant failed to respond to those questions. Ms Bunton, having reviewed the investigation report considered the allegations. She decided it was reasonable to provide the Claimant with one further opportunity to respond to the questions that had previously been provided. The disciplinary was therefore adjourned to allow the Claimant to respond. The Claimant did respond on 14th March but raised concerns that he hadn't been provided with a signed version of the investigatory meeting notes and was suggesting that parts of those notes were inaccurate. This was despite the fact that the Claimant had been in possession of those documents for some four weeks by this date.
12. The Claimant was therefore asked by Ms Bunton to provide his amendments to the notes so she could take those into account when reaching her decision on the disciplinary allegations. Ms Bunton considered all the evidence and on 18th March took the decision to dismiss the Claimant on the grounds of misconduct. The dismissal was with immediate effect and a letter setting out the reasoning for dismissal was sent out and dated 24th March giving the Claimant a right of appeal. The main reasons for her decision are set out in that letter at pages 306 through to 313. They are detailed and comprehensive.
13. The Claimant did raise an appeal by letter of 5th April. The main grounds for his appeal were that the process was unfair in that the hearing was held in his absence and that the investigatory meeting notes were inaccurate. That any errors in expenses claims should be identified by the expenses payroll team and they hadn't for over year.

Further the Claimant's view that he lacked training in expenses procedures and policies. The appeal hearing took place on 20th April and was conducted by Mr Wooldridge, Head of Retail Operations. The Claimant attended in person without anybody accompanying him.

14. It is clear the appeal was lengthy and detailed and the Claimant had every opportunity to respond to all matters raised by Mr Wooldridge and indeed could raise any matters that he would have done in the disciplinary hearing and had not been able to do so given his absence. Indeed, when he was asked by Mr Wooldridge, in effect the Claimant failed to provide any additional information in defence of the allegations against him.
15. Mr Wooldridge considered the matter and took the view on balance, he didn't believe the Claimant. The reasons for that were: Ms Reynolds' statement confirming that the Claimant had approved this arrangement by which she would be paid effectively from home to her normal workplace; the original email in which the Claimant lied to Mr Smith regarding Ms Reynolds' expenses claim; the fact that Ms Reynolds had omitted her base location from the expenses claim and the Claimant nevertheless signing them; and the Claimant's changing version of events from his initial conversation throughout the process. He therefore confirmed the decision that the dismissal would remain and that was set out in a letter to the Claimant on 28th April, again, a comprehensive letter, at page 345 through to 349.

15. The Law

15.1 The starting place is at section 98(2) of the Employment Rights Act 1996. Firstly what is the potentially fair reason to dismiss; in this case it would be conduct. The Tribunal then has to have regard to the matters set out in section 98(4) and in doing so, one will consider the well trodden path of *British Home Stores Limited v Burchell* [1980] ICR 303. Here the employer must show it must believe the employee is guilty of misconduct, thereafter the burden of proof is neutral in that it had to have 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 all the circumstances. It does not have to be a counsel of perfection the investigation.

15.2 I remind myself this means that the employer need not have conclusive direct proof of the employee's misconduct, only a genuine and reasonable belief, reasonably tested. At that stage one then has to consider whether the sanction of dismissal is within the band of a reasonable response of a reasonable employer and in that respect I remind myself not to substitute my own view. Was the sanction of dismissal a sanction that was appropriate and could be invoked by the Respondents having

regard to the facts known to them at the time they took the decision to dismiss.

16 Conclusions

- 16.1 Firstly I consider whether one of the main arguments of the Claimant that there was some procedural flaw in not being able to attend the disciplinary hearing. It is true that the Claimant was absent due to stress. At the time he had a fitness note "not to attend work certificate". The ACAS code does not state that the failure to allow a Claimant to attend a disciplinary hearing will be fatal. It is clearly desirable wherever possible for a Claimant/employee to attend a disciplinary hearing but, I repeat, not fatal. In this case it was not fatal as any failure to attend the disciplinary hearing would have been cured by the comprehensive and detailed appeal that was carried out by Mr Wooldridge. The Claimant at that stage had every opportunity to put forward his case, answer the allegations by putting forward any views that he felt would have changed the disciplining officer's mind bearing in mind the disciplining officer's decisions contained in her letter. Going back to the disciplinary hearing it is quite clear that Ms Bunton believed that the Claimant was responsible for misconduct. That misconduct, as the Claimant now seems to accept, was in authorising payments for a junior employee for expenses for travelling from home to her base place of work. That is never allowed under any circumstances under the HMRC rules. If an employer is to pay an employee for travelling from home to normal place of work they would have to pay tax on those travelling expenses.
- 16.2 It is clear to me that the Claimant was trained and as an experienced manager if he was in any doubt as to what he was signing and authorising he should have checked with the payroll department. It is simply not good enough or conceivable as Ms Bunton seems to have believed and the appeal officer accepted, that the Claimant should put all the emphasis on payroll in checking expenses claims, and the Claimant should simply sign forms authorising expenses and expecting payroll to work out who worked where, when etc. particularly in circumstances where the forms for the entire twelve months when these payments were authorised had omitted the base address.
- 16.3 It is also clear that Ms Bunton had reasonable grounds upon which to sustain her belief in the allegations put forward that he was effectively falsifying and authorising inappropriate expense claims, deliberately telling the payroll officer that Ms Reynolds was based at Biggleswade and to pay her when she covered Letchworth and Welwyn, stating she was either on maternity or sickness cover and agreeing payment beyond the Claimant's authority for travel, leading to additional expenses incurred by

the Respondents. Those three matters on the evidence before Ms Bunton, would not have been difficult to conclude in the Claimant's misconduct. Furthermore, it is clear at this stage when she formed that belief into the misconduct there had been sufficient and reasonable investigation into the allegations. In this case I am entirely satisfied this was a reasonable and thorough investigation, from which Ms Bunton was entitled to conclude misconduct in respect of the allegations.

- 16.4 I am therefore entirely satisfied that this was a fair dismissal, any procedural flaw would have been cured by the extensive detailed and thorough appeal and that the decision to dismiss for misconduct was within the band of a reasonable response of this employer given the facts known to Ms Bunton at the time she took the decision.

Employment Judge Postle, Bury St Edmunds

JUDGMENT SENT TO THE PARTIES ON

21st February 2017

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FOR THE SECRETARY TO THE TRIBUNALS