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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr L Jakubowski

AND

Acorn of London Limited

Heard at: London Central

On: 10 September 2018

Before: Employment Judge Burns

Representation

For the Claimant: In person

For the Respondent: Mr K Sonaike (Counsel)

JUDGMENT

1. The unfair dismissal claim is dismissed.
2. The Respondent's application for costs is dismissed.

REASONS

1. The Claimant claimed unfair dismissal.
2. I heard evidence from the Respondent's witnesses Kevin Murtagh, Patrick Murtagh and Adam Celiz and then from the Claimant and I was referred to documents in a bundle. The case started at 2pm because Mr Jakubowski had not been given the proper Hearing date. He arrived shortly before 2pm and was ready to proceed. He gave his evidence through an able Polish interpreter.

Finding of facts

3. The Respondent company provides cleaning services in student accommodation.
4. The Claimant started work as a cleaner for the Respondent on 19 May 2013. In June 2013 his main work changed from being a cleaner to being a driver.

5. On 8 April 2016 he worked as a driver until about 4pm and was then asked to do some extra cleaning duties by a manager in Building 13. He did about forty minutes cleaning work there starting at about 4pm. At about 5pm he started a bout of drinking alcohol in the company of other colleagues and his manager in one of the flats in Building 13. He became extremely drunk, he was observed sleeping on a sofa at about 6pm by various of his drinking companions before they left at 6.25pm.
6. The CCTV which I have seen records the Claimant a little later leaving Building 13, staggering about barely able to stay on his two feet, and obviously extremely drunk. He was on his way to Building 19 in order to get changed out of his work attire before going off home.
7. He arrived at Building 19, was let in by a security guard and then attempted to negotiate the flight of fifteen stairs which lead down to a basement where his clothing etc were stored, but, being extremely drunk, lost his footing and fell down the stairs. He suffered a head injury and injuries to both hands and his fingers, was taken and admitted to hospital, had various procedures, and was absent from work for a considerable period of time before returning to work.
8. The Respondent investigated the incident at the time, looked at the CCTV and took statements and found out that the Claimant and others had been drinking that evening in Building 13, but decided not to take any disciplinary action because drinking alcohol in the flats seems to have been a widespread practice amongst certain employees at least at the time, and no anti-alcohol policy was in place at that time.
9. The Claimant instructed Geoffrey Leaver solicitor to pursue a personal injury claim against the Respondent and gave instructions via a Polish legal worker within the firm of Geoffrey Leaver as to how he had been injured. He did not tell the legal worker that he was drunk and had been drinking before the accident.
10. In December 2017 the Respondent received a protocol letter of claim dated 6 December from the solicitor notifying a proposed substantial claim by the Claimant for damages against the Respondent arising out of the incident on 8 April. The letter deals with the circumstances of the accident (provided by the Claimant to the solicitor) as follows:- *“The Claimant was working as a driver and cleaning assistant. At the time of the accident he was employed as a site cleaner and part time driver. He was cleaning some flats. He was told by his supervisor that there was a lot of work to do and that he must work quickly to get everything done. He tripped on the stairs.”*
11. Thus the letter suggests that the Claimant was injured in the course of his employment while working and that the direct and only cause of the accident was that he was being put under pressure by a supervisor (who had told him there was a lot of work to do and he must work quickly to get everything done) and was a consequence of that he tripped on the stairs. That was false. The reason for him falling down the stairs was that he was drunk. He had been cleaning earlier in the evening but was no longer working and had come off duty when he was injured, and the cleaning he had done earlier had nothing whatsoever to do with

him falling down the stairs. He was not in a rush, and when he fell down the stairs he was on his way to get changed after the drinking session.

12. At the time the letter was sent by the solicitor to the Respondent a copy was sent to the Claimant, who, although he does not read English himself, has his sister to translate English text to him. He was aware of the false version of events which had been put forward on his behalf.

13. When the Respondent received the letter, its officers regarded it as an attempt to extort money from the Respondent by a means of a fraudulent claim based upon obviously false facts. The Respondent commenced a disciplinary process against the Claimant in relation to the letter.

14. The disciplinary process was in accordance with the ACAS guidelines.

15. The Claimant did not admit at the disciplinary hearing that he had been drunk. Instead he suggested that the various witnesses who had seen him drinking and drunk were lying. He belatedly agreed that the solicitor's letter was wrong and promised that he would correct the matter with the solicitor, but he never did.

16. The Claimant was summarily dismissed on 24 January 2017 for gross misconduct.

Consideration

17. I apply the **BHS v Burchell Test**.

18. The Respondent had a genuine belief that the Claimant had been guilty of gross misconduct, namely deliberately putting forward a false version of events in order to try to extract money from the Respondent. The version was false both in what it stated positively (namely that he fell down the stairs because a supervisor had told him to hurry up) and it was false in what it did not say (namely that he was very drunk when he fell down the stairs). He was responsible for the false version and he had not taken the opportunity to correct it, but had instead attempted to defend that version and suggest that somebody else was lying.

19. The Respondent had reasonable grounds for reaching that conclusion, namely the witness statements of other employees and the CCTV footage, as well as what was stated by the Claimant when he was investigated and at the disciplinary hearing.

20. The Respondent carried out a reasonable investigation.

21. Dismissal was within a range of reasonable responses. The Claimant had a clean disciplinary record previously but then had been guilty of advancing a false version of events in order to try to extract a payment of damages to which he plainly was not entitled.

22. The misconduct breached the implied term of trust and confidence and would make the Respondent doubt the Claimant's honesty, which was a serious matter

because as a driver the Claimant had charge of Respondent's credit cards and petrol cards.

23. For these reasons I find that this was a fair dismissal and the Claimant's claim is dismissed.

24. The Respondent made a cost-application stating that the claim had been misconceived, based on an attempted fraud, and that the Claimant had unreasonably declined an offer of £1,000 made for commercial reasons before the final Hearing.

25. I have decided not to award costs. The Claimant is not a sophisticated person, and he clearly has little or no understanding of Employment Law. I am not satisfied that the Employment Tribunal claim was entirely misconceived, as I myself had a number of points I wished to clarify before I was able to reach my conclusion that a dismissal had been fair. Furthermore, the Claimant is not well-off financially as he works for a basic wage, he has no savings and lives in rented accommodation and he tells me that he barely comes out of the end of the month. I think that if costs were ordered in these circumstances would cause him undue hardship, so for these reasons I refuse to make a cost order.

Employment Judge Burns

Dated 23 September 2018

Judgment and Reasons sent to the parties on:

24 September 2018

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For the Tribunal Office