



EMPLOYMENT TRIBUNALS

Claimant: Mr F Ward

Respondent Moorcroft Construction Limited

HELD AT: Liverpool **ON:** 12 December 2017

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: In person
For the Respondent: Mr D Jones, Solicitor

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. the claimant's claim of unfair dismissal is not well-founded and is dismissed; and
2. the claim for notice pay is dismissed.

REASONS

1. This Judgment is given with reasons because, although the case was listed for a day's hearing, the oral evidence and parties' submissions were completed only at the very end of the hearing day. As there was insufficient time for the tribunal to reach its decision on the same day, the tribunal reserved its judgment.

Background

2. On 20 August 2017, the claimant presented claims of unfair dismissal and for notice pay arising from his summary dismissal by the respondent on 30 March 2017.
3. An agreed bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. References to page numbers in these Reasons are references to the page numbers in the agreed bundle.
4. The claimant gave evidence from a written witness statement and was subject to cross examination. For the respondent, Mr Miles Platt, managing director, and Ms Janice Platt, finance director appeared as witnesses; each gave evidence from a written witness statement and were subject to cross examination.

Issues to be determined

5. At the outset it was confirmed with the parties that the issues to be determined by the tribunal were:-

Unfair dismissal

- 5.1 Whether the claimant was dismissed for a potentially fair reason, namely conduct, within the meaning of section 98 of the Employment Rights Act 1996 ("ERA");
- 5.2 If so, whether the respondent acted fairly and reasonably in the circumstances within the meaning of section 98 (4) ERA in treating the reason as a sufficient reason for dismissing the claimant. In particular:
 - 5.2.1 Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
 - 5.2.2 If so, did the respondent have reasonable grounds for its belief?
 - 5.2.3 Did the respondent follow a fair procedure, including a reasonable investigation?
- 5.3 Whether dismissal was within the range of reasonable responses open to a reasonable employer in the circumstances of the case;
- 5.4 Whether, if there were any procedurally failings which rendered the claimant's dismissal unfair, the claimant would still have been dismissed had a fair procedure been followed;

- 5.5 Whether, if the claimant was unfairly dismissed, any compensation should be reduced by reason of the claimant's conduct, and if so, by what measure.

Notice pay

- 5.6 Whether the claimant's conduct constituted gross misconduct so as to justify summary dismissal;
- 5.7 If not, what notice of termination of employment was the claimant entitled to receive in the circumstances, whether under section 86 ERA or pursuant to his contract of employment;
- 5.8 If so, what amount of notice pay is owing?

Findings of fact

6. The tribunal made findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues which have been determined are as follows.
7. The claimant started working for the respondent on 1 March 1994 as a plumber. He had previously served an apprenticeship but had undertaken no formal training since he was 21 years old, save that he might occasionally update himself informally, by adopting new practices if and when he saw other tradesmen use such. In recent years, and in response to requests by customers for evidence of the training and qualifications of its employees and/or the requirements of industrial certification bodies including the CITB, the respondent had made several requests to the claimant to supply details of his training and qualifications. However, the claimant had never provided the respondent with any of the requested paperwork.
8. On 10 October 2014, the claimant signed a contract of employment which included a provision that he "... *shall diligently exercise such powers and perform such duties as may from time to time be assigned to [him] ...*".
9. The respondent has a staff handbook which includes disciplinary rules at schedule 9. These include a list of matter considered to be gross misconduct, which includes "Causing loss, damage or injury through serious negligence".

10. The respondent is run by 3 directors, Mr Platt, Mrs Platt and Mr Bailey, all of whom are involved in the day-to-day running of the business.
11. On 23 February 2017, the claimant was asked to attend and repair a hot water boiler at a customer of the respondent. The repair was done the following day and included installing new joints to chrome pipe work.
12. On 2 March 2017, the respondent was informed by its on-site supervisor that one of the joints had come apart, causing a flood at the customer's premises which necessitated isolating the electrical power supply. The claimant was sent back to replace the failed joint which he did with an alternative compression joint.
13. On 8 March, the respondent received an email of complaint from its customer, detailing that the claimant had used an incorrect, plastic fitting on chrome pipes, that the fitting had failed within a few days, flooding the customer's changing rooms and workshop, and that this required the electrics and water to be turned off for around 3 hours while the customer cleaned up. The customer questioned the claimant's competence and stated that it would prefer an alternative plumber to come to their site in future. The respondent replied immediately, apologising and to confirm that an alternative plumber would be sent in future.
14. The customer's email was followed by a more formal letter from the customer, which ended with a statement that it would seek to find an alternative source for plumbing works until the respondent could satisfy it of the claimant's competence.
15. On 17 March 2017, the claimant attended an investigatory meeting with the respondent's director, Paul Bailey. The claimant disputed that he had done anything wrong or been negligent. At the end of the meeting, he was suspended on full pay pending further investigation and he was invited to submit any documents or names of witnesses who may be relevant to the matter.
16. Mr Bailey made further enquiries of the customer, concerning the cost of the damage and lost production time, and the respondent attempted to estimate the value of lost business. Mr Bailey prepared a short report on the incident which was sent to the claimant with a letter inviting him to a disciplinary hearing to face allegations that (1) he had been grossly negligent and caused significant damage and disruption to a customer and (2) that he may have caused a breakdown in trust and confidence by causing damage to the respondent's reputation and irreparably damaged the relationship with the customer.
17. On 28 March 2017, the claimant attended a disciplinary hearing which was chaired by Mr Platt, the respondent's managing director. The claimant was accompanied by his union representative and stated that the joint was in order when he left it, that it had not failed immediately and he suggested

it could have been tampered with. When the claimant was asked whether he had considered researching the type of repair required, he dismissed the suggestion although he confirmed that he was unaware that the joint he had used was not recommended for chrome pipes.

18. On 30 March 2017, the respondent wrote to the claimant to confirm that his employment was terminated without notice or pay in lieu, for gross negligence and loss and damage to the respondent's reputation.
19. On 4 April 2017, the claimant appealed against his dismissal on the basis that the decision was unfair, predetermined and did not reflect his long service. He complained of a lack of training and lack of support from management and he denied that he was incompetent or negligent.
20. On 25 April 2017, the claimant attended his appeal hearing, which was chaired by Mrs Platt, the respondent's finance director. There had been a slight delay in convening the meeting due to the unavailability of the claimant's union representative. Mrs Platt conducted the appeal as a review of the decision to dismiss the claimant although, as one ground of the claimant's appeal had been his record and contribution to the respondent, the discussion also covered previous matters for which the claimant had been disciplined. In respect of the fault at the customer's premises, the claimant contended that he was not grossly negligent because he did not know what he was doing and he stated that "plumbers learn the hard way".
21. On 8 May 2017, Mrs Platt wrote to the claimant to confirm that his appeal was unsuccessful. Mrs Platt also confirmed that no previous issues relating to the claimant's conduct were taken into account by her in reaching her decision, despite that there had been a discussion of the claimant's record at the appeal hearing.

The Law

22. A concise statement of the applicable law is as follows:

Unfair dismissal

23. Section 98 of the Employment Rights Act 1996 sets out a two stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's conduct.
24. Conduct is a potentially fair reason for dismissal under Section 98 (2) (b) of the Employment Rights Act 1996.

25. If the employer shows a potentially fair reason in law, the tribunal must then consider the test under section 98 (4) of the Employment Rights Act 1996, namely whether, in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.
26. In considering the reasonableness of the dismissal, the tribunal must have regard to the test laid out in the case of British Home Stores -v- Burchell [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief; and the tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances.
27. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so matters which come to light during the appeal process can also be taken into account: West Midlands Co-operative Society Ltd -v- Tipton [1986] IRLR 112.
28. The tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd -v- Hitt [2003] IRLR 23.

Notice pay

29. Section 86 of the Employment Rights Act 1996 provides that an employer is required to give minimum notice to an employee to terminate his contract of employment. The minimum period of notice which an employer is required to give to an employee, where the employee has been continuously employed for one month or more, is one week's notice for each completed year of service up to a maximum of 12 weeks' notice. However, an employer is entitled to terminate the contract of an employee without notice in circumstance of gross misconduct.

Conclusions (including where appropriate any additional findings of fact)

30. The tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

31. The tribunal was satisfied that the respondent had demonstrated that the reason for the claimant's dismissal was his conduct, which is a potentially fair reason in law. The claimant had performed a repair which had subsequently failed, causing loss and damage to the respondent and its customer. The respondent had received a complaint from a valuable customer which had chosen to source future plumbing work elsewhere. The claimant did not suggest any alternative reason for his dismissal.
32. The tribunal considered that the respondent had reasonable grounds for its belief in the claimant's misconduct. It was the respondent's belief, which the tribunal accepted as reasonable, that the claimant was responsible for the failure of the joint, through being careless, amounting to negligence, in his approach to and execution of the job he performed. Whilst the claimant sought to suggest that the failure may have had nothing to do with his workmanship, there was no evidence to support his assertions that the job could have been tampered with, or that the customer was lying about the fault in order to avoid paying the bill - an assertion that simply lacked credibility.
33. There was, however, ample evidence to support the respondent's belief that it was the claimant's actions which were the cause of the flood. He had performed the work and he accepted under cross examination that his work had not been correct and that he could have researched the job when he did not know what to do. When asked how he might know what to do and which joint(s) to use, the claimant stated that he would "just use whatever he had in the van" even though he confirmed that there was a plumber's merchant very close by to the customer's premises, if he needed a particular joint or advice. The claimant also sought to lay the blame for his workmanship at the respondent's door complaining of a lack of training, although he accepted in evidence that he had never requested training or complained about a lack of training before.
34. The tribunal also considered that the respondent's investigation into the allegations which the claimant faced was sufficient in the circumstances of the case. The claimant was invited to an investigatory meeting on 17 March 2017 and was given an opportunity to explain and respond to the complaint. The claimant was then invited to produce documents and witnesses, but he did not do so. The claimant later sought to suggest that he had not had a proper opportunity to call witnesses but neither he, nor his union officer, sought a postponement for that purpose, nor did he provide names of witnesses who might assist him.
35. The claimant took issue with the way the disciplinary process was conducted by the respondent. The claimant alleged that Mr Bailey's influence, and also that of Mrs Platt, was apparent throughout the disciplinary process, and tainted it, such that the respondent's decision to dismiss was effectively pre-determined. In this regard, the claimant pointed to Mr Bailey's apology to the customer when the complaint was

first received, and the claimant contended that the respondent should not have apologised and that by doing so, Mr Bailey had already made up his mind about the claimant's guilt. The tribunal rejected this submission, taking the view that Mr Bailey had acted properly in response to the customer's complaint, but that such a response did not have any bearing on the conduct of the disciplinary process by the other directors, or its outcome.

36. The claimant described the disciplinary hearing as a sham but the tribunal did not agree with that assessment particularly as, when the claimant was asked direct questions in cross-examination about what had been said at the disciplinary hearing, he resorted to saying that he could not remember, or he sought to take issue with matters that he had relied upon in his own witness statement.
37. The tribunal noted that the respondent's 3 directors worked closely together in the running of the business and may well have been aware of the ongoing disciplinary proceedings, given the limited administrative resources of the respondent. However, there was no evidence to support a suggestion of influence over either Mr Platt or indeed Mrs Platt in their deliberations, by any other director. Each decision maker had received advice separately from the respondent's solicitors. Whilst Mr and Mrs Platt are married, the claimant accepted that there was no other senior individual who could have handled the appeal, except Mrs Platt, given that the third director, Mr Bailey had dealt with the customer complaint and the investigation. Both Mr Platt and Mrs Platt presented as competent decision-makers, through their explanations of their decisions and the tribunal was satisfied that both of them carried out their roles with diligence and independence.
38. For all the above reasons, the tribunal concluded that dismissal fell within the range of reasonable responses open to the respondent in the circumstances of this case. The misconduct was serious – gross negligence causing loss and damage to the respondent and to its customer. Such conduct is defined in the respondent's disciplinary procedure as gross misconduct.
39. The tribunal heard from Mr Platt that, in considering whether dismissal was appropriate, he had given thought to whether it might be possible to redeploy the claimant to another site or to other work but he concluded that such was not realistically possible, particularly given that the respondent had only a limited amount of plumbing or general labouring work at a few sites.
40. In all the circumstances, dismissal was a reasonable sanction and one which the tribunal considers fell within the band of reasonable responses in the circumstances of this case. The dismissal was therefore fair both substantively and procedurally.

41. Notice pay: The tribunal concluded that the claimant's conduct constituted gross misconduct so as to justify summary dismissal and so the claimant is not entitled to pay in lieu of notice.

Employment Judge Batten
Date: 4 January 2018

JUDGMENT SENT TO THE PARTIES ON:

11 January 2018

FOR THE TRIBUNAL OFFICE