EMPLOYMENT TRIBUNALS

Claimant: **Mr Calvin Hadley**

Respondent: **Decx Limited**

Heard at: **Nottingham** **On:** **30 October 2018**

Before: **Employment Judge Moore**

Representation
Claimant: Mr Hadley (claimant's father)
Respondent: Mr Geeves - Director

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.
2. The claimant's claim for wrongful dismissal fails and is dismissed.
3. The claimant's claim for unauthorised deduction from wages fails and is dismissed.

REASONS

Background

1. This is a claim for unfair dismissal, wrongful dismissal and unauthorised deduction from wages. The ET1 was presented on 28 May 2018. The claimant was dismissed on 20 February 2018. The claim was heard at Nottingham Employment Tribunal on 30 October 2018. Neither party was legally represented. There was an agreed bundle of documents. Witness evidence was heard from the claimant and three directors of the respondent; Mr M Geeves, Mr A Guyler and Ms J Guyler.

2. The issues before the Tribunal were explained to the parties and were as follows:-

3. Unfair Dismissal – S98 Employment Rights Act 1996

a) Has the respondent shown the reason for dismissal? The respondent relied upon conduct which is a potentially fair reason for dismissal.

b) Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

c) Was the dismissal within the range of reasonable responses?

d) Was there a failure to comply with the ACAS code?

e) Did the Claimant contribute to his own dismissal?

4. Wrongful dismissal

a) Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment thereby entitling the Respondent to summarily terminate the contract?

Relevant Law

5. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996. The relevant sections provide:

Section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(b) relates to the conduct of the employee,
….
(4) [Where] the employer has fulfilled the requirements of subsection (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.

6. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

7. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439.** The test was formulated in the following terms:

i. "Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

ii. the starting point should always be the words of [s 98(4)] themselves;

iii. in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

iv. in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

v. 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, another quite reasonably take another;

vi. the function of the Industrial 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 falls outside the band it is unfair'.

8. In assessing whether the claimant's conduct amounted to gross misconduct that conduct must be deliberate wrong doing or gross negligence. In the case of deliberate wrong doing it must amount for wilful repudiation of the express or implied term of the contract **(Sandwell and West Birmingham Hospitals NHS Trust v Westwood).**

9. If the dismissal is procedurally unfair I must assess the percentage chance of the Claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].**

10. I must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

11. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. S123 (6) provides that where the tribunal finds that the 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.

12. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Findings of fact

13. The claimant was employed by the respondent as an Installation Manager. He commenced his continuous period of employment on 1 May 2015 having previously worked as a sub contractor. His duties involved installing Christmas lights and displays in shopping outlets and town centres throughout the country. He was the responsible person on site leading an installation team. The respondent is a small business with six employees. Their main client was a well known designer outlet shopping centre with locations throughout the UK.

14. During the installation period before Christmas 2016 the respondent had received some negative feedback from their customers. Following this in February 2017 Mr Guyler held a 'lessons learned' feedback meeting with all staff and reiterated the standards of work and behaviour expected from all employees. Mr Guyler also conducted formal staff appraisals to discuss individual performances. The Tribunal had sight of the claimant's appraisal form. It was highlighted to the claimant that he needed to improve in customer focus, communication and focus on quality. Specifically, in "focus on quality" the claimant was advised that he needed to take less on trust from his teams and ensure he is happy and confident to sign schemes over to the customer. It was stressed quality assurance was fundamental to his role.

15. Mr Guyler also devised and the claimant agreed to an “Install Team Agreement” in October 2017. This was a written agreement, described as an incentive scheme to ensure that work was completed to a satisfactory standard although in reality this would be achieved by deducting 25% of wages due if work overran or had to be re-worked due to poor workmanship or negligence by the person responsible.

16. On 18 December 2017 Mr Guyler was asked to attend a meeting at one of their clients in Middlebrook, Bolton. Mr Guyler made a note of the meeting which recorded that the client had been generally unhappy with the overall installation. The claimant later disputed that the issues were of his making and asserted that the client was angry due to Mr Guyler promising and not delivering on a service. Mr Guyler’s note of the meeting recorded that the client directly stated they were met with resistance from the claimant when raising issues with him and had to repeat instructions.

17. On 10 January 2018 the claimant was responsible for leading the take down of Christmas decorations at the shopping outlet in East Midlands. He had previously requested additional persons to help with the work. Mr Guyler became concerned after receiving a text from a team members advising they had left behind some decorations and arranged for his sister also an employee to visit and check the site on 11 January 2018 who returned with a bag of rubbish and photographs of several items that had been left behind. It should be noted that the take down had to occur at night so it would not have necessarily been possible for the claimant to have observed black cable ties discarded on gravel at the time.

18. On 19 January 2018 Mr Guyler was contacted by the Marketing Director of the East Midlands shopping outlet and required to attend a meeting outlining their concerns of the install and takedown. At the meeting on 23 January 2018, the client complained that they were unhappy with the service referencing lack of respect by the team, leaving rubbish, site regulations not being adhered to and stress being caused to the shopping centre management.

19. The claimant was involved in supervising a further takedown of Christmas decorations at Cheshire Oaks between 14-18 January 2018. A fifth night was agreed by Mr Guyler if necessary and this was utilized by the claimant.

20. On 22 January 2018 Mr Guyler was contacted by the Operations Manager of Cheshire Oaks who was unhappy at the take down and complained it had not been completed. Mr Guyler visited the site the next day and complied a report of issues that gave him concern. These included lights still in Christmas trees, fixing eyes used for overhead garlands, loose cables, and plugs used to secure eyes not painted over.

21. The claimant was due to take a period of leave from 23 January 2018. Mr Guyler arranged for two contractors to go back to Cheshire Oaks and finish the take down to the required standards which cost just over £500.00. In addition, the respondent had to hire access equipment for the works to the cost of £384.00.

22. Whilst Mr Guyler was at Cheshire Oaks a dispute arose with the claimant over use of the company van during his leave. The claimant thought it had been agreed he could keep the van during his leave but was informed at some point prior to 23rd January it was needed for the following Monday. On 23 January 2018 he text Mr Guyler to ask if it was ok to keep it until the Sunday as he needed to unload his tools but Mr Guyler did not reply. I find there was a genuine belief by the claimant that he had been authorized to use the van at least until the Sunday however on 24th January 2018 a misunderstanding arose between Mr Guyler's sister who thought the claimant was taking the van for the duration of his leave. This led to Mr Gulyer's mother Ms J Guyler contacting the claimant and insisting the van be returned immediately. When the claimant arrived back with the van Ms J Guyler informed him and a colleague called Adam they were under investigation for the issues that had arisen at East Midlands and Cheshire Oaks.

23. There was no corroborating documentary evidence of the complaints received by Mr Guyler in the form of emails or letters. Mr Guyler explained it was difficult to ask clients to put complaints of this nature in writing. Mr Guyler complied written notes of his meetings which were subsequently provided to the director that undertook the disciplinary hearing.

24. Mr Guyler met with Mr Geeves another company director over the weekend of 27/28 January 2018 and it was decided there should be a disciplinary procedure instigated against the claimant. A letter was sent from Mr Guyler setting out the allegations and advising him of the right to be accompanied. The claimant was advised the directors believed the claimant's behavior represented gross misconduct.

25. The hearing was rearranged to take place after the claimant's holiday on 16 February 2018. The claimant had been sent a copy of the evidence upon which the respondent was relying. The claimant was represented by a Mr Hoare who was a friend of the family and a former volunteer from Derby Law Centre. Mr Geeves was the director conducting the hearing also in attendance was Mr Guyler. The hearing was recorded and a record of the discussion typed. There was a dispute regarding the notes and the claimant had produced his own transcript which contained an extra 70 lines . It was put to Mr Geeves that he had not considered all of the evidence as the respondent's notes missed 70 lines of additional discussion although the claimant was unable to point to any specific missing matters that were said to have unfairly affected the outcome. Mr Geeves was clear that he had based his decision on what he had heard at the hearing not the transcript.

26. The claimant's position in relation to Cheshire Oaks was that he accepted he had not undertaken a "walk round" or a final check which was a mistake but not serious negligence and that some items may have been missed but these were minor and did not warrant a charge of gross misconduct. Further that he trusted the team to do the job properly. He disputed that the arches should have been painted and also that he was not aware that additional Nutcrackers had been installed. The claimant understood the Install Team Agreement as authority that everyone worked a system that should have seen the work completed in full

27. The claimant accepted in cross examination that he had been aware that the contract the respondent had for the installation and takedown of Christmas decorations at the large shopping outlets was up for tender.

28. The hearing was adjourned and Mr Geeves wrote to the claimant on 18 February summarily dismissing him for gross misconduct. The letter stated that they had decided the claimant's negligence at Cheshire Oaks constituted gross misconduct. The decision was taken by Mr Geeves independently of Mr Guyler. The claimant appealed, and an appeal hearing took place on 15 March 2018 conducted by the only remaining director who had not been involved in events other than the van issue, Ms J Guyler. The appeal was not upheld, and this was confirmed on 26 March 2018.

29. Part of the claimant's appeal was that he had been treated differently to another employee who had not been dismissed for the same misdemeanors. Ms Guyler concluded that the different sanction was appropriate as the other team member was more junior and the claimant as the Install Manager was ultimately responsible.

30. The sum of £275.00 was deducted from the claimant's final pay slip in respect of a 25% deduction pursuant to the Install Team Agreement discussed at paragraph 15 above.

Events post dismissal

31. Following the claimant's dismissal, the respondent lost the contract for the shopping outlet which was their biggest client.

Conclusions

Unfair dismissal

32. There was no serious dispute between the parties that the claimant had been dismissed for conduct. That is a potentially fair reason. The issues in dispute was alleged shortcomings in the procedure and whether the conduct was serious enough to have warranted summary dismissal.

Discussion - Procedure

33. The claimant criticisms of the procedure were as follows.

34. That the respondent failed to follow their own disciplinary procedure. This was said to be in relation to two matters, firstly that they had not given the claimant former warnings and secondly that there had not been an investigation meeting. I do not find either of these to be fatal to the procedure. Whilst the claimant had not been given any formal warnings in a disciplinary context he had been advised very clearly what the expectations were in respect of ensuring schemes were sufficiently quality checked before handing over to the customer. This had been explained both at the lessons learned feedback and his formal staff appraisal.

35. Further, there is no hard and fast rule there must be an investigation meeting. The claimant was able to put forward his version of events at the disciplinary hearing in the same way he would have done at an investigation meeting.

36. That Mr Guyler was involved at all stages of the process and this rendered it unfair being a member of the disciplinary panel and deciding the outcome of the disciplinary hearing. I am satisfied this was not the case and accepted the evidence of Mr Geeves and Mr Guyler that it was Mr Geeves decision alone to dismiss the claimant. In a company with only 6 employees and three directors it was inevitable that Mr Guyler's involvement would overlap to a degree between the investigation and disciplinary hearing but there was no evidence to support the allegation that Mr Guyler was involved in the decision to dismiss the claimant.

37. That there was no written evidence from the clients confirming the complaints.

38. The respondent demonstrated a plausible explanation for this. There is often reluctance to involve important clients in disciplinary matters both from the client and the respondent company. This does not however negate the respondent from ensuring they have sufficient evidence upon which to form a reasonable belief. In this case that took the form of first hand accounts written by Mr Guyler following meetings from the clients. There was no evidence to suggest Mr Guyler had exaggerated the complaints or made them up. The claimant accepted he had not undertaken a final check and this was a mistake.

39. Turning now to the Burchell test. This was not really the issue between the parties. I am satisfied that the respondent had an honest and genuine belief the claimant was responsible as Installation Manager for the customer complaints they received and there were reasonable grounds to form that belief. The investigation undertaken was reasonable and whilst there were some issues in dispute such as whether the arches required painting it was not in dispute that the customer perception of the workmanship was one of significant dissatisfaction.

Range of reasonable responses

40. This is the key issue in this case. The claimant's case was that whilst he was guilty of some misdemeanors there were not grounds to treat what happened as gross misconduct. The respondent's view, genuinely held, could not have been more different. They clearly believed that the misconduct was so serious it was gross misconduct.

41. I am mindful in this case of the obligation not to substitute my view for that of a reasonable employer. There are some grounds to suggest that the issues with the Cheshire Oaks takedown may have not been so serious to have warranted gross negligence. When these are looked at in isolation, leaving Christmas lights in trees, failing to leave the site tidy, and leaving fixings and garlands may not seem sufficiently serious as to amount to gross negligence. On the other hand if the consequences on the respondent's business of the complaints are considered, it can be seen how an employer the size of the respondent could have concluded the actions amounted to gross misconduct. The claimant's failure to check the site were serious enough matters for the

shopping centre management to summons the managing director back to site. The respondent incurred costs in putting the concerns right and were fearful there had been serious reputational damage which later proved to be founded as they lost the contract. Were they serious enough to amount to gross misconduct?

42. Having regard to the overall test in S98 (4) I have concluded that the respondent's decision to dismiss the claimant was within the range of reasonable responses. In a larger company the consequences of the claimant's lack of care may not have had such a serious impact.

43. I have had particular regard to the size and administrative resources of the respondent, the training provided in the lessons learned exercise, the formal appraisal in which the claimant was specifically instructed not to leave matters to chance and to focus on quality. Despite this the claimant openly accepted he had not checked the site and relied on the team to ensure the work was completed as standard which was directly contrary to what his formal appraisal stated he must do. As a manager he was responsible for the delivery of a service which resulted in a number of customer complaints and had serious consequences for the respondent's small family business. The claimant accepted he was aware the contract was up for tender yet failed to check the work had been completed to the required standards even though he accepted he should have performed this check. For these reasons I find that the dismissal was a fair dismissal.

Wrongful Dismissal

44. As I have decided there were grounds to summarily dismiss the claimant the respondent was entitled to withhold notice pay and accordingly this claim fails.

Unauthorised deduction from wages

45. The respondent had a written agreement authorizing the deduction. There was no disagreement that the agreement did not apply or that the claimant had not agreed to the agreement. In fact the claimant sought to rely on the agreement to assert that the failures with the installation should mean others were equally responsible for the failings that led to the customer complaints. Therefore the 25% deduction applied by the respondent was an authorized deduction pursuant to Section 13 Employment Rights Act 1996 and this claim must also fail.

Employment Judge Moore

26 November 2018

Date:

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS