



EMPLOYMENT TRIBUNALS

Claimant: Charles Bentinck

Respondent: Marken Limited

Heard at: Reading Employment Tribunal

On: 9 May 2024

Before: Employment Judge Freshwater

Representation

Claimant: in person

Respondent: Ms G Rezaie (counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant is Mr Charles Bentinck. The respondent is Marken Limited. I will refer to the parties as the claimant and respondent in this judgment.
2. This is the claimant's complaint that he was unfairly dismissed.

Procedure and hearing

3. The hearing took place remotely by CVP.
4. I was referred to a bundle of documents of 221 pages. I allowed the respondent to submit a further document during the hearing. That document was a letter dated 3 June 2022, from the respondent to the claimant confirming the claimant transferred his job.
5. I heard oral evidence from the claimant.
6. I heard oral evidence on behalf of the respondent from Leanne Boytler, Doaa Fathallah and Robert Williams.

7. I heard submissions from both parties.

Issues

8. The claimant submitted that he had been unfairly dismissed because the respondent did not follow the correct procedure. In particular he said that: he had not been provided with a copy of the Employee Handbook until after his dismissal; he had not been provided with the evidence against him before the disciplinary hearing; that the notes of the meeting were transcribed incorrectly; and that he had not received a proper explanation of the reason for his dismissal. He did not dispute the factual basis of the allegations against him but believed that it had been a private matter and that a finding of gross misconduct was unreasonable. In his view, the outcome of the disciplinary process was premeditated. He took issue with the use of CCTV footage
9. The respondent submitted that it had genuine belief about what the claimant had done, because he had admitted to the facts. Further, a reasonable investigation had taken place. In the view of the respondent, the claimant had acted in a way that had fundamentally undermined his contract of employment and caused reputation damage to the business. Dismissal was within the range of reasonable responses.

The Law

10. Under section 94(1) of the ERA 1996, an employee has the right not be unfairly dismissed by their employer. It is for the employer to show the reason for the dismissal and that it is a one of a number of listed reasons. In this case, the respondent says that the reason relates to the conduct of the employee (section 98(1)(2)(b) of the ERA 1996).
11. Section 98(4) of the ERA 1996 states that the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employee):
 - 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.
12. In determining if the dismissal is fair, the tribunal must consider whether the dismissal fell within a band of reasonable responses. This is a test set out in the case of Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT) as follows:

"[T]he authorities establish that in law the correct approach for the... tribunal to adopt in answering the question posed by [S.98(4)] is as follows:

- (1) the starting point should always be the words of [S.98(4)] themselves;*
- (2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;*

(3) *in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

(4) *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;*

(5) *the function of the... 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."*

13. In the case of *British Home Stores Ltd v Burchell [1980] ICR 303 (EAT)* it was said that a dismissal on the grounds of conduct will be fair where, at the time of the dismissal:

- a. the employer must have a genuine belief in the misconduct;
- b. there are reasonable grounds for that belief; and
- c. the employer carried out as much investigation as was reasonable in the circumstances.

14. In the case of *Polkey v A E Dayton Services Ltd [1988] AC 344 (HL)* it was said, in respect of a conduct dismissal, that the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation.

15. In the case of *Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588* it was said that the range of reasonable responses test applies to whether a reasonable dismissal procedure has been adopted.

Findings of fact

16. The claimant was employed by the respondent on 4 January 2021 as a Warehouse Associate. His contract of employment is found in the bundle at pages 42 to 49. That contract was varied on 3 June 2022, when he was transferred to a new role as CGT Operations Coordinator. His salary increased. This is set out in the letter admitted into evidence today. The letter clearly states that "all other aspects of [his] employment contract remain unchanged."

17. Paragraph 17 of the claimant's contract of employment deals with termination. It says that "The Company reserves the right to terminate employment immediately in cases of serious misconduct or following any other fundamental breach of your duties. Examples of serious misconduct are quoted in the Company disciplinary procedures."

18. The company disciplinary procedures are found in the Employee Handbook. Relevant excerpts are as follows:

- a. Paragraph 11.1 states "Informal action will be considered, where appropriate, to resolve problems."
- b. 11.2.2 states "All reasonable efforts will be made to establish the facts quickly and to deal consistently with disciplinary issues."

- c. 11.2.3 states “No disciplinary action will be taken against you until the circumstances have been investigated.”
 - d. 11.2.4 states “At each stage in the procedure, you will receive advance notice of disciplinary meetings and shall be advised of the nature of the complaint against you. You will be provided, where appropriate, with written copies of evidence and relevant witness statements in advance of a disciplinary meeting, and will be given the opportunity to state your case.”
 - e. 11.2.7 states “Save in exceptional circumstances, you will not be dismissed for a first breach of discipline, except in the case of gross misconduct (see below). The disciplinary procedure may be implemented at any stage if the conduct or performance warrants it.
19. Examples of what might constitute gross misconduct are dealt with in paragraph 11.6. This includes unlawful harassment or discrimination (11.6.9) and gross negligence and/or mismanagement of our interests (11.6.12). Another entry is found at 11.6.14 which states: “conduct on or off duty which we consider prejudicial to our interests and reputation.”
20. On 13 February 2023, the respondent received a complaint from another company called DHL Global Forwarding [“DHL”]. DHL was both a client and a competitor of the respondent. The complaint was that one of the respondent’s vans had arrived outside DHL’s site. A person had got out of the van and tied between 7 and 9 signs to lampposts. Those signs contained an image of a person who had previously worked for the respondent and, at the time of the incident, was working for the competitor. The signs said words to the effect that this member of staff was untrustworthy as he had borrowed money that had not been paid back, and that this was the sort of person that DHL employed.
21. The complaint said the information in the signs could be considered defamatory and that the DHL senior management team wished to protect the name and reputation of DHL. The respondent was asked to investigate and invited to the DHL site to view CCTV footage to identify the people involved.
22. On 15 February 2023, representatives from the Respondent attended the DHL site to review the CCTV footage, and it was established that the claimant tied the signs to the lampposts.
23. On 17 February 2023, the claimant was issued with a suspension notice. A letter was sent, dated 17 February 2023, to the claimant to say that a disciplinary meeting would take place on 23 February. It may have been delivered to the wrong address by one of the respondent’s delivery drivers. This is what the claimant believed, although I am unsure on the basis of this belief. In any event, I accept the claimant did not receive the letter. An email copy of the same letter was sent to the claimant on 21 February 2023. However, it is clear from the email correspondence that the claimant was aware of the hearing and what would be discussed.
24. The disciplinary meeting took place on 28 February 2023. Before that meeting, the claimant admitted to the Respondent that he had been responsible for tying the signs to the lampposts. The claimant was not given copies of witness statements or written evidence before the meeting. This was accepted by the

respondent. The meeting was chaired by a different person than had been notified to the claimant in advance.

25. Following the meeting, the decision was made to dismiss the claimant for gross misconduct. The reason for the dismissal was said to be unlawful harassment and mismanagement of the respondent's interests. He was paid salary in lieu of notice. He was notified of his termination at a meeting on 28 February 2023.
26. The respondent accepts that notes taken at the meeting were not shown to or countersigned by the claimant directly after the meeting. The claimant requested to see copies of the notes and was provided with a typed copy. It is accepted by the respondent that the typed and handwritten notes were not identical. I find that the notes are materially the same.
27. There was no dispute between the parties about what was discussed during the disciplinary meetings, or about the factual basis of the incident that had led to the meeting taking place.
28. On 3 March 2023, the claimant appealed against the decision to terminate his employment. He asked for copies of the evidence shown to him during the meeting of 28 February, as well as notes of the meeting. These were provided to him on 9 March.
29. The appeal was heard on 20 March 2023 and the decision was upheld.

Conclusions

30. The reason that the respondent dismissed the claimant was due to gross misconduct. The use of the terms "unlawful harassment" and "mismanagement of the company's assets" are both examples of types of misconduct. This can be seen from the Employee Handbook. Whether or not harassment occurred and if it was unlawful is a matter of interpretation, but not material. The list of types of gross misconduct in the handbook is not exhaustive. There was probably a better label from the list that could have been selected (namely "conduct on or off duty which we consider prejudicial to our interests and reputation."). However, the fact remains that the respondent formed the view that the claimant's conduct amounted to gross misconduct.
31. The respondent had a genuine belief in the misconduct. There were reasonable grounds for that belief. The claimant accepted that he had carried out the actions in question. There was no dispute about what had happened, or why.
32. The respondent carried out as much investigation as was reasonable in the circumstances. There was a full and fair investigation of the misconduct. The claimant was invited to a meeting where he put forward his point of view. He had notice of the meeting and the allegations against him.
33. The investigation into the misconduct was a reasonable response. The claimant was driven by another employee of the respondent to the place where he put up the posters. He was in a work van that clearly displayed the respondent's name. The site of the incident was directly outside a client of the respondent. The posters were displayed publicly. These factors made it more than simply a private matter between the claimant and the person that owed

him money. I do not find it relevant whether the incident happened during working hours or a lunch break because of the public nature of what happened.

34. The fact that the claimant was traced through CCTV is not a factor that makes the respondent's decision unreasonable. The CCTV was provided by DHL and the respondent was invited to view it. The images were not obtained in an underhand manner, and it is self-evident that the cameras covered any area which the public had access to. There could be no expectation of privacy.
35. The respondent followed a fair procedure prior to effecting the claimant's dismissal. The procedure was in accordance with the contract of employment and Employee Handbook. The fact that written evidence and CCTV images were not shown to the claimant before the disciplinary meeting is not relevant in the circumstances. It was already known that the claimant did not dispute the factual basis of the allegations against him. There was no suggestion of mistaken identity.
36. The decision to dismiss the Claimant was made after a full and reasonable investigation, which was fair considering all the circumstances. The respondent followed its own disciplinary procedures. There is no evidence that the outcome was premeditated.
37. Dismissal fell within the band of reasonable responses available to the Respondent. Due to the claimant's actions, the respondent believed its relationship with an important business partner had been damaged. It is entirely reasonable for the respondent to have formed this view and I accept it was a genuinely held belief. The claimant appeared to lack insight into what he had done, and this compounded the lack of trust that the respondent could have in him.
38. The complaint is not well founded and is dismissed.

Employment Judge **Freshwater**

Date 29 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
29 July 2024

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FOR EMPLOYMENT TRIBUNALS

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