



EMPLOYMENT TRIBUNALS

Claimant: Mr C Aitchison

Respondent: Colin Appleyard Limited

Heard at: Leeds **On:** 18 July 2017
15 August 2017 (deliberations in chambers)

Before: Employment Judge Cox

Representation:

Claimant: In person

Respondent: Mr Paget, solicitor

RESERVED JUDGMENT

1. The Respondent's name is amended to Colin Appleyard Limited.
2. The claim for holiday pay is dismissed on withdrawal by the Claimant.
3. The claim for damages for breach of the contractual right to notice of termination is dismissed on withdrawal by the Claimant.
4. The claim for arrears of pay is dismissed on withdrawal by the Claimant.
5. The claim of unfair dismissal succeeds.
6. The Respondent shall pay the Claimant a basic award of £304.31.

REASONS

1. Mr Aitchison presented a claim to the Tribunal alleging that he had been unfairly dismissed by the Respondent ("the Company"). He also claimed holiday pay, damages for breach of contract and arrears of pay but he withdrew these aspects of the claim at the Hearing and they were dismissed with his consent.

The issues

2. Mr Aitchison worked for the Company from 3 September 2012 until 20 February 2017, when he was dismissed without notice.

3. The first task for the Tribunal was to identify the reason why Mr Aitchison was dismissed. An employee's dismissal will be unfair unless the employer can show that the reason or principal reason for the employee's dismissal fell within those set out in Section 98(1)(b) and (2) of the Employment Rights Act 1996 (the ERA). These include a reason related to the employee's conduct. The first issue for the Tribunal was therefore, what was the reason or principal reason for Mr Aitchison's dismissal and did it fall within these provisions?
4. If the Tribunal was satisfied that the Company had established that the reason for Mr Aitchison's dismissal fell within the potentially fair reasons for dismissal, the next issue was, did the Company act reasonably, in all the circumstances of the case, in treating that reason as a sufficient reason for dismissing him? That question had to be determined in accordance with equity and the substantial merits of the case, and by reference in particular to the Company's size and administrative resources (Section 98(4) ERA). In determining the question of fairness, the Tribunal's role was not to decide whether it would have dismissed Mr Aitchison had it been in the Company's shoes, but rather whether the Company's decision fell within the range of possible reasonable responses that a reasonable employer might have adopted (Post Office v Foley [2000] IRLR 827).
5. The Company's case was that it had dismissed Mr Aitchison for gross misconduct. In a case involving alleged misconduct, the Tribunal will need to establish whether the employer had a genuine belief that the employee was guilty of that misconduct, and had based that belief on reasonable grounds after a reasonable investigation (British Home Stores Ltd v Burchell [1978] IRLR 379). The Tribunal must also take into account whether the employer has followed the ACAS Code of Practice on disciplinary procedures (Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992).
6. If the Tribunal concluded that the Company had not acted reasonably in dismissing Mr Aitchison, and that his dismissal was therefore unfair, the next issue for it to decide was, what remedy should Mr Aitchison be awarded?
7. Mr Aitchison expressed a wish to be re-employed by the Company if his claim succeeded. Under Section 112(3) ERA, if an unfairly dismissed employee wishes to be re-employed by the employer, the Tribunal must consider that issue first. The Tribunal has power to order the employer to reinstate the employee into his old job or re-engage him in another comparable or other suitable job. When deciding whether to order re-employment, the Tribunal must take into account whether the employee wishes to be re-employed, whether it is practicable for the employer to comply with a re-employment order and, if the employee has caused or contributed to some extent to the dismissal, whether it would be just to order re-employment (Section 116(1) and (3) ERA).
8. If the Tribunal decided not to order the Company to re-employ Mr Aitchison, it then needed to decide what compensation to award him. Compensation for unfair dismissal is comprised of a basic award and a compensatory award. A basic award is calculated by reference to the

employee's age, week's pay and length of continuous employment (Section 119 ERA). The Tribunal must reduce the basic award if it considers that any conduct of the employee before the dismissal was such that it would be just and equitable to do so.

9. The compensatory award is of "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer" (Section 123(1) ERA). If the Tribunal is satisfied that even if the employer had acted reasonably it would still have dismissed the employee, it may reduce the amount of the compensatory award to reflect that finding (Polkey v AE Dayton Service Limited (1988) ICR 142). If the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the employee, it must reduce the compensatory award by such proportion as it considers just and equitable (Section 123(6) ERA).

Findings of fact

10. The Tribunal heard oral evidence from Mr Appleyard, the Company's Managing Director, who dismissed Mr Aitchison, and Mr Tony Dodsworth, the Company's Finance Director, who attended the disciplinary hearing with Mr Appleyard and also chaired the meeting that considered Mr Aitchison's appeal against dismissal. The Tribunal also heard oral evidence from Mr Aitchison. On the basis of that evidence and the documents to which the witnesses referred it, the Tribunal makes the following findings.
11. The Company is a family-run business that sells new and used motorcycles and cars and associated parts and accessories. The Company markets itself as a family-run business and uses the marketing slogan "Feel like family".
12. The section of the Company's Staff Handbook headed "Conduct" states that "conviction on a criminal charge" and "receiving any sentence of imprisonment" amount to gross misconduct. The Company's standard contract of employment, which was issued to Mr Aitchison when he was recruited and signed by him, states:

"Your employer has issued a staff handbook a copy of which is supplied to you with this contract. It contains your employer's rules, policies and procedures on important matters relating to your employment. You agree to read the contents of the staff handbook...

You must tell your employer if at any time you are arrested, charged with or summonsed for a criminal offence of any nature. You are under a duty to truthfully and fully answer any questions from your employer in relation to any such matters. If you are convicted of a criminal offence of any nature whether committed in or out of working hours your employer may terminate your employment with or without notice or payment in lieu of notice and irrespective of the fact that no warnings had been given."
13. Mr Aitchison worked at the Company's Keighley branch as a car valet.

On 13 February 2017 he took a day's holiday. On 14 February, Mr Scott, manager of the Keighley branch, told Mr Appleyard that he had received a call from Armley Prison informing him that Mr Aitchison had been sentenced to six months' imprisonment and wanting to know whether his job would be kept open for him. Mr Appleyard told Mr Scott that there was no way that the Company could keep his job open for him for that long. Mr Appleyard telephoned Martin Mollet, the business manager at the Company's Shipley branch, who he knew to be a friend of Mr Aitchison's family, and asked him if he had heard the news about Mr Aitchison. Mr Mollet said that he hadn't heard anything. Mr Appleyard then asked Ms Caroline Bond, who is the Assistant to the Directors and deals with personnel matters, to investigate what had happened to Mr Aitchison.

14. During the course of her investigation, Ms Bond took a statement from Curtis North, one of the Company's service advisors, who said he had taken a call from Mr Aitchison's father at around 9.25am on 14 February to say that Mr Aitchison had a sickness bug and would not be in work that day. She also took a statement from Mr Scott. He confirmed the content of the conversations he had had with Armley Prison and Mr Appleyard, and that he had called the Prison back to let them know that Mr Aitchison's position would not be left open for him. She took a statement from Mr Mollet, who confirmed the conversation he had had with Mr Appleyard. On 15 February, Ms Bond emailed the Magistrates Court and asked why Mr Aitchison had been given a 24-week custodial sentence. The Court replied that the sentence was "for making indecent images of a child x 2. Mr Aitchison has submitted an appeal regarding his sustenance [sic]").
15. By Friday 17 February Mr Aitchison had been released from prison. Ms Bond spoke to him by telephone. He explained that one evening in April 2016 he had downloaded a movie. As it was quite late, he left it downloading and went to bed. When he returned from work the next day he noticed that the download had an extension on it which was underage pornography. He deleted the file immediately and turned off the computer. Virgin Media had logged the download and reported it to the police. He was charged and then bailed on three occasions. A pre-sentence report was ordered and at a hearing on 13 February he was sentenced to 24 weeks' imprisonment. His solicitor was "outraged" and "asked for an appeal" and the Crown Court said the sentence was "ridiculous". He was released from prison at 4.05pm on 15 February but would need to attend the Crown Court again for sentencing and needed to sign the Sex Offenders Register once a year at the police station. He confirmed that his appeal related to his sentence, not his conviction. He said that it was an accident that had been blown out of proportion. Ms Bond informed him that she would be sending out a letter inviting him to a disciplinary meeting on the following Monday. She asked if that was OK and Mr Aitchison replied that it was.
16. The letter inviting Mr Aitchison to the disciplinary hearing was signed by Mr Appleyard. It set out the allegations that would be discussed at the hearing as follows:
 - You failed to report for work when expected on 16 February 2017 without explanation
 - You failed to adhere to the absence reporting procedure on 15

February 2017 also without explanation

- You deliberately and dishonestly (by your father acting on your behalf and at your instruction) reported in as “sick” on 14 February 2017 when in fact you were absent due to being sent to prison following a conviction and
- You have been convicted of an offence which amounts to gross misconduct according to the company handbook.

17. The letter went on:

“The circumstances are that you took a day’s holiday legitimately on Monday 13 February 2017 in order to attend court without informing the company either of this court attendance or of the likelihood/possibility you could be sent to prison; you were convicted and sent to prison that day and misrepresented the reason for subsequent absence as set out above; the first we knew of the true facts were when we received a call from the prison.

Without in any way prejudging the outcome of the meeting, you should understand that these are very serious allegations and if proved then you could be summarily dismissed under the disciplinary procedure.

If you require more time to prepare for the hearing than is available, please let me know as soon as possible and we can consider an adjournment.”

18. The letter went on to explain that Mr Aitchison had the right to bring a colleague or union official with him to the hearing.
19. The disciplinary hearing on 20 February was chaired by Mr Appleyard. Mr Dodsworth was at the hearing to assist Mr Appleyard and he also asked Mr Aitchison one or two questions. Mr Aitchison was not accompanied.
20. At the hearing, Mr Aitchison said that he had spoken to his solicitor over the weekend and she had told him that he had not been convicted yet and that it would be decided at his appeal at the Crown Court. He had been advised it would be likely he would be convicted and given a community service order. He also said that when his father had telephoned the Company to say that he was ill, this was not on his instruction but because his father was trying to protect his son. Mr Appleyard said to Mr Aitchison that he should have had a confidential “sit down” with him to explain what was happening. Mr Aitchison responded that the police had advised him that he did not need to tell the Company about the case against him. He had been told he would not be going to jail. He would have come in to discuss it with the directors once it was all done, but until he knew what was happening he didn’t think he needed to speak to anyone.
21. Mr Appleyard left the hearing with Mr Dodsworth and Ms Bond to discuss the case. On re-entering the hearing Mr Appleyard told Mr Aitchison that he was being suspended for a week on full pay while the Company investigated whether he had in fact been found guilty or not.
22. Ms Bond continued with further investigations, which she recorded in

writing. On 20 February, she telephoned the Court and was told that Mr Aitchison had pleaded guilty to the offences. Ms Bond then telephoned Mr Aitchison to ask him if he would authorise her to speak to his solicitor, as the Court had given conflicting information to the information he had given in his disciplinary hearing. He would not authorise the Company to speak to his solicitor, but he said he would contact her himself to see whether she would speak to the Company. On 21 February, Mr Aitchison's solicitor contacted Ms Bond and confirmed that Mr Aitchison had been convicted and his appeal was against his sentence only.

23. On receipt of this further information, Mr Appleyard sent Mr Aitchison a letter of dismissal, dated 21 February. The letter said:

“Following on from the Disciplinary meeting that was adjourned on Monday 20 February 2017 pending verification of the information you supplied us with. It has been confirmed that this information was inaccurate, and that you have been in fact convicted of a criminal offence, and awaiting a review of the sentence you received. Based on this information the Company believes it is left with no alternative other than summarily to dismiss you on the ground of gross misconduct. The gravity of your misconduct is such that the Company believes the trust and confidence placed in you as its employee has been completely undermined.”

24. The letter went on to say that Mr Aitchison had the right to appeal, which he could do by writing to Mr Appleyard. If he appealed, the Company would invite him to attend an appeal hearing.
25. On 27 February Mr Aitchison sent Mr Appleyard a letter of appeal. He said that with hindsight maybe he should have spoken to Mr Appleyard, but he was advised by the police to keep it quiet as it might not come to anything. Also he was down and was not thinking rationally. He did not intentionally lie about the nature of his appeal. When he was being removed from the court after his hearing on 13 February he had only heard the word “appeal” and did not realise it was in relation to the sentence and not the conviction. He asked for a second chance. He did not work with the public and was not a danger to anyone. His home depended on his job. He apologised for the hurt he had caused and confirmed that his sentence had now been altered to six months' imprisonment suspended for two years with 200 hours of community service.
26. On 27 February, the Company convened a meeting of the Company's directors to consider Mr Aitchison's letter of appeal. Mr Aitchison was not invited to that meeting. Mr Dodsworth chaired the meeting, which was also attended by Mr Appleyard, Mrs Peggy Appleyard (Mr Appleyard's mother) and Ms Judith Parker (Mr Appleyard's sister). The directors unanimously decided that the dismissal decision was correct. In particular, they were satisfied that Mr Aitchison had a criminal conviction and had been dishonest at the disciplinary hearing by denying he had one.

Conclusions on the issues

27. From the letter of dismissal and the evidence of Mr Appleyard and Mr Dodsworth, the Tribunal is satisfied that the decision to dismiss Mr

Aitchison was Mr Appleyard's alone. While Mr Dodsworth was present at the disciplinary hearing and asked Mr Aitchison one or two questions and also discussed the case with Mr Appleyard when the hearing was adjourned, the final decision was taken by Mr Appleyard.

28. The Tribunal finds that principal reason Mr Appleyard decided to dismiss Mr Aitchison was that he had been convicted of a criminal offence. That is a reason related to Mr Aitchison's conduct and was therefore a potentially fair reason for dismissing him.
29. Turning to the issue of whether Mr Appleyard's decision to dismiss Mr Aitchison was reasonable, the Tribunal does not accept Mr Aitchison's submission that Mr Appleyard's response to the Prison's query as to whether the Company would keep his job open for him indicated he had already decided to dismiss Mr Aitchison before the disciplinary hearing began. Mr Appleyard's response to the Prison's query was based on the assumption that Mr Aitchison had been sentenced to an immediate term of six months' imprisonment. When he found that that was not the case, Mr Appleyard approached Mr Aitchison's case on the basis of the facts as they turned out to be.
30. The Tribunal is satisfied that Mr Appleyard's decision to dismiss Mr Aitchison fell within the range of possible reasonable responses in all the circumstances. In deciding to dismiss, Mr Appleyard clearly attached importance to the fact that conviction of a criminal offence was categorised in the Company's disciplinary rules as gross misconduct and in Mr Aitchison's contract of employment as conduct that entitled the Company to dismiss him without notice. If he had decided to dismiss Mr Aitchison for the conviction alone, the Tribunal might have been open to an argument that his decision was unreasonable, since, in response to questions from the Tribunal, Mr Appleyard confirmed that he believed Mr Aitchison's account of how he had come to be in possession of indecent images of children and he did not consider Mr Aitchison to be a risk to the children with whom he might come into contact during his work.
31. There were other circumstances surrounding the conviction, however, that caused Mr Appleyard to conclude that Mr Aitchison should be dismissed, and the Tribunal considers that it was reasonable for him to take these matters into account when deciding on the appropriate sanction. First, Mr Aitchison had, in breach of his contract of employment, failed to keep the Company informed of the charges against him. Secondly, as a result of what Mr Aitchison had told Ms Bond in his first interview and what Ms Bond's had found out when she investigated further after the disciplinary hearing, Mr Appleyard had reasonable grounds to believe that Mr Aitchison had been dishonest when he stated at his disciplinary hearing that his appeal was against his conviction rather than his sentence only. Thirdly, although Mr Appleyard accepted Mr Aitchison's explanation of the conduct that led to his conviction, there was a real risk of damage to the Company's reputation and goodwill if it became known that it was employing someone with such a conviction, particularly given the Company's image as a family-orientated business. The decision to dismiss was taken on 21 September, only a week after Mr Aitchison's initial conviction, at a time when it was too early to know whether his conviction would become widely known in the area in which the Company operates.

32. The Tribunal considered whether the procedure that the Company adopted followed the recommendations of the ACAS Code. The Code requires that the employee should be given a reasonable time to prepare their case. Mr Aitchison believed that he had inadequate notice of his disciplinary hearing. The Tribunal notes, however, that he knew from his telephone conversation with Ms Bond on 17 February that the meeting would be held on 20 February and that the Company would be considering what disciplinary action it was appropriate to take because of his criminal conviction and the circumstances surrounding it. That gave him the weekend to prepare what he wanted to say in his defence. Further, he did not ask for the hearing to be postponed. The Tribunal accepts that Mr Aitchison had a reasonable time to prepare for the hearing.
33. The Tribunal does, however, accept Mr Aitchison's criticism that it was unreasonable for the Company not to invite him to an appeal hearing. The ACAS Code requires that there be an appeal hearing and there was none in Mr Aitchison's case, even though the letter of dismissal said there would be. Mr Appleyard's evidence was that Mr Aitchison was not invited to a hearing because it was apparent from his appeal letter that he was not adding anything new. The Company could not know at that stage, however, whether Mr Aitchison might raise something at a hearing that could affect the decision on his appeal.
34. The ACAS Code also requires that an appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case. The Tribunal accepts that this requirement was not followed in Mr Aitchison's case, since Mr Appleyard and Mr Dodsworth, who had both been involved in the decision to dismiss Mr Aitchison, then took part in the decision-making on his appeal. It would clearly have been possible for Mrs Appleyard and Ms Parker to consider the appeal on their own.
35. Because of these fundamental flaws in the handling of Mr Aitchison's appeal, which formed part of the Company's overall decision-making process, the Tribunal finds that Mr Aitchison's dismissal was unfair.

Remedy

36. Mr Aitchison sought an order for re-employment. The Tribunal does not consider it appropriate to make such an order. It is not practicable for the Company to re-employ Mr Aitchison when the relationship of trust and confidence between itself and Mr Aitchison has clearly broken down, because of his lack of openness and honesty in relation to the criminal proceedings against him.
37. Further, the Tribunal does not consider that it would be just to order re-employment when it is satisfied that Mr Aitchison caused or contributed to some extent to his dismissal by his misrepresentation at his disciplinary hearing of the nature of his appeal. At the Tribunal Hearing, Mr Aitchison maintained that, at the time of the disciplinary hearing, he believed that he had appealed against his conviction. He said that he had gone to his solicitor's office on Saturday 18 February, before his disciplinary hearing, to thank his solicitor for securing his release from prison, but she was not

there. He spoke instead to an office administrator who told him that it was a good thing that he was “appealing against the case” and that if the court intended to send him back to prison it would not have let him out on bail. At that point, he said, he got it into his head that the appeal was against “the whole situation”.

38. The Tribunal does not accept that Mr Aitchison believed at the time of his disciplinary hearing that he was appealing against his conviction. He had pleaded guilty to the charges against him. It not credible that he formed a belief that he was appealing against his conviction on the basis of a conversation he had had with an unqualified member of his solicitor’s office in which she said encouraging things to him about his appeal “against the case”. The Tribunal finds that when Mr Aitchison stated at his disciplinary hearing that he was appealing against his conviction he knew that that was not true.
39. Turning to the issue of compensation, the parties agreed the amount of the basic award as £1,217.25, subject to any reductions the Tribunal might make. The Tribunal is satisfied that Mr Aitchison’s basic award should be reduced by 75% because of his conduct. In the light of his obligations under his contract of employment, Mr Aitchison was clearly blameworthy in not informing the Company of the criminal proceedings against him, whatever the police may have advised him to do. He also acted dishonestly by stating in the disciplinary hearing that he was appealing against his conviction. These were serious matters that played a substantial part in the breakdown in trust and confidence between himself and the Company. The Tribunal therefore awards Mr Aitchison a basic award of £304.31.
40. In relation to the compensatory award, the Tribunal considered what difference it would have made had the Company acted reasonably by allowing Mr Aitchison to appear at an appeal hearing conducted by individuals not previously involved in the case. In the light of all the evidence it heard, including that of Mr Aitchison, the Tribunal is satisfied that it would have made no difference to the outcome of the appeal had there been a hearing conducted by Mrs Appleyard and Ms Parker at which Mr Aitchison was allowed to have his say. There was nothing that Mr Aitchison could or would have added to the information he had already given in his appeal letter, and there was nothing in the appeal letter that would have been likely to cause Mrs Appleyard and Ms Parker to alter the decision to dismiss. The Tribunal does not, therefore, consider it just to make Mr Aitchison a compensatory award.
41. In summary, the Tribunal awards Mr Aitchison a basic award of £304.31 in respect of his unfair dismissal.

Employment Judge Cox

Date: 24 August 2017