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EMPLOYMENT TRIBUNALS

Claimant: Mr J Phillips

Respondent: Hoo Hing Ltd

Heard at: East London Hearing Centre **On:** 24 February 2017

Before: Employment Judge C Hyde (sitting alone)

Representation

Claimant: In person

Respondent: Mr M Lee (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The unfair dismissal complaint was not well founded and was dismissed.
- (2) The claim for arrears of pay was dismissed forthwith on withdrawal by the Claimant.

REASONS

1 Written reasons are provided for the above Judgment pursuant to a request by the Claimant after the Judgment was announced on 24 February. The reasons are provided only to the extent that the Tribunal considers it necessary in order for the parties to understand why they have won or lost, and only to the extent that it is proportionate to do so.

2 All findings of fact were reaching on the balance of probabilities.

3 In a claim form which was presented on 5 October 2016, Mr Phillips complained that he had been unfairly dismissed. It was apparent on reading the grounds of

complaint that this was a complaint of unfair dismissal under what is normally called the ordinary unfair dismissal provisions which would require this Tribunal to determine first the reason for the dismissal; and then to assess whether dismissal for that reason was fair in all the circumstances.

4 The Claimant raised in his claim form the possibility that his dismissal was an act of discrimination. He confirmed that he had used that word in a general sense in relation to the Respondent wanting to get rid of employees with old style contracts which did not require weekend or Bank Holiday working. In the event the Claimant did not pursue this argument and he acknowledged that it was not really part of his case. In any event if one looked at the statement of terms and conditions signed by the Claimant, it provided that the Respondent could require that the Claimant's work included weekend and bank holiday working.

5 The additional apparent claim in the claim form was for arrears of pay. Once again when this was discussed with the Claimant he confirmed that what he had been referring to here was compensation for the dismissal. He was not suggesting that there was some earlier period during the employment that he had worked for the Respondent and not been paid for that work by them. For the avoidance of doubt the unlawful deduction of wages claim was treated as withdrawn by the Claimant, and the Tribunal accordingly dismissed it.

6 I had to determine whether the Respondent proved a reason for dismissal which was potentially fair under the Employment Rights Act 1996 ("the 1996 Act"). The employer relied on a reason related to the Claimant's conduct as the reason for the dismissal. They relied on the matters set out in their letter of dismissal and the appeal outcome as well in relation to the factual circumstances that led to the disciplinary action being taken against the Claimant. In essence, they found that he had failed in serious respects to safeguard the cash which he had collected from the Respondent's customers on 11 August 2016. It was not in dispute that this money was then removed from the parked van when the Claimant stopped to relieve himself leaving the agency driver in the vehicle and then a third party had apparently come to the vehicle and removed the cash from the vehicle.

7 The Claimant had not previously been involved in a similar incident and there was no information before the Tribunal to suggest that this was other than a first disciplinary matter for the Claimant. He relied on that and on the fact that he had frequently been in charge of considerably larger sums of money and yet he had safely returned these to the Respondent. He also asked the Tribunal to bear in mind that the Respondent had in effect imposed too severe a sanction on him and that they could have taken appropriate alternative steps such as transferring him to other duties and/or giving him the opportunity to repay the money lost. Indeed, he would have wanted to have taken responsibility by way of making good the losses suffered by the Respondent.

8 I heard evidence from Ms Brainerd who is Human Resources Manager and she provided a witness statement which was marked [R3]. I also heard from Mr Geoffrey Joseph who is known by the nickname of "Tosh". He was the Claimant's loading bay manager and he conducted the disciplinary hearing. His witness statement was marked [R4]. The Claimant submitted an appeal which was heard by Mr Derrick Brown

and his evidence in chief to me was set out in his witness statement which I marked [R5]. Finally the Respondent relied on a witness statement from another member of staff, the office supervisor Ms Siu King Lam. Her witness statement was [R6]. She did not give oral evidence and her statement was simply read by the Tribunal. It had been exchanged approximately two weeks before the hearing in accordance with the directions for exchange of witness statements. I took into account that obviously she was not present to be questioned about the evidence in her statement and to the extent that the Claimant cast doubt on some of the contentions in her statement I obviously had regard to those matters also.

9 Finally, I heard evidence from the Claimant and his witness statement was by way of an email which had been sent to the Tribunal on 7 February 2017 which I marked [C1].

10 In addition, the parties had liaised to prepare a bundle of documents which I marked [R1] and which consisted of approximately 130 pages.

11 At the commencement of the hearing Mr Lee on behalf of the Respondent presented a skeleton argument which I marked [R2] dated 24 February 2017 and he attached to it printouts of two authorities that he relied on: the cases of *Tayeh v Barchester Healthcare Ltd* [2013] IRLR 387 and *Pennine Care NHS Foundation Trust v Mr F Mundangepfupfu* UKEAT/0109/15 an Employment Appeal judgment handed down on 17 December 2015. I expressed my gratitude to Mr Lee for the written submission which he incorrectly described as a 'skeleton'. It covered the relevant legal principles, the submissions and the factual points very comprehensively.

12 I clarified with the parties at the beginning of the hearing that I would first determine liability and the issues relating to *Polkey* and contributory fault, both of which really go to remedy but which it is helpful to have decisions about at the same time as liability.

13 On the grounds of proportionality and because I was happy that the statement accurately reflected the applicable law, I adopted the statement of the principles of law that Mr Lee set out.

14 The Respondent supplies oriental food and catering products. Mr Phillips was employed by them as a warehouse /van assistant from 18 July 2011 to 17 August 2016 when he was summarily dismissed on the grounds of gross misconduct.

15 The first point to be determined was whether I accepted the Respondent's case as to the facts that they found which led them to find the Claimant was guilty of the misconduct alleged.

16 I was satisfied on the balance of probabilities that the Respondent believed that the Claimant had failed to take steps to safeguard cash collected from the Respondent's customers on 11 August 2016. It was agreed that the Claimant was responsible for the security of the cash on that date. He agreed that he was fully aware of the relevant rules and policies. Indeed he had been responsible for training others on the appropriate procedures. In breach of those provisions, he had failed to check that the lorry he was using was fitted with a safe before departing from the depot

that morning. The Claimant then failed to store the cash he collected on his person in a bum bag as required, or indeed in another bag which he then kept on his person at all times. Instead, having asked an agency lorry driver to pull over by the side of an urban street so that he could go round the corner to urinate, the Claimant simply left the bag containing the cash in the lorry, not concealed in any way, next to the passenger side door which he did not lock on leaving the lorry. Nor did he take any steps to pass the bag to the driver or to discuss with him the security of the bag in his absence from the lorry. While the Claimant was away from the lorry, albeit for a matter of minutes, the bag containing the cash was stolen from the lorry. The agency driver reported that an unknown person had come up to the lorry, opened the door, snatched the bag and made a speedy escape. When the Claimant returned to the lorry, the driver was standing on the street near the lorry apparently looking to see where the thief had gone.

17 These circumstances were not disputed.

18 The Claimant argued at the Tribunal hearing that the real reason for dismissal was because of his contractual terms. There was no evidential basis for that contention given the finding recorded above about the effect of the Claimant's contract in relation to bank holiday and weekend working. Further, the Tribunal considered that the reason relied upon by the Respondent, given the agreed facts, was the more likely. Further, the Claimant had not raised the issue of his contract terms being a reason for dismissal at his disciplinary hearing or at appeal.

19 This was a reason relating to the employee's conduct and is thus potentially fair under section 98 of the 1996 Act.

20 I then had to assess whether it was a fair dismissal measured against the well established principles set out in the case of *British Home Stores v Burchell* [1978] IRLR 379. For the avoidance of doubt, I noted that the burden of proof in relation to fairness is neutral, and does not lie on one or other party: section 98(4). I had to decide whether the Respondent had carried out an adequate investigation and whether dismissal for that reason was fair, or put another way, whether the dismissal fell within the band of reasonable responses of an employer procedurally and substantively.

21 As far as the investigation was concerned again it did not appear to me that there were any failings which were material. I also had regard to the ACAS Code of Practice on disciplinary proceedings in reaching that view.

22 It was relevant that the Claimant accepted fault when being questioned by Mr Joseph. Further there were written procedures in place setting out the relevant safeguards; and the Claimant accepted the importance of keeping the cash safe.

23 The Claimant said that he did not see one of the memos, but he accepted he was aware of all the essential elements of the Respondent's procedures for safeguarding the cash. Both the disciplining and appeal managers were faced with the factual circumstances outlined above which demonstrated that the Claimant had failed to take the money with him and had done nothing else to safeguard the money in his absence. The undisputed evidence demonstrated to them on reasonable grounds that the Claimant had given no thought as to the security of the money when he left the

lorry.

24 The context did nothing to reassure the managers either in that they knew that Mr Phillips asked the driver to stop only a short distance from his home. Whilst he explained that he was desperate and could not wait until the driver reached his home, he failed to provide convincing answers to the questions about why he had not taken the opportunity to stop earlier for example at a petrol station forecourt where there was access to public toilets. He was very familiar with the neighbourhood and told his employers that he had asked the driver to stop where he did because the Claimant knew that there was a cemetery around the corner where he could relieve himself without the risk of causing offence to onlookers. The ability to trust the Claimant in the performance of his duties going forward was on reasonable grounds a significant consideration for both the managers.

25 The only procedural issue raised by the Claimant was really a proposal by him that there should have been a requirement on the drivers or assistant to complete a checklist of tests before leaving the depot. This was not a defect in the procedure followed by the Respondent in assessing the Claimant's disciplinary. At best it was a suggestion for improving the Respondent's security. The failure to have a written checklist did not render the dismissal unfair for that reason, but also because there was no doubt that the Claimant was fully aware of the security arrangements which should have applied. The conversation that he had with his manager after he had left the warehouse and had discovered that there was no safe in the lorry was not disputed. It was also evidence that the Respondent had tried to assist the Claimant with the security of the takings by offering him the option of not collecting cash or payment for any of the remaining deliveries. He declined to take up that option.

26 I was satisfied that the Respondent had complied with the requirements of the ACAS Code and that in the circumstances they had carried out a perfectly adequate investigation.

27 The Tribunal raised certain procedural questions during the evidence which could have impacted on the issue of fairness. They did not have that effect in this case because the Respondent was largely able to proceed on the basis of undisputed facts and admissions and acceptance by the Claimant during his various interviews about what his responsibilities were and about his knowledge of the processes. Thus, even though the Claimant was not given a copy of the investigation notes prior to the disciplinary hearing, this did not appear to me to be material because the matters had been gone through with him quite recently and he was being asked about quite a narrow and straightforward issue. Further both parties knew that the Claimant was making his own recording of the proceedings and the manager dealing with the hearing did confirm that with the Claimant subsequently.

28 Importantly however he was sent a copy of the Respondent's disciplinary procedure and also of the working practices which he was said to have breached so he was therefore given sufficient notice of those matters for it not to impinge on the overall fairness of the process.

29 The other point was that the manager of the Claimant Mr Joseph, was someone who had some direct knowledge of some background matter relating to this issue and

that was about the telephone call that the Claimant made after his first drop off in which he queried the absence of the safe in the vehicle. In all the circumstances of the case and given that the Claimant fully accepted his responsibility that he had done wrong and that he was aware of the correct procedures to be followed for the most part it did not appear to me that that involvement of Mr Joseph in the events of that day impinged on the fairness of his decision. I took on board the point that the Respondent's Counsel made which is that there is always a balance to be drawn between having a manager who is aware of the working situation and having a manager who had some involvement in the incident. Ideally, Mr Joseph would not have been involved in considering the decision to dismiss, but it was highly relevant that there was no controversy during the internal proceedings about the conversation. It did not affect the seriousness of the Claimant's subsequent failings in relation to the security of the cash.

30 Further the Claimant appealed. He was able to put forward all his points afresh and he was invited to add any new points that he wished so it was effectively a re-hearing. The appeal was conducted by a manager who did not have any involvement in the events of the day, so any potential procedural failing by reason of Mr Joseph's involvement was cured by the appeal.

31 I explained to the parties at the beginning of the hearing that the law has long recognised that in assessing whether a dismissal is fair or not an employer is not held to the same standard as for example the police or some similar investigatory body. The Tribunal is required under the terms of section 98(4) to take into account all the circumstances of the case including the size and administrative resources of the Respondent so it is against that background that I was satisfied that there was not in this case an unfair dismissal i.e. the dismissal was fair. The Respondent carried out an adequate investigation, they had sufficient grounds for believing that the Claimant was guilty of the misconduct alleged and they were also acting within the band of reasonable responses when they took the decision that dismissal was an appropriate sanction. I took on board the points made by the Respondent's managers about the need to trust the van assistant, both in the specific sense of trusting the person's integrity but also trusting him to comply with the procedures which are there partly for the protection of the employee as well as for the protection of the company.

32 Finally, it is not a requirement of fairness that the employer should in such a situation give the Claimant an opportunity to refund the money and overlook the breach of the rules. An employer is entitled to say that they do not any longer have any trust in the person and unfortunately that can be the end of it fairly, even if it is a first breach of the procedures and a first incident.

Employment Judge Hyde

3 April 2017