



EMPLOYMENT TRIBUNALS

Claimant: Miss J Kumari

Respondent: Arch Global UK Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham

On: 29 and 30 October 2018

Before: Employment Judge Kelly

Representation

Claimants: Mr Ennis, solicitor

Respondent: Mr Ahmed of counsel

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claims for unfair dismissal and breach of contract are dismissed.

The claimant's claim for unlawful deduction from wages is dismissed on withdrawal.

REASONS

1. The claimant brought claims for unfair dismissal, breach of contract (for notice pay) and unlawful deduction from wages.
2. At the start of the Hearing, the claimant withdrew the claim of unlawful deduction from wages.
3. The liability issues in relation to the unfair dismissal claim were:
 - 3.1. Was the dismissal unfair because the respondent had already predetermined the outcome?
 - 3.2. In a disciplinary hearing against her, was it unfair to show the claimant no evidence apart from CCTV footage?

- 3.3. Did the respondent have reasonable grounds for concluding that the claimant was guilty of misconduct?
- 3.4. Did the respondent follow a fair procedure in accordance with the ACAS Code of Practice on Disciplinary and Grievance procedures? (This point was not pursued separately from point 3.2 above and we will not consider it separately.)
- 3.5. Was there inconsistent treatment of the claimant with the treatment of her colleague, JP?
- 3.6. Was dismissal within the range of reasonable responses?
4. For the claimant, we heard oral evidence from the claimant, her son and her sister. For the respondent, we heard oral evidence from RN, who was petrol station store manager, the respondent's director and the investigating manager; MH, a store worker; MS, duty manager; VB, assistant manager; and RB, store manager. We did not hear evidence from the dismissing officer.
5. We were given a bundle of documents and a statement of issues which was finalised and agreed in the Hearing. We were not given any skeleton arguments. We watched CCTV.
6. We were referred by the respondent to the cases of *Mohammed Hussain v Elonex PLC CA EATRF 97/1382/3* and *Royal Bank of Scotland v Mr C J Donaghay UKEATS/0049/10/B1*.
7. References to "the Hearing" are to the Tribunal Hearing, to page numbers are to numbers of the Hearing bundle, and to paragraphs are to paragraphs in this Judgment.
8. We refer to third parties by initials.

What happened

9. We make the following findings of fact relevant to the issues in dispute.
10. The respondent is a small business engaged in running one petrol and food station as a franchisee. It took over the business in April 2017. It had no internal HR advice. The organisation from which the franchise was held supplied an HR library and templates, but no helpline service on specific issues.
11. The claimant was employed at the station from 1 May 2002 and her employment was transferred twice during her employment to new business owners.
12. The claimant's contract of employment described her as "Supervisor" and, in her ET1, she described herself as "petrol station supervisor". In the Hearing, she gave evidence that she did not see her role as supervisor and that she was merely on the till without responsibility for the other staff. In her disciplinary investigation meeting (p94), she was asked what she did when she was normally in charge of a shift. She did not deny that she was in charge of a shift. She was asked what her responsibility was for the store and she said "I know my responsibilities, I know what to do on my shift".

13. On 12 November 2017, the claimant was at work. At the store with her were two inexperienced employees who had recently joined the business, Ra and JP. They were not fully trained. The claimant called out as a customer appeared to be leaving the site without paying. JP rushed out with the metal shelving he had been holding and struck the customer's car with it. The customer was agitated and the police were called.
14. After the incident had concluded, JP accused the claimant of it being her fault. JP and the claimant argued and were confrontational with each other in front of customers. The claimant left the till and went to continue the argument with JP on the shop floor. The claimant was upset. The claimant called RN complaining that JP had been disrespectful and asking him to come to address the issue. RN refused to do so, but said he would view the CCTV and take necessary actions.
15. The claimant left the store and took no steps to ensure that the site was secure. The claimant did not inform RN that she intended to leave the store.
16. Ra called RN to inform him that the claimant had left the store. RN asked MS to call the claimant to find out what was happening. The claimant did not answer two calls from MS or return his messages.
17. The respondent called in MH to cover the shift in the claimant's absence.
18. Shortly afterwards, the claimant's son arrived at the store and came in and said "Who's JP?" The claimant's son aggressively accused JP of making his mother cry and demanded that he come outside with him. JP was scared and retreated to the security of the office.
19. As shown on the CCTV, another man arrived and spoke to the claimant's son. The claimant's son and the man stood by the entrance door. They both then walked nearer the door leading to the office. At 17.23, the claimant arrived with her daughter and joined the claimant's son and the man. They all gathered by the entrance door. The claimant went to get back in the car she had arrived in. The other three people walked back into the shop and the claimant followed them. They all stood next to the door leading to the office. The claimant stood with folded arms furthest from the door. She did not bang the door and does not appear to be shouting. At 17.38, the claimant left with her daughter. Shortly afterwards, the claimant's son and the man left. The police attended again.
20. The claimant was signed off work from 14 Nov 2017 with "stress at work".
21. RN investigated the incident. He viewed the CCTV (which had no sound) and interviewed MH (twice), Ra, JP, and the Claimant, and prepared an investigation report. He suspended the claimant from the end of her sick note period.
22. In the first interview, MH said that, when the claimant arrived with her daughter at the store, they shouted abuse and called JP "a pussy" and demanded he went outside with them. He said that he did not want the contents of his statement divulged to the claimant due to the threats made by her son (including to get local crackheads to raid the shop) and because the claimant had previously told him that, if anyone disrespected her, her family would come down and sort things out.
23. In his second interview, MH said that the claimant said "Is JP going to come out, why is he scared?" The claimant said she wanted JP to come out. The claimant did not

ask her son to leave. He said that the claimant's son asked him for RN's number and the claimant said that MH would not give it as "he's up RN's arse".

24. In his interview, Ra said that, after JP accused the claimant of the pump incident being her fault, she was continuously shouting and swearing in front of the customers. He said that the claimant made racial comments. He said that when the claimant came back with her daughter, they were all very aggressive shouting and swearing and that the claimant and her daughter stood by the door that led to the office banging it and shouting at JP not to hide and saying "arse, pussy, come out". A customer told the claimant to stop. The claimant's son threatened to burn the store down and that he would stab Ra on the street. Ra complained that he was very upset that, as a new starter, the claimant had walked out of work leaving him alone at a busy time and then brought her family with her behaving in the way they did, threatening him and JP with their language and body language.
25. In his interview, JP said that the claimant had told him of incidents where people had been beaten up by her son and family because they had said something to her. He said he felt unsafe.
26. After these interviews, RN interviewed the claimant and told her that the meeting was to investigate alleged three counts of gross misconduct, and listed them much as they became set out in her invitation to the disciplinary hearing (see below).
 - 26.1. The meeting went on to discuss what happened in the claimant's argument with JP. She clearly understood what the first disciplinary allegation was about.
 - 26.2. They then talked about how the claimant left her workplace. she was asked if it was alright for her to leave the store with two new members of staff. She responded "No, but she felt she had to walk out after being accused of something that was not her fault." RN said to her "The staff actually worked for you on that shift, you left them in a vulnerable position. Why did you do that? You have a duty of care to the business. The claimant answered "Because of the situation I was in." RN asked her if it was the right behaviour and she said "no".
 - 26.3. They then talked about her son's involvement and her return to the garage. She said her son called her and asked what had gone on and that he was going to the station, and that she told him not to and that it would cause trouble. She said she did not know how he knew what had gone on and said someone must have told him. She said she went to the station with her daughter to get her son. She said when she got there, she asked him to come home. She denied making any racist remarks. She said she didn't know if her son was shouting at Ra.
27. RN had a second investigation meeting with the claimant when he showed her the CCTV. RN suggested that, when her son could be seen on the phone, he might be on the phone to the claimant. The claimant said she went to the store to get her son. She said that her son asked for JP to come out, not her. She said she couldn't remember if she asked if JP was scared to come out. RN said the CCTV and other statements said differently. She said she had not answered MH's call because she was upset. RN said it was her responsibility to call someone when she left. The claimant said she was upset and didn't think. She said she did not tell RN she was leaving the shop when she called him because she wanted to get out of the store.

28. On 5 Dec 2017, the claimant was invited to a disciplinary hearing in respect of the following allegations:
- 28.1. Allegation 1: The use of inappropriate language and behaviour in front of customers leading to gross misconduct by bringing the organisation into serious disrepute;
 - 28.2. Allegation 2: Leaving the site vulnerable and insecure while at work as a duty manager, leading to gross misconduct of serious breach of confidence;
 - 28.3. Allegation 3: By bringing outside people into the store to threaten another member of staff which escalates to the level of gross misconduct of physical violence.
29. The claimant was told that the evidence included the CCTV recording, a script of the CCTV footage, a statement from Ra, a statement from JP, 2 statements from MH, 2 statements from herself and an investigation report. The only evidence she was shown was the CCTV.
30. The disciplinary officer appointed was VC who was a store manager for another franchisee.
31. The disciplinary meeting took place on 15 Dec 2017. VC raised for the first time the allegation that the claimant, herself, had joined with members of her family in threatening staff.
32. VC produced an undated disciplinary decision (p121).
- 32.1. Allegation 1: He said that, although it was not clear whether the claimant had used inappropriate language, he was satisfied from the CCTV that there was inappropriate behaviour in the shop with customers present, which had brought the organisation into serious disrepute. He decided that this was gross misconduct and a written warning would be sufficient.
 - 32.2. Allegation 2: He considered that the claimant left the site vulnerable and insecure when, as duty manager, she left the site leaving two new staff who had not fully completed their training. He said if a supervisor does not put her responsibility to business prior to her personal issues, the business could not have confidence in her anymore. He said he could not see any evidence that the situation made it impossible for the claimant to stay on site and, even if it had, she should have informed management and taken the necessary actions to leave the site secure, which she failed to do. She failed to reply to two missed calls after she had left site. It was gross misconduct of serious breach of confidence which could have only dismissal as the outcome.
 - 32.3. Allegation 3: he concluded that it was likely the claimant told her son what had happened, hence how her son knew JP's name. He said that her son and the man were violent, abusive and threatened physical violence, and were acting for the claimant "therefore I think that whether she intended or not she is responsible for the action". He continued that he could not see on the CCTV that the claimant came to the store to take her son home. He described that he saw her join her son and the man waiting for JP to come out. He did not see the claimant talking to her son to calm him down or trying to ask him to leave the site. On the contrary, the statements said that the claimant demanded JP to come out and she made an abusive comment about him. He was satisfied that

a gross misconduct of physical violence occurred for which she should be dismissed.

33. By letter of 15 Dec 2018, VC wrote to the claimant dismissing her from that date. She was given the right of appeal and it was explained how to do this.
34. The claimant did not appeal.
35. The reason the respondent gave for not providing the claimant with all the evidence was that the witnesses were afraid. VB's evidence was that all three of the claimant's colleagues who gave evidence asked for their statements not to be disclosed, even if this was only recorded in MH's evidence. We accept this. It is consistent with other comments made; JP referred to incidents where people had been beaten up and Ra said that the claimant's son threatened to burn down the store.
36. In the Hearing, the claimant was asked what disadvantage she suffered from not being able to see all the evidence prior to the disciplinary hearing. She said that she could not remember swearing, and that she did not tell people to come to the store.
37. On 20 Nov 2018, JP was dismissed by VC for breach of the company non confrontation with customers policy. He appealed to RN who reduced the penalty to a final written warning.
38. JP received a final written warning for inappropriate language and behaviours in front of customers on 4 Dec 2018.
39. The claimant's representative submitted that there were discrepancies in the witnesses evidence which we accept was correct. For example, Ra said that the claimant banged on the door leading to the office, but the CCTV showed that this was not the case.

The law

Unfair dismissal

40. Under section 94(1) Employment Rights Act 1996 ("ERA"), an employee has the right not to be unfairly dismissed by his employer.
41. Under section 98(1) ERA, 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 sub-section (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.
42. Under section 98(4) ERA, 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.

43. In *British Home Stores v Burchell* 1980 ICR 303, dealing with unfair dismissal for misconduct, the EAT stated that the employer must show:
- 43.1. it believed the employee guilty of misconduct;
 - 43.2. it had in mind reasonable grounds upon which to sustain that belief; and
 - 43.3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
44. In *Iceland Frozen Foods v Jones* 1983 ICR 17, the EAT determined that in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for the employer; in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal 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.
45. It was confirmed in *J Sainsbury v Hitt* that the "range of reasonable responses" test applies to the procedure by which the decision to dismiss is reached.
46. In *Mohammed Hussain*, the Court of Appeal stated "There is no universal requirement of natural justice or general principle of law that an employee must be shown in all cases copies of witness statements obtained by an employer about the employee's conduct. It is a matter of what is fair and reasonable in each case... there is a failure of natural justice if the essence of the case on the employee's conduct is contained in statements which have not been disclosed to him, and where he has not been otherwise informed at the hearing, or orally or in other manner, of the nature of the case against him". In *Royal Bank of Scotland*, the EAT notes that, although the Tribunal identified two things which could have been done – including providing the claimant with copy statements, there were no findings which showed that the claimant was prejudiced in any way by these steps not being taken.

Claim for notice pay

47. Under Rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131 (2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine, (b) the claim is not one to which article 5 applies and, (c) the claim arises or is outstanding on the termination of the employee's employment.
48. In *British Heart Foundation v Roy (Debarred)* EAT 0049/15 it was stated to be an objective test as to whether the employee had acted in serious breach of contract such as to entitle the employer to dismiss summarily.

Conclusions

Unfair dismissal

49. We will now consider the grounds on which it is alleged the dismissal was unfair:

i. Alleged pre-determination of outcome

50. We do not consider that there is evidence to show this. The fact that RN went through disciplinary allegations at the start of the claimant's investigatory interview does not, as the claimant alleges, show pre-determination of the outcome. On the contrary, the respondent carried out a full investigation, which was not challenged as inadequate by the claimant, and brought in an independent disciplinary manager. These are not compatible with a pre-determined outcome.

ii. Not showing the claimant evidence apart from the CCTV

51. We accept that, given the fear of the witnesses of the claimant's son, it was reasonable not to disclose their statements to the claimant. The question arises as to whether it was outside the range of reasonable responses for the respondent to have failed to take some other step to inform the claimant of the case against her, so that she had full chance to challenge it. The respondent argued that the claimant was sufficiently informed of the case against her by other means than being provided with a copy of the witness statements. The respondent contended that the allegations were put to the claimant in the interviews with her and that, when asked, she could not show any material prejudice from the failure.

52. With regard to Allegation 1, this was not the reason for dismissal and so is not relevant.

53. With regard to Allegation 2: All the material evidence about this was patently clear to the claimant who was asked in her interviews about her leaving site. RN put to her his view of it. Little if anything was added by the other witnesses who were interviewed. We therefore do not consider that the failure to show the claimant the other evidence was a material breach of the requirements of natural justice.

54. With regard to Allegation 3: It was key to VC's decision that the claimant's son knew JP's name from which he concluded that it was likely the claimant told her son what had happened. This evidence was never put to the claimant. We consider that it was a breach of natural justice for the claimant not to have been given this key detail of the evidence of witnesses about the alleged events when she returned to the station.

iii. Did the respondent have reasonable grounds for concluding that the claimant was guilty of misconduct?

55. With regard to Allegation 1, this was not the reason for dismissal and so is not relevant.

56. With regard to Allegation 2: We conclude that the claimant did have supervisor responsibilities and that she knew and agreed that she should not just have left the store. In her interview, she was asked if it was alright for her to leave the store with

two new members of staff. She responded No, but she felt she had to walk out after being accused of something that was not her fault. RN said to her “The staff actually worked for you on that shift, you left them in a vulnerable position. Why did you do that? You have a duty of care to the business. The claimant answered “Because of the situation I was in.” RN asked her if it was the right behaviour and she said no.

57. We consider that the claimant had important duties as supervisor and that it was a breach of her employer’s confidence in her to walk away from her role without good cause and without informing her manager so that he could take appropriate steps. (We say she had no good cause because it is not appropriate for a supervisor to walk out because a person she was managing criticised her.) The store was a vulnerable site with tills and customers who could leave without paying. She left two inexperienced staff who were not fully trained. She took no steps to ensure that the site was secure. We consider that there were reasonable grounds for the disciplinary manager to conclude that the claimant’s actions constituted misconduct.

58. With regard to Allegation 3, we consider that there are three flaws in this decision of misconduct:

58.1. Firstly, by not giving the claimant the relevant witness evidence (i) she did not know that it was concluded that her son knew JP’s name (from which it was inferred that this information must have come from the claimant). Therefore, the claimant was not in a position to defend herself on this point. We note that this is not the disadvantage that the claimant relied on in the Hearing from not receiving all the evidence. However, the claimant was a station supervisor, not a lawyer, and could not be expected to appreciate the nuances of the evidence.

58.2. Secondly, it is clear from the decision that the disciplinary manager considered that the claimant was responsible for her son’s actions whether she intended it or not. He made no finding that the claimant had intended that her son and the man were violent, abusive and threatened physical violence. In the absence of such a finding, we consider it is outside the range of reasonable responses for an employer to find misconduct. A finding that the claimant gave the son JP’s name is not the same as a finding that the claimant intended her son be violent towards JP. He effectively found the claimant guilty of misconduct because third parties had been abusive and threatening, even if she did not intend this. The actions of a third parties which were unintended by the claimant cannot reasonably be seen as misconduct.

58.3. Thirdly, the disciplinary allegations do not include that the claimant demanded JP came out and made an abusive comment towards him. Therefore, the disciplinary manager was basing his decision on an allegation which was not put to the claimant. Such conduct is not within the range of a reasonable response to the situation.

iv. Was there inconsistent treatment of the claimant compared to the treatment of her colleague, JP?

59. We do not consider that the treatment was inconsistent. JP was initially dismissed for his conduct towards the customer, just like the claimant was dismissed, although for different disciplinary allegations. JP was reinstated on appeal. The claimant chose not to appeal. JP was given a written warning for inappropriate language and

behaviour in front of customers. The claimant was not dismissed for the same incident.

v. Was dismissal within the range of reasonable responses?

60. We consider that dismissal was within the range of reasonable responses for Allegation 2. The claimant understood the case against her. We have found that it was reasonable to conclude her actions constituted misconduct. We consider it to be within the range of reasonable responses for an employer to dismiss a supervisor for leaving a vulnerable site staffed by inexperienced staff who were not fully trained, without taking steps to secure the site. The disciplinary manager considered that dismissal could be the only outcome to this conduct on its own. He did not rely on another misconduct to make the misconduct serious enough to merit dismissal. Therefore, the claimant's dismissal was fair and reasonable based on Allegation 2 alone and her unfair dismissal claim must fail.

61. In these circumstances, the fact that we have found issues around the decision making process in respect of Allegation 3 is irrelevant to the unfair dismissal claim.

62. Therefore, we dismiss the claimant's unfair dismissal claim.

Breach of contract claim

63. We have already found that the claimant leaving the store in the circumstances in which she did so constituted misconduct. We consider that it was a serious breach of contract such as to entitle the employer to dismiss summarily. The store was a vulnerable site with tills and customers who could leave without paying. She left two inexperienced staff who were not fully trained. She took no steps to ensure that the site was secure. Therefore, the respondent was entitled to dismiss the claimant without notice and her claim for notice pay fails.

64. Given this finding, we do not need to consider whether her other actions constituted misconduct entitling the employer to dismiss summarily. For completeness, we will consider this point.

65. We find that the claimant, while acting as supervisor, engaged in an argument with a junior colleague in front of customers, even leaving her till duties to engage in the argument. We consider that such conduct is likely to bring the employer into disrepute and is misconduct entitling the employer to dismiss summarily.

66. On the question of Allegation 3, there was conflicting evidence as to whether the claimant was guilty of serious misconduct. Pointing to the claimant's gross misconduct is the evidence of two witnesses, MH and Ra, collected during the investigatory interview, who said that the claimant shouted abuse and called JP "a pussy"; and that they were all very aggressive shouting and swearing and that the claimant and her daughter stood by the door that led to the office banging it and shouting at JP not to hide and saying "arse, pussy, come out". Although we accept that there were some discrepancies in the witnesses' evidence, the general thrust was that the claimant had been abusive to a junior colleague in a way that was completely unacceptable and which would amount to misconduct entitling the employer to dismiss summarily.

67. We weigh this against the claimant's denial of such conduct and the fact that the CCTV does not show her demonstrating aggressive body language to JP.

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Nevertheless, there was no sound on the CCTV. On the balance of probabilities, we consider that the witness evidence proves that the claimant did commit misconduct entitling the employer to dismiss summarily

68. Therefore, we dismiss the claimant's wrongful dismissal claim.

Employment Judge Kelly
19 November 2018