EMPLOYMENT TRIBUNALS

Claimant: **Mr D Brown**

Respondent: **Homeserve Membership Limited**

Heard at: **Nottingham** **On:** **Tuesday 14 August 2018**

Before: **Employment Judge Blackwell (sitting alone)**

Representatives

Claimant: **Ms M Tutin of Counsel**
Respondent: **Mr R Johns of Counsel**

RESERVED JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.

2. The claim of a failure to pay notice pay is dismissed on withdrawal by the Claimant.

REASONS

1. Mr Johns represented the Claimant whom he called to give evidence. Ms Tutin represented the Respondents and she called Mr N Mulholland the investigating officer, Mr M Garbutt who took the decision to dismiss and Mr R Kerr who heard Mr Brown's appeal. There was an agreed bundle of documents and references are to page numbers in that bundle. Because time did not permit oral submissions to be given both parties submitted written submissions and I am grateful to both Counsel for the clarity of those submissions. Both parties had liberty to comment upon each other's submissions and the Respondents did so.

Issues and the law

2. Mr Brown brings a single claim of unfair dismissal pursuant to Section 94 of the Employment Rights Act 1996 (the 1996 Act). As a matter of law it is for the employer Homeserve to prove a potentially fair reason for dismissal pursuant to Sections 98, subsections 1 and 2 of the 1996 Act. There is a dispute between the parties as to that reason. Homeserve allege that the reason for dismissal was conduct which is a potentially fair reason, whereas Mr Johns on behalf of Mr Brown alleges that the real reason was capability, again another potentially fair reason for dismissal.

3. If the Homeserve prove such a potentially fair reason then it is for the Tribunal to determine whether the dismissal was fair or unfair having regard to the statutory test of fairness set out in subsection 4 of Section 98:-

> "(4) In any other case 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."

4. It is also common ground that in cases of conduct dismissals then the well-known case of British Home Stores against Burchell [1978] IRLR 379 is relevant in which it was held that the employer must prove a genuine belief in the misconduct complained of, such belief being held on reasonable grounds after an investigation which was reasonable in all the circumstances of the case. It is also common ground that whilst it is for the employer to prove the genuine belief element the burden of proof as to the other two elements is neutral. In addition the well-known test of the band of reasonable responses is to be applied not only to the decision to dismiss but also to the process.

5. Mr Brown attacks the decision to dismiss on 3 main grounds:-

(a) That Homeserve mistakenly viewed Mr Brown's actions as conduct when in fact the real issue was one of capability in that it was Mr Brown's thought processes which were being criticised.

(b) that the investigation was poor and could not form a reasonable basis for the decision to dismiss and;

(c) that dismissal was not a reasonable sanction ie dismissal fell out-with the band of reasonable responses.

6. Homeserve's case can be summarised as follows:-

(a) The reason for dismissal was misconduct in that Mr Brown gave negligent advice to an engineer which was both in breach of Homeserve's own technical bulletins and the Gas Safety (Installation and Use) Regulations 1998 (GSIUR).

(b) That a thorough and reasonable investigation was carried out and;

(c) that the decision to dismiss fell within the band of reasonable responses.

Findings of fact

7. Mr Brown was employed as a Gas Business Support Officer by Homeserve from 17 April 2000 to his summary dismissal on 3 November 2017.

8. Homeserve are an organisation providing home emergency repairs to gas appliances including the repair and maintenance of domestic gas boilers.

9. Mr Brown was employed as a Gas Business Support Officer and thus his role was to conduct assessments of the work of gas engineers ie a quality control role and to supervise engineers and to provide them with technical assistance.

10. On 12 October 2017 a gas engineer, Mr Paul Oliphant telephoned Mr Brown seeking advice. Mr Oliphant was not an engineer with whom Mr Brown was in regular contact but this has no bearing on the issues to be determined.

11. It is common ground that at the time of Mr Oliphant's contact with Mr Brown, Mr Brown was driving on an unfamiliar road and was following the advice of his satellite navigation system.

12. At page 54 is Mr Oliphant's statement and given that its contents do not seem to have been disputed as a matter of fact it is worth setting out in its entirety:

> "On 12 October 2017 I was called to attend a Worcester Highflow 400 BF. During the course of my work I found the combustion chamber grommets to have perished and allowing products of combustion to enter the property. The customer has her 86 year old mother staying with her.
>
> I thought it may be possible to use high temperature silicon sealant as a temporary repair to stop the boiler being ID (ie immediately dangerous), bringing it down to an at risk. I decided to seek guidance from the GBSO's.
>
> The first to answer the call was Del (ie Mr Brown). I cannot remember word for word but he advised me that he wouldn't recommend it, but if I am getting the parts in day, or they are available for next day then it should be ok to seal with silicon and class the boiler as at risk. I must mention that he was driving at the time of the conversation and he did mention that.
>
> Alan Proudman (another GBSO) then returned my call. His advice was that the boiler is ID and silicon is not acceptable even as a temporary repair. Adam then returned my call also confirming that it's ID and silicon cannot be used as a temporary repair to the best of my recollection."

That e-mail is dated the next day 13 October. As a consequence Homeserve determined to investigate the matter and suspended Mr Brown from duty, see 58. The investigation was said to be "into an alleged breach of Health and Safety Regulations".

13. Mr Brown was interviewed on 16 October at which Mr Brown broadly confirmed Mr Oliphant's account. In particular he is recorded as saying in answer to the question "what did you advise?":

> "Advise no. But if going for grommet today could do as temp measure but ideally use replacement grommet."

14. In answer to the question “is that acceptable?” he said:

> “My understanding is if you can remove/reduce risk you can do but if going to get grommet straightaway not a permanent measure or fix.”

15. Mr Oliphant gave a further statement as did Mr Proudman, see pages 64 and 65.

16. As a consequence Mr Brown was called to a formal disciplinary hearing by letter of 19 October, pages 68 and 69. The letter said as follows:

> “At this hearing the question of disciplinary action against you in accordance with the company disciplinary procedure will be considered with regard to:-
>
> - Potential breach of the Gas Safety and Installation and Use Regulations 1998
> - Potential breach of the reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013
> - Failure to follow company technical operating procedures.”

Mr Brown was warned that dismissal was a potential consequence. The disciplinary hearing eventually took place on 3 November and the notes of that hearing begin at page 92.

17. At page 100 Mr Garbutt who chaired the hearing asked “what was the decision making process? Use correct grommet, acceptable today to use HTS”. Mr Brown replied “as temporary repair, that appliance is then safe”. Mr Garbutt then asked “so in your opinion if reduced to AR would we still be able to operate that appliance?”. Mr Brown replied “no”.

18. At page 103 Mr Brown conceded that had he been the engineer on site it was more than likely that he would have turned off the appliance and not made a temporary repair using HPS.

19. Mr Brown refused to sign the notes of the discussion but I am satisfied having regard to the evidence of Mr Garbutt that they are an accurate reflection of the hearing.

20. It also emerges from the disciplinary hearing that Mr Brown did not know the following at the time of giving his advice to Mr Oliphant:-

(a) The make and model of the appliance.

(b) Whether it was room sealed or open flued.

(c) The classification of the appliance ie ID or AR.

(d) The fault with the appliance.

(e) Whether there was any justification for a temporary repair.

(f) When a replacement approved manufacturer’s part could be obtained and fitted.

21. I am also satisfied from having read the correspondence and the notes of the disciplinary hearing and from concessions made by Mr Brown in cross examination that he knew at all times during the disciplinary process which regulation of the GSIUR he was in breach of namely Regulation 26, subparagraph 7, page 245 and Homeserve's technical bulletin 116, 232 and 233.

22. The logic is that the use of HST which is not a part approved by a manufacturer puts both the engineer carrying out such a task in breach of Regulation 26(7). Further at page 229 at paragraph 6.9.40 it is stated "no temporary repair shall be carried out that may compromise the continued safe operation of the appliance. Further guidance must be sought from your line manager".

23. The compromise in this case was that the use of HST could not be guaranteed to provide a seal that would not prevent products of combustion leaking into the living space because the presence of oil and debris would make such a seal problematic. Further even if a manufacturer approved part could be obtained quickly there was no guarantee that the property could be accessed so as to complete the repair as a permanent repair. Again Mr Brown conceded in cross examination that he was aware of these factors at the time he gave the advice to Mr Oliphant.

24. Mr Garbutt decided to dismiss Mr Brown and that decision is confirmed by letter of 8 November, pages 114 and 115.

25. Mr Garbutt's conclusion is summarised in this paragraph from that letter:

> "My decision was based on the fact that your fundamental role as GBSO is to provide clear guidance to engineers regarding matters of gas safety that comply with gas safe regulations and adhere to company policy. Failure within this role may leave the business open to litigation from external bodies eg HSE Gas Safe Registers. You advised an engineer to carry out a course of action that you would not carry out yourself and did not appear to believe that you had done anything wrong, showing no accountability for your actions or decision. You gave advice which placed the engineer at risk and potentially endangered the health and safety of the customer."

26. Mr Brown appealed by letter of 15 November at page 119. His grounds of appeal were as follows:-

- "It was my understanding that following the fact finding meeting held on 16 October 2017 that the handwritten notes would have been typed up so it is legible and a copy sent to me
- Section DP1, 1.4, DP6, 6.2 and 6.7 of the Homeserve disciplinary procedure
- The similarity in the layout of both Paul and Alan's statements
- Paul's statement stating reducing the risk "bringing it down to an at risk" I feel is similar to the interpretation of reducing the risk given in my meeting held on 16 10 17."

27. An appeal hearing was held by Mr Kerr on 12 December. The notes begin at page 157. The notes show that the grounds of appeal were discussed and considered. Arising from an exchange with Mr Brown which is recorded at pages 165 and 166 Mr Kerr caused enquiries to be made of the manufacturer of the boiler in question, namely Worcester Bosch, see pages 176, 177 and 178 which led Mr Kerr to the conclusion that the use of high temperature silicon on Worcester Bosch boilers is not approved by the manufacturer. What Mr Kerr did not know because for some inexplicable reason Mr Brown did not tell him was that Mr Brown had spoken to Worcester's technical help desk prior to the appeal hearing and the recording of his telephone call is at pages 381 to 384. At page 382 the help desk is recorded as saying:

> "Providing you do a safety check around the boiler and there are no obvious or immediate dangers, and then for a very, very short period of time, I can't see that being a problem, but obviously as long as you know it's definitely not, you know, not a long term thing."

28. Mr Kerr delivered his decision by way of letter of 18 December, pages 183 to 185. Mr Kerr dealt thoroughly with each of the 4 grounds of appeal and I note that the grounds of appeal do not appear to be relied upon in supporting Mr Brown's claim before me.

29. Mr Kerr also dealt with the question of whether the manufacturer would approve the use of HTS and confirmed on the basis of the investigation recorded above that it was not.

30. Mr Kerr upheld the original decision and thus Mr Brown advances his claim before this Tribunal.

Conclusions

Reason for dismissal

31. Mr Johns relies upon an answer given by Mr Garbutt in cross examination that it was the thought process of the Claimant that was the reason for dismissal. He thus argues on that basis that the real reason for dismissal was capability not conduct as averred by Homeserve. In the context of these facts, capability must be a reference to the skill or aptitude of Mr Brown.

32. In my view Mr Brown clearly had the skill and aptitude to give the correct advice to Mr Oliphant. In fact the advice he gave was in my view clearly negligent. A fact that he has acknowledged but appears not to have admitted to himself.

33. I am satisfied that Homeserve have proved a potentially fair reason for dismissal, namely conduct in that Mr Brown's advice to Mr Oliphant on the facts set out above put the company in breach of Regulation 26(7) and was not in accordance with two of Homeserve's technical procedures.

34. Contrary to Mr Johns's submissions, Mr Garbutt's letter of dismissal and his evidence could not have been clearer. I accept that Mr Kerr muddied the waters by including in his appeal letter a criticism of Mr Brown giving advice over the telephone whilst driving, a matter which was never put as an allegation of misconduct to Mr Brown. Nonetheless it is equally clear from Mr Kerr's letter that he too accepted the grounds for dismissal advanced by Mr Garbutt.

35. It follows that I also hold both Mr Garbutt and Mr Kerr had a genuine belief in the misconduct complained of.

Was the dismissal unfair?

36. Mr Johns attacks the investigation firstly on the basis that it was never clear to Mr Brown what he was accused of and which regulations or technical bulletins he was alleged to have breached. As I have found as a fact above that submission is inaccurate. I am satisfied that Mr Brown was fully aware of both the substance of the accusation against him and the specific regulations in the bulletins he was alleged to have breached. Mr Brown acknowledged both during the disciplinary hearing and during his cross examination.

37. Mr Johns then goes on to refer to the fact that had Mr Oliphant or any other gas engineer contacted the Worcester help desk as Mr Brown had done on 16 November then they would have received advice that the temporary use of HTS was safe.

38. I find it extraordinary that Mr Brown did not disclose this information to Mr Kerr at the time of the appeal. I can only conclude that Mr Brown himself had no faith in the advice he was given on 16 November.

39. Taken as a whole in my view the investigation meets the band of reasonable responses test having regard to the fact that this is a large employer. I would go further, the investigation seems to me to have left no stone unturned. I would therefore conclude that Homeserve had reasonable grounds for holding the belief that Mr Brown had given negligent advice to Mr Oliphant on 12 October 2017 which was in potential breach of Regulation 26(7) of GSIUR and of 2 of Homeserve's technical bulletins.

40. Finally then comes the question of whether the decision to dismiss fell within the band of reasonable responses. Mr Brown in his evidence states that in the light of his clean disciplinary record and length of service the decision to dismiss was harsh and unfair. I remind myself at this point of the wording of subsection 4 of Section 98 and of the guidance of Mr Justice Brown-Wilkinson set out in the head note of the case of **Iceland Frozen Foods Limited against Jones** [1983] ICR, page 17. I also have regard to Mr Garbutt's reasoning set out both in his dismissal letter and in his evidence that Mr Brown at no stage appeared to accept any accountability for the error that he had made.

41. There were plainly extenuating circumstances given that he was driving at the time and attempting to concentrate on where he was going because the road was unfamiliar. Nonetheless I agree with Mr Garbutt. Mr Brown both in his evidence in chief and in cross examination still does not appear to accept that the advice he gave was negligent and potentially dangerous. He has sought throughout to lay blame at the door of Mr Oliphant and so far as I can see has never acknowledged, even to himself, that he was at fault.

42. Given the potential risks ie that products of combustion could find their way through a temporary seal made by the use of HTS and the potential risk to life as a consequence, notwithstanding Mr Brown's length of service and clean disciplinary record, a decision to dismiss would fall within the band of reasonable responses particularly given in Mr Garbutt's words that:

> "If Mr Brown had appeared willing to learn from his mistakes and take responsibility for his actions I may have applied a different sanction. However as noted above, I was left with little faith that he would not make the same mistake again."

I concur and therefore Mr Brown's claim of unfair dismissal must fail.

Employment Judge Blackwell

Date 9 November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE