



EMPLOYMENT TRIBUNALS

Claimant: Mr B Arikan

Respondent: Veli's Wholesale Doner Kebab Limited

Heard at: Nottingham

Heard on: 29 April 2024

Before: Employment Judge Victoria Butler

Appearances:

Claimant: In person with his wife to support

Respondent: Mr S Shah, assisting the Respondent

RESERVED JUDGMENT

The decision of the Employment Judge is:

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

REASONS

Background

1. The Claimant presented his claim to the Employment Tribunal on 1 November 2023 following a period of early conciliation between 17 October 2023 and 18 October 2023. He was most latterly employed by the Respondent from 28 October 2019 until 13 October 2023.
2. Both parties were unrepresented, and I was not provided with a list of issues nor referred to any case law. However, I set out the issues below which apply in any

case of this nature.

3. I was provided with typed witnesses statements and the parties provided separate bundles, with limited pagination. I have referred to page numbers where I can.

The issues

4. What was the principal reason for the Claimant's dismissal and was it potentially fair in accordance with Section 98 of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it dismissed him for misconduct.
5. If the reason was misconduct, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources in treating that as a sufficient reason to dismiss the Claimant? My determination whether the dismissal was fair or unfair must be in accordance with the equity and substantial merits of the case, in particular, whether:
 - 5.1.1. There were reasonable grounds for the respondent's belief in the Claimant's misconduct.
 - 5.1.2. At the time the belief was formed the Respondent had carried out a reasonable investigation.
 - 5.1.3. The Respondent otherwise acted in a procedurally fair manner; and
 - 5.1.4. Dismissal was within the range of reasonable responses.
6. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed/had been dismissed in time anyway?
7. Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA and, if so, to what extent?
8. Did the Claimant, by blameworthy or culpable actions, cause or contribute to his dismissal to any extent and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award pursuant to Section 123(6) ERA?

The hearing and the evidence

9. The hearing was listed for one day which allowed time to hear the witness evidence and submissions. I reserved my judgment as there was insufficient time to deliberate.
10. I heard evidence from the Claimant and his wife, Mrs Esmay Arikan.

11. I found the Claimant's evidence to be inconsistent at times. By way of example, he submitted a sick note to the Respondent on 3 October 2023 signing him off work for the period 25 September 2023 – 6 October 2023 despite working on 25 September 2023. The Claimant's evidence was initially (and forcefully) that his GP had made a mistake with the dates. He subsequently conceded that she had simply recorded the dates given to her by him. On another occasion, he denied seeing Mr Shah and Mr Sandham when he came into the office on 3 October 2023, but subsequently agreed they had been present in the room.
12. I also found Mrs Arikan's evidence inconsistent at times but, in particular, relating to a phone call between the Claimant and the Respondent's Managing Director, Mr Ghalani, on 5 October 2023. She said in her witness statement that when the Claimant's phone rang, she took it to him into the kitchen and returned to the living room to carry on with her job. She went on to say: *"suddenly I could hear loud voices coming through. I went back into the kitchen to see what the problem was and I heard Mr Ghalani saying, "I'm not going to pay your sick note I will apply Sharia Law here; you lost your job and come to pick up your P45!!!"*. However, in oral evidence, she was insistent that she took the Claimant's phone to him in the kitchen and remained there to listen to the call because she had *'an instinct'* and *'curious psychic feeling about it'*.
13. For the Respondent, I heard evidence from Mr Sadiq Shah, who assists Mr Ghalani with the day-to-day running of the business.
14. I found Mr Shah to be a credible and consistent witness and therefore, where there was any conflict on the evidence, I preferred that of Mr Shah.

The Facts

15. I made my findings of facts based on the material before me, considering the contemporaneous documents where they existed and the conduct of those concerned at the time. I resolved any conflicts of evidence on the balance of probabilities.

Background

16. The Respondent is a small wholesaler which makes kebabs and employs approximately forty employees. It does not have a HR Department or access to legal advice and Mr Shah deals with employment matters by researching online.
17. The Claimant's first period of employment with the Respondent commenced on 8 September 2003 working five days a week.
18. In 2006, he was issued with a statement of particulars of employment. Under *'Hours of Work'* it provided: *"If there is a shortage of work you may be placed on short time or suspended from work without pay. This will be done in accordance with provisions of current employment legislation"*.

19. Under the heading '*Pension*', it provided: "*The Company does not operate a private pension scheme and there is no contracting out certificate in force in respect of your employment. You are therefore contracted into the state earnings related pension scheme (SERPS) unless you have made your own personal pension arrangements*".
20. Under '*Holiday Entitlement*' there was no clause providing that employees could not take more than two weeks' holiday at a time unless special permission is given by the Directors.
21. The Claimant refused to sign this contract of employment at the time and under signature it is noted by a Company official "*refused to sign due to ignorance*".
22. The Claimant received the following warnings during his first period of employment:
 - On 25 September 2009, a warning for smoking during work time (page 19).
 - On 5 March 2010, a written warning for fighting during working hours on the factory floor (page 20).
 - On 22 February 2011, a written warning for refusal to wear his apron whilst working (page 21).
 - On 1 November 2017, a written warning due to attendance. He had been absent from work between 23 October 2017 to 31 October 2017 without notifying the Company of his absence and reasons for the same (page 18).
 - On another occasion (undated), a verbal warning for refusing to carry out instructions from Mr Veli and behaving in an unacceptable manner towards him (page 22).
23. The Claimant resigned with effect from 6 September 2019 to pursue other opportunities. He returned to the Respondent on 28 October 2019 working three days a week.
24. In August 2022, the Respondent was sold to the current owners and the existing staff transferred.
25. In July 2023, Mr Sadiq Shah was asked by the Respondent's Managing Director, Shakel Ghalani, to help him supervise staff in the factory, assist with customer accounts, take calls and deal with any employment issues. Mr Shah is Mr Ghalani's cousin.
26. Mr Shah was tasked with reviewing and updating all employees' files including identification documents and right to work checks. One such update was providing health and safety training after which all employees were asked to sign the training document to confirm they had understood it. The Claimant initially refused to sign the form despite having attended the training. He deliberately delayed doing so but

ultimately signed on 19 September 2023 (pages 26 – 29).

27. Mr Shah also issued all employees with updated terms and conditions of employment (pages 23 – 25). The new contract was primarily updated to reflect the change of ownership and the terms were largely the same including the short time working clause and pension clauses. The only change to holiday provision was the inclusion of a new clause which provided *“employees are only allowed to take a maximum of two weeks holiday any one time unless special permission is given by the Directors”*.
28. The Claimant’s wife was troubled by the clauses in respect of short time working, pension and holiday and he refused to sign the contract. This was despite the Claimant having previously worked broadly under these terms for circa nineteen years.
29. However, at no time did the Claimant explain to Mr Shah what his concerns were about the contract. He simply refused to sign it saying that he would never sign the document as he did not believe in them and, by signing it, he would have his rights taken away. Furthermore, he said he did not trust the company.
30. Mr Shah asked the Claimant on several occasions what his concerns were so they could discuss them and urged him to take advice but without success. The Claimant continued to refuse to sign the contract and was encouraging other employees not to either. However, all other employees signed without issue.
31. The Claimant subsequently had absences on 20 September 2023, 26 September 2023, and 27 September 2023 without explanation and, therefore, unauthorised. More generally, he was attending for work late and leaving early without explanation and displayed reluctance in adhering to management instructions.
32. On 29 September 2023, Mr Shah had a meeting with the Directors and Mr Sandham, Quality Manager to discuss the Claimant’s unauthorised absence, his refusal to sign the terms and conditions of employment without reason and his general attitude in the workplace. It was agreed that the Claimant would be invited to attend a disciplinary hearing to discuss his conduct.
33. Accordingly, on 2 October 2023 Mr Shah wrote to the Claimant in the following terms:

“You have taken unauthorised days off work on several occasions this last year, verbal warnings were given to you regarding this, recently you once again were absent 20/09/23, 26/09/23 and 27/09/23 you did not call, email, or take any steps to inform us that you were not going to be in work. You were given a written warning regards this issue on the 01/11/2017 by the previous owners.

You have consistently been coming to work late and leaving early and on many occasions, you were invited into the office by Mr Shakel and told that

your work timing is unacceptable you need to be on time for work and leave at the time set as per your contract of work. Once again looking at your file in May 2017 you were given a warning letter for behaviour, attitude and work timings by the previous owners.

Our main reason for this disciplinary hearing is due to the fact that you have refused to sign the Safety Operation Guide when presented to you and after several attempts and discussion you reluctantly signed this.

We then had an updated new terms of employment contract drafted for all Veli's employees which was signed by all existing employees however you have refused to sign this contract to date. I and my managers have asked you to read and sign this contract several times you have refused this request. Once again looking again at your file I find that in 2006 you refused to sign this contract given to you by your previous employer.

You production and performance at work is poor, you refuse to do tasks and duties given to you, in fact you complain that if I am going to do this job I need more money, this is not my job, I have shoulder pain and various excuses and arguments to avoid doing the job you are paid to do.

In short and to summarise, your behaviour, attitude towards the management, timing keeping, unauthorised absences, working performance, your conduct and unable to follow procedure and terms of your employment, I have no option now but to consider you dismissal..."(pages 10 – 11).

34. A disciplinary hearing was scheduled for 10 October 2023 and the previous warnings accompanied the letter. However, the Respondent did not want to dismiss the Claimant. It simply wanted his conduct to improve and for him to sign the contract or, at the very least, explain what his concerns about it were.
35. On 3 October 2023, the Claimant attended his GP to obtain a fit note. The fit note recorded "*unwell, right shoulder pain*" and stated that he was not fit to work for the period 25 September 2023 – 6 October 2023 as per the Claimant's instruction (page 5).
36. The Claimant brought the fit note into work and handed it to Mr Sandham who in turn handed it Mr Shah. Mr Sandham did not make any comment about the dates. Mr Shah noted that it covered 25 September 2023 when the Claimant had attended work.
37. On 4 October 2023, the Respondent wrote to the Claimant stating "*Unfortunately, your sick note is invalid as the dates given show that you were at work on the Monday 25 September 2023. Our records and timecards show that you started work at 8.00am and worked a full shift ending 5.00pm. We cannot accept this as a valid sick note due to the reason given above*" (document 2).
38. That same day, Mr Ghalani telephoned the Claimant to discuss the fit note. The

call lasted for approximately one minute and the Claimant was advised that the Respondent would not be paying him sick pay until he produced a valid fit note.

39. The Claimant somehow mistakenly understood that he had been dismissed during the call, but this was not the case. The Respondent valued his expertise, despite the issues with his conduct, and had already called him to a disciplinary hearing. As such, Mr Ghalani had no reason to dismiss him on the call.
40. The Claimant attended the disciplinary hearing from 10 October 2023. It was conducted by Mr Ghalani and Mr Shah was present. Mr Ghalani confirmed that the Respondent did not want to lose him as an employee, it simply wanted him to consider signing the contract and improve his behaviour. However, the Claimant would not engage with Mr Ghalani having taken the mistaken view that he had already been dismissed. He refused to articulate his concerns about the employment contract and simply said he wanted to go to the Employment Tribunal *'to seek justice'*.
41. Considering the Claimant's stance and his refusal to engage with the Respondent about the allegations, it felt it had no choice to dismiss him summarily for gross misconduct.
42. The outcome of the disciplinary hearing was confirmed by way of letter the same date which said:

"The reasons for your dismissal are: refusing to accept your Terms of Employment, your total disregard of management and rules, failing to sign Safety Operation Guide and your conduct/performance. You have the right of appeal against this decision. Please write to the Director, Mr Shakel Ghalani within 14 days of receiving this disciplinary decision" (page 12).
43. The Claimant appealed the decision to dismiss him by way of letter dated 20 October 2023 (page 13). He confirmed his understanding that he had been dismissed over the phone by Mr Ghalani on 3 October 2023 and said that he did not sign the new term of employment *"because there were clauses in the contract that I needed to discuss with you; however, as you were not in the office, I was not able to do so. When you came back, I was on a sick leave and you just terminated my contract over the phone before allowing me to discuss those clauses with you!..."*.
44. Notably, again, the Claimant did not explain what his concerns about the contract were.
45. On 23 October 2023, the Respondent invited the Claimant to attend an appeal hearing on 6 November 2023 (page 14). The invite letter highlighted that the Claimant had still not explained which clauses in the contract he took issue with.
46. The appeal hearing took place as scheduled with Mr Ghalani, Mr Shah and Mr Sandham. Again, the Claimant refused to engage explaining he had only attended

to show his respect. The Respondent offered him his job back, but he refused saying that he was not interested and confirmed that he wanted to take the matter to an Employment Tribunal.

47. The Respondent confirmed the outcome of the appeal meeting by letter of the same date which said:

“We asked Mr Arikan that if wished to be reinstated at Veli’s Donor Kebab and if he wanted his job and position back, we will consider this only if he can sign the contract and if there is something that he is not happy with we can discuss this and see if it can be resolved to his satisfaction so that he can be reinstated. Mr Arikan was adamant he does not want a job at Veli’s Donor Kebab and wishes to leave it to the Tribunal to decide his rights. To summarise Mr Arikan has been offered his job back in the appeal meeting and he has declined this offer he has no demands and has stated he is only interested in going to the Tribunal to see how much money they will pay him for unfair dismissal...” (pages 15 – 16) .

48. Since leaving the Respondent, the Claimant has secured alternative work at JCB with effect from 4 March 2024 working 5 days a week. Prior to that he made little effort to secure alternative employment because he wanted to take a break from working.

The Law

49. Section 98 Employment Rights Act 1996 provides:

“(1) 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 subsection (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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his

employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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.

Submissions

50. Both parties were given the opportunity to provide oral submissions.
51. The Claimant said that he had tried to explain in the best possible way why he felt his dismissal was unfair. He said the Respondent had been trying to find reasons to get rid of him and wanted to know if the way that he was treated was right or not.
52. The Respondent submitted that it was a small family-run business and had not wanted to dismiss the Claimant. He is an experienced member of the team with particular expertise. It simply wanted him to respect boundaries, rules and regulations and it did everything it could to try and keep him employed. Ultimately, it had to dismiss the Claimant because of his conduct.
53. Mr Shah discredited the Claimant’s account of the call on 4 October 2023 because the Respondent simply had no reason to dismiss him over the phone when it had already called him to a disciplinary hearing.
54. Mr Shah submitted that the Claimant’s evidence had been confused from the outset, he had changed his story and got his dates and facts wrong.

Conclusions

55. At the hearing, I explained to Mr Shah that typically I would not take expired warnings into account in arriving at my conclusions. He explained that he was not

relying on them as such but had included them within the documentation to show a pattern of behaviour.

56. I am satisfied that, on the balance of probabilities, the Respondent did not dismiss the Claimant during the phone call on 4 October 2023. Rather, it dismissed him on 10 October 2023 following the disciplinary hearing.
57. I am satisfied that the Respondent has established that the Claimant was dismissed for the potentially fair reason of conduct. The Claimant had days of unauthorised absence in September 2023 and subsequently submitted a fit note with incorrect dates to attempt to legitimise it, wilfully refused to sign the health and safety training document without reason (albeit eventually relented), refused to sign the updated contract without explanation, was arriving late and leaving early and displaying a belligerent attitude in the workplace. It was these matters that resulted in the Respondent calling the Claimant to a disciplinary hearing.
58. I am satisfied that the Respondent had a reasonable belief in the Claimant's misconduct. The Claimant agreed that he had initially refused to sign the health and safety briefing document and refused to sign the updated contract at all. In terms of the three concerns he highlighted to me, two were identical to the terms he had worked under for nineteen years and the change to holiday booking was of no great consequence as permission could still be granted for more than two weeks' leave. Regardless, the Claimant would not articulate his concerns to the Respondent so it could not take steps to alleviate them.
59. The Claimant had unauthorised absence on 20, 26 & 27 September 2023 and the submitted a retrospective fit note with incorrect dates. The Claimant maintained that when he gave the fit note to Mr Sandham, he was told that he could submit it without amendment. I do not accept his evidence in this regard. Rather, I accept the Respondent's evidence that Mr Sandham simply passed the fit note to Mr Shah who noticed that the dates were wrong and advised the Claimant that it would not be accepted.
60. I am also satisfied that the Claimant's timekeeping was poor, as was his attitude to management instructions. I consider the Respondent acted reasonably in referring to the previous warnings to demonstrate a pattern of behaviour albeit accept that it dismissed him because of his conduct during his second period of employment.
61. I am satisfied that the Respondent carried out a reasonable investigation given the limited scope of the allegations and that there was no further investigation that could be undertaken before the disciplinary hearing.
62. The Claimant attended the disciplinary hearing but would not engage with the Respondent. His view remained that he had been dismissed and refused to return to work. He was adamant that he wanted to take the matter to the Tribunal.
63. Given the Claimant's conduct, insistence that he had been dismissed and refusal to engage with the disciplinary proceedings to address his conduct, I am satisfied

that the decision to dismiss the Claimant was reasonable in all the circumstances.

- 64. In terms of the procedure followed, I am satisfied that the Respondent followed a fair procedure. The Claimant was given notice of the disciplinary hearing, sent the accompanying evidence and given the right to be accompanied. The outcome of the disciplinary hearing was confirmed in writing and the Claimant was given the right to appeal.
- 65. I have had regard to the size and administrative resources of the Respondent. I accept that it is a small company without HR expertise or legal advice and that Mr Shah used online resources to understand how to deal with employment matters. Whilst the communication with the Claimant about the disciplinary matters was perhaps unsophisticated, the allegations against him and reasons for dismissal were clear. The Claimant was given full opportunity to answer the allegations but would not engage with the disciplinary or appeal. Absent that engagement, I am satisfied that the Respondent acted reasonably in dismissing the Claimant for gross misconduct and the decision fell within the range of responses of a reasonable employer.
- 66. Accordingly, the Claimant’s claim of unfair dismissal fails and is dismissed.

Employment Judge Victoria Butler

Date: 17 May 2024

JUDGMENT SENT TO THE PARTIES ON

....21 May 2024.....

.....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.