



EMPLOYMENT TRIBUNALS

Claimant

Mr S Roberts

v

Respondent

Kingspan Environmental Limited

Heard at: Leeds

on: 11 and 12 April 2018

16 April 2018 (reserved Judgment in chambers)

Before: Employment Judge Cox

Appearances:

For the Claimant: Mr M McDonough, employment law consultant

For the Respondent: Mr N Smith, counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.
2. The claim for damages for breach of contract fails and is dismissed.

REASONS

1. Mr Roberts presented a claim to the Tribunal alleging that his former employer, Kingspan Environmental Ltd ("the Company") had unfairly dismissed him from his job as a production manager. He also alleged that the Company had breached his contract of employment by failing to give him notice of termination of his employment.

The issues

2. The parties agreed that Mr Roberts was employed from 1 June 2007 until 21 July 2017 and that the effective date of termination of his employment was 21 July 2017. The parties also agreed that the reason for Mr Roberts's dismissal related to his conduct, namely, the Company's belief that he had been guilty of theft of Company property. That was a potentially fair reason for dismissing him within section 98(2)(b) of the Employment Rights Act 1996 (the ERA). The issue for the Tribunal in relation to Mr Roberts's claim of unfair dismissal was therefore whether the Company acted reasonably in treating that as a sufficient reason for dismissing him (Section 98(4) ERA). That question had to be

decided by reference to all the circumstances of the case, including the size and administrative resources of the Company's undertaking, and in accordance with equity and the substantial merits of the case.

3. Applying the guidance of the Employment Appeal Tribunal in British Home Stores v Burchell [1978] IRLR 379, in a case of alleged misconduct the Tribunal must consider whether the employer had a genuine belief in the guilt of the employee and based that belief on reasonable grounds after a reasonable investigation. The person who made the decision to dismiss Mr Roberts was Mr Ben Johnson, an Operations Manager at Kingspan Insulation Ltd, another company in the same corporate group as the Respondent Company. Mr Roberts accepted that Mr Johnson had a genuine belief that he was guilty of theft but he did not accept that he had based that belief on reasonable grounds after a reasonable investigation. If the Tribunal were to find that he had, then Mr Roberts accepted that the decision to dismiss him, rather than impose some lesser disciplinary sanction, was within the band of possible reasonable responses in the circumstances. Mr Roberts made no other criticism of the procedure that the Company had followed when deciding to dismiss him.
4. In relation to his claim for damages for breach of contract Mr Roberts accepted that, if he had been guilty of theft of Company property, that would amount to conduct that fundamentally breached his contract of employment, meaning that he would not have been entitled to notice of termination. The issue for the Tribunal in relation to the claim for damages for breach of contract was therefore whether the Tribunal itself, on the basis of the evidence presented to it, was satisfied that it was more likely than not that Mr Roberts had in fact stolen Company property.

The evidence

5. The Tribunal heard oral evidence from Mr Roberts himself. On behalf of the Company, the Tribunal heard oral evidence from: Mr Johnson; Mr Shaun Stancliffe, Head of Operations for the Company and Mr Roberts's line manager, who conducted the investigation into his conduct; and Mrs Alison Sheavills, who at the relevant time was the General Manager of the Company's hot water cylinder business, who heard Mr Roberts's appeal against dismissal. On the basis of that evidence and the documents to which it was referred, the Tribunal made the following findings on Mr Roberts's claim.

Findings on unfair dismissal

6. The Company is part of the Kingspan Group, which manufactures an array of building products. This Company's products include copper and stainless steel hot water cylinders. It has a Human Resources department and access to advice on employment law from external advisers. It has around 1,100 employees, with around 58 working on the site where Mr Roberts worked.
7. On the basis of Mr Johnson's evidence, the Tribunal finds that the principal reason for his decision to dismiss Mr Roberts was that he genuinely believed that he had been guilty of stealing 60 StatRX1 programmers from the Company. These programmers were obsolete stock, in the sense that they were over two years old and could no longer be used by the Company in its production processes, but they still had a commercial value. If the Company had wanted to dispose of them, it would first have had to obtain approval at Group level to

write their value off. The programmers had been identified as missing at a stock-take in May 2017.

8. Mr Johnson reached his conclusion primarily on the basis of evidence provided by another employee who worked in the same part of the business as Mr Roberts, "Witness A".
9. When the programmers were first identified as missing, Mr Stancliffe posted a notice in the factory asking whether anybody had any information about their whereabouts. Witness A came forward. He was not prepared to disclose his identity to Mr Roberts because at the time he gave his information there was a possibility that the Company would refer the matter to the police and he did not want to be involved in giving evidence against Mr Roberts in court. He confirmed to Mr Stancliffe that he had seen Mr Roberts taking the items. He said that he had never had a cross word with Mr Roberts and would regard him as a friend and felt very awkward giving evidence against him. He confirmed that he had seen Mr Roberts wrapping up the programmers and disappearing with them at the end of the working day. He could not be sure where Mr Roberts took them but by the time the stock-take happened a couple of days later they had vanished. At a second interview with Mr Stancliffe, Witness A explained that Mr Roberts had wrapped up the programmers by stacking them on some sheeting and then rolling them up. Mr Roberts had said words to the effect that he was selling them to a mate who was a plumber.
10. Mr Johnson had Witness A's first two statements in front of him at the disciplinary hearing on 14 July. After he adjourned the hearing he spoke to Witness A himself and then asked Mr Stancliffe to speak to him again to confirm and record his answers. In these interviews Witness A gave more detail of the conversation he had had with Mr Roberts whilst he was wrapping the programmers. He had asked Mr Roberts: "do you really need to be doing that?", to which Mr Roberts had replied: "I've never needed to do it, I can buy a car with cash tomorrow if I wanted to". Witness A had also asked him: "now you're a manager is it worth risking your job over this?" On around 18 July Mr Johnson sent Mr Roberts a letter enclosing a copy of Witness A's third statement.
11. By this time Mr Johnson had also become aware of evidence that Mr William Alexander, a senior manager in the business, had given to Mr Stancliffe earlier about a conversation he had had with Mr Roberts when escorting him back to the factory after he had been suspended on 30 June. Mr Roberts had told Mr Alexander that he could not understand why he was being accused of theft and that another manager, Mr Smith, had told him he could have certain redundant stock as it was only going to be thrown out anyway. Mr Stancliffe had then spoken to Mr Smith who had confirmed that he had not authorised Mr Roberts to take any obsolete items.
12. In his letter of 18 July to Mr Roberts, Mr Johnson referred to this additional evidence. He said that he understood from Mr Alexander that Mr Roberts had stated that Mr Smith had informed him that he could have the obsolete stock as it was going to be thrown out, but Mr Smith had denied saying this. The letter went on: "Given the seriousness of the allegations made against you I would like to invite you to comment further on any of this information before I reach a decision". In an email in reply Mr Roberts said that he had nothing to add to the investigation. At the reconvened disciplinary hearing on 21 July Mr Johnson

asked Mr Roberts again whether there was anything he would like to say before he went on to make his finding and Mr Roberts said “no”.

13. The Tribunal accepts that the evidence of Witness A alone was sufficient to provide Mr Johnson with reasonable grounds for his conclusion that Mr Roberts had taken the programmers. Further evidence to support Mr Johnson’s conclusion was added at the appeal stage. Having conducted the appeal hearing, Mrs Sheavill decided to interview Witness A to confirm for herself that he was a credible witness. At this point Witness A showed her an exchange of mobile telephone texts between himself and Mr Roberts. Mr Roberts had asked Witness A to accompany him to his disciplinary meeting. Witness A replied: “Sean been thinking bout what you asked sorry don’t wanna get involved we both know it’s true too many ppl know someone is talking so wanna keep out of it really sorry mate”. Mr Roberts’s reply was: “Whos talking n alright no problem”. Mrs Sheavills took the view, and the Tribunal accepts that it was reasonable for her to do so, that this corroborated Witness A’s existing evidence that he had had a conversation with Mr Roberts whilst he was wrapping up the programmers: Witness A’s text was clear assumed that he knew what Mr Roberts had been doing and Mr Roberts knew he knew.
14. In his submissions to the Tribunal as to why his dismissal was unfair, Mr Roberts said that he was not arguing that the Company’s decision to keep Witness A’s identity from him was unreasonable. He did believe, however, that the Company had failed to follow guidelines 2, 3 and 6 in the Employment Appeal Tribunal’s guidance on dealing with anonymous informants in Linford Cash & Carry Ltd v Thompson and others [1989] ICR 518. The Tribunal considered that guideline 2 had been followed in that Mr Stancliffe’s and Mr Johnson’s interviews with Witness A had covered the detail of how Mr Roberts wrapped the programmers and the conversation that they had had, and neither they nor Mrs Sheavill had been given any reason to believe that Witness A had any motive to fabricate his evidence. Guideline 3 suggests that further investigation could be made to confirm or undermine the information given but Witness A was the only witness to Mr Roberts wrapping the programmers. Two employees came forward but neither had witnessed Mr Roberts taking the programmers and none of the other six employees Mr Stancliffe had chosen at random to interview had any information to give. Guideline 6 says that it is desirable that the manager responsible for the disciplinary hearing should interview the informant and satisfy himself what weight is to be given to the information. That was followed in this case because both Mr Johnson and Mrs Sheavills interviewed Witness A and found him a straightforward, consistent and credible witness.
15. Mr Roberts argued that Mr Johnson should have interviewed Mr Alexander himself and clarified why he had not raised the conversation he had had with Mr Roberts earlier, so that Mr Roberts could have had a full opportunity to comment on it at the disciplinary hearing. The Tribunal accepts that ideally Mr Stancliffe would have included the conversation he had with Mr Alexander and Mr Smith in his investigation report and Mr Roberts would have been provided with a recording of the formal interviews that Mr Stancliffe later carried out with Mr Alexander and Mr Smith. Nevertheless, Mr Johnson summarised the information these men had given in his letter to Mr Roberts and invited him to make any comments he wanted to make on it. This invitation was repeated at

the meeting itself. The Tribunal considers that Mr Roberts had a reasonable opportunity to comment on or challenge this evidence but did not do so.

16. As the Tribunal was satisfied that Mr Johnson had reasonable grounds based on a reasonable investigation for his conclusion that Mr Roberts was guilty of stealing the programmers, Mr Roberts's claim of unfair dismissal was dismissed.

Findings on breach of contract

17. The Tribunal did not hear evidence from Witness A to confirm the truth of the statements that he made to the Company during its investigation. The Tribunal nevertheless accepted that the statements Witness A made to the Company were true. Mr Roberts accepted that Witness A had no reason to fabricate evidence against him and suggested no reason, to the Company or to the Tribunal, why he would be lying. Witness A's statements were consistent with each other, albeit that he gave more detail on each occasion that he was interviewed. Further, the text that Witness A sent Mr Roberts when invited to accompany Mr Roberts to his disciplinary interview stated, "we both know it's true". The Tribunal cannot think of a reason why he would have said that if it was not the reality. Mr Roberts's response was not to challenge the statement but to say, "alright no problem".
18. For these reasons, the Tribunal concluded that it was more likely than not that Mr Roberts had been guilty of theft of the programmers. That clearly amounted to very serious misconduct which fundamentally breached his contract of employment with the Company, meaning that it was no longer obliged to give him notice that it was terminating his contract. The Tribunal therefore dismissed Mr Roberts's claim for damages for breach of contract.

Employment Judge Cox

Date: 17 April 2018