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IN THE INDUSTRIAL TRIBUNAL

2004 Ind Tri No. 5

BETWEEN

JOSE ARGÜEZ

Complainant

- and -

RESTSSO TRADING COMPANY LIMITED

Respondent

JUDGMENT

1. The Respondent (“Restsso”) is a wholesale trading Company which has been established in Gibraltar for the past 30 years or so. Among the goods in which Restsso trades is tobacco. Restsso is the local agent and distributor of various brands of tobacco of the Imperial Tobacco Company Limited (“Imperial”).
2. The Complainant was employed as a van driver with Restsso from 9th December 1999 until his dismissal on 12th February 2004. Of Restsso’s seven drivers, the Complainant was one of three that usually delivered tobacco to retail outlets in Gibraltar.
3. In December 2003 the Complainant was arrested in connection with an alleged unlawful exportation of tobacco on board a vessel in Gibraltar and was subsequently charged.
4. Restsso’s Managing Director, Mr John Risso (“Mr Risso”), was informed of this by another employee. As a result, Mr Risso decided to engage a Private Detective, Mr Hector Payas, to attend the Magistrates’ Court on the day that the Complainant was due to appear to answer to the charge. Mr Payas then reported the outcome of his Court attendance to Restsso.
5. According to a Witness Statement filed by Mr Payas and which has not been challenged, on 11th February 2004 the Complainant appeared in the Magistrates’ Court and pleaded guilty to charges of illegally being in possession of and attempting to export tobacco, namely 15,000 Chesterfield

INDUSTRIAL TRIBUNAL
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cigarettes valued at around £6,000. He was fined £300 to be paid in several monthly instalments and the Court intimated that in default of payment the Court would consider imprisonment.

6. According to his evidence, prior to his Court appearance the Complainant attended the Primary Care Centre in the morning of 11th February complaining about kidney pain (from which he had apparently suffered before) and obtained a Medical Certificate declaring him unfit to attend work that day.
7. In his evidence the Complainant admitted that he had driven his car into town in order to attend Court and had driven back home. He also admitted that he had made no attempt to inform his employer of the fact that he was allegedly unfit for work that day.
8. The Complainant returned to work on 12th February. He started work at 8.00 a.m.
9. At about 11.00 a.m., after having done two rounds of deliveries, the Complainant was, as he put it in his Witness Statement, "summoned" to attend the Managing Director's office where Mr Risso (the Managing Director), Mr John Paul Risso (a Director), Mr Salvador Rios (the warehouse manager), Mr Cumbo (a fellow employee) and Mr Ramon Requena (the Shop Steward) were present.
10. By this stage, the Complainant had not yet told his employer that he had had to appear in Court the day before. All he had done to explain his absence of the previous day was to produce to one of the managers the Primary Care Centre certificate I have already referred to. His evidence to the effect that he had intended to tell his employer that he was going to Court I found most unconvincing, especially as in the next breath he said that, if his employer had not asked him about it, he would not have told him about his Court appearance.
11. The Complainant stated that the meeting with his employer at 11.00 a.m. on 12th February lasted 5, possibly 10 minutes. In his witness statement and oral evidence he stated that Mr Risso accused him of having deceived him in claiming that he had been unwell the previous day and that Mr Risso told him he knew that the Complainant had appeared in Court that

morning on a tobacco-related offence. According to the Complainant, Mr Risso then informed him that he was dismissed with immediate effect. On the Complainant's own evidence, when Mr Risso said words to the effect of "*You have been deceiving me, I have to dismiss you*", the Complainant kept quiet.

12. Mr Risso's evidence (which, I accept as accurate in all material respects) was to the following effect: When Mr Risso asked for an explanation for the Complainant's absence the previous day, the Complainant said that it was due to medical reasons and that he had not left home all day. When asked by Mr Risso whether he was sure and wanted to say anything else, he replied that he did not. Mr Risso then told the Complainant that he thought the Complainant was lying to him and that he owed his employer a duty to be truthful. Mr Risso told the Complainant that it was unacceptable to him as an employer to have as an employee someone who had lied to him and been convicted of tobacco charges, especially because of the nature of his business. The Complainant then admitted having been convicted and having lied to Mr Risso. According to Mr Risso the Complainant then tried to make excuses as to why he had been arrested and about his medical problems. By then it was clear to Mr Risso that he had no confidence in his employee and that their relationship had broken down because he had lied to him and had been convicted of a serious matter which had or could have a bearing on his business. Mr Risso then told him he was dismissed and felt the reasons were perfectly clear to the Complainant and also felt he had given the Complainant a full opportunity to explain.
13. The Complainant said in evidence that he understood that his conduct might have been unacceptable from Restsso's point of view but that instead of asking for an explanation they summarily dismissed him. He conceded in his evidence that it was understandable that Restsso should be concerned about the damage to their credibility and reputation in the eyes of the authorities and of their suppliers as a result of one of their employees being involved in a tobacco offence. He also conceded that smuggling tobacco was unacceptable conduct from his employer's point of view and that he appreciated this from the day that he was arrested.

14. He said, however, that he felt that he had been trapped in not having been told "point-blank" by Mr Risso what the reason for his being called up to the 11.00 a.m. meeting was and in not having been told of his employer's prior suspicions and knowledge of the incident. He said that if Mr Risso had called him over to one side and asked him to explain, he would have told him everything.
15. He said that he had never used his employer's vehicles to carry his own tobacco and that the brand of tobacco that he had sought to smuggle, namely Chesterfield, was not a brand which Restsso traded in.
16. The Complainant said that he had never seen a copy of a Restsso Employee Handbook which had come into existence some years ago, apparently as a result of consultations and agreement between Restsso and the TGWU. Mr Nuza, representing the Complainant, made great play of the fact that this handbook was stated to form part of an employee's terms of employment and set out procedures to be followed prior to dismissal which, Mr Nuza said, had not been followed in this case.
17. The Complainant, under cross-examination, gave rather lengthy but vague evidence of the arrangements he had made in connection with the smuggling incident for which he was arrested. However, I consider this evidence to be totally irrelevant to the issues to be decided and will therefore not refer to it in this judgment.
18. More pertinently, the Complainant gave evidence of the fact that he had got a new job in around mid-July with Pipework Limited. Prior to that and, following his dismissal, he had received unemployment benefit for 13 weeks consisting of £146 every fortnight and had subsequently done some casual labour for an undertaker and for Blands.
19. Mr Risso in his evidence essentially stood by the contents of his witness statement and stressed his concerns about the fact that the Complainant's involvement in a tobacco offence would reflect very badly on his company from the point of view of the Collector of Customs (the person responsible for enforcing the Tobacco Ordinance) and his tobacco suppliers, Imperial, since employing persons who were involved in illegal

exportation of tobacco could affect the trust and confidence which the authorities and Imperial had reposed in Restsso in, respectively, granting it a licence and in using Restsso as its agents / distributors in Gibraltar.

20. Mr Risso gave evidence as reflected in his witness statement of the fact that Restsso's original agency / distributorship agreement with Imperial had been tightened up considerably since the original arrangements entered into some 30 years ago. He also referred to the strict obligations imposed on tobacco traders in recent years by the coming into force of the Tobacco Ordinance.
21. The aim of the Ordinance, as is well known, was to curb tobacco smuggling and other activities involving tobacco which could damage the reputation of Gibraltar.
22. Mr Risso confirmed that 50% of the turnover of Restsso's business is made up of tobacco sales and, as such, the safeguarding of the tobacco aspect of their business was crucial to their continued commercial liability.
23. I think that the concerns which Mr Risso expressed in evidence to the effect that this incident could somehow put in jeopardy Restsso's Tobacco Licence or constitute a breach of Restsso's contract with Imperial were somewhat overstated and misplaced.
24. I do, however, believe the thrust of Mr Risso's evidence of his overall concerns, namely that he feared that the Complainant's involvement in and conviction for a tobacco smuggling offence would undermine Restsso's reputation in the eyes of the authorities and in the eyes of Imperial. Further, that it also destroyed Mr Risso's trust and confidence in the Complainant and that his loss of trust and confidence was further confirmed by the Complainant's lack of frankness with his employer about involvement in a serious tobacco offence when Mr Risso called him up to his office on 12th February.
25. As Mr Risso put it in his oral evidence "*I would not risk playing with my licence*", or words to that effect. I asked Mr Risso whether the Complainant could not have been given alternative employment within Restsso which did not involve dealing with tobacco. The essence of Mr Risso's reply was that

his company was a small company (with some 50 employees) and that he could not afford to continue to employ someone who had been convicted of a tobacco offence elsewhere in the Company since it would suggest, within the Company and outside, that the Company did not take such wrongdoing sufficiently seriously and would thus set a bad example or “send the wrong message” within the Company. I regard Mr Risso’s response on this issue as perfectly understandable and reasonable. The possibility of alternative employment, depending on the employer’s size and resources, can be a factor for the employer to take into account and I fully accept that, given the size and nature of Restsso’s business and of the nature and extent of the employee’s misconduct, this was a possibility which a reasonable employer could well have discarded in the circumstances of this case.

26. I also expressed concern at the hearing as to whether an incident of this sort which took place outside the employee’s place and time of employment could constitute misconduct capable of justifying a dismissal. In this regard, however, Mr Azopardi, Counsel for Restsso, drew my attention to relevant caselaw in this field, notably the decisions of the Employment Appeals Tribunal in *McLean –v- McLane Ltd* [1997] UKEAT 682 and *Moore –v- C&A Modes* [1981] IRLR 81.
27. The upshot of these authorities is that, although clearly, criminal offences and convictions outside employment cannot be considered as automatic reasons for dismissal, (even if the offence is relevant to the duties of the employee), the test is one of whether the reason for the dismissal is reasonable in all the circumstances, in particular, having regard to whether the offence is one that makes the individual unsuitable for his or her type of work or unacceptable to other employees.
28. I have no doubt that a conviction for a tobacco smuggling offence would make an employee unsuitable for having custody of and delivering tobacco, regardless of whether the tobacco is that of the employer or not and regardless of whether the offending conduct took place outside the place and time of employment.
29. The Complainant’s criminal conduct was the reason why Mr Risso “summoned” the Complainant to explain his absence of

the previous day and in my view was, on its own, capable of being a sufficient reason to dismiss.

30. The matter, however, does not end there because, when Mr Risso asked the Complainant what he had done the previous day and he failed to disclose his Court appearance, instead limiting himself to referring to his alleged illness, Mr Risso concluded that the Complainant could not be trusted to tell his employer the truth. At that point, Mr Risso clearly and, in my view, not unreasonably, felt vindicated in his decision to dismiss by the fact that, apart from the Complainant's criminal conduct, the Complainant had not been candid with Mr Risso about his Court appearance, which I regard as a further breach by the Complainant of the implied duty of trust and confidence which exists in every contract of employment.
31. In the circumstances I have no difficulty in concluding that the Complainant's criminal conviction and his subsequently being evasive and disingenuous with his employer about his Court appearance and conviction, each amounted to misconduct leading to a breakdown of trust and confidence on the part of the Respondent towards the Complainant.
32. I therefore find that the requirements of Section 65(2)(b) of the Ordinance are satisfied. Therefore the next question is whether the employer acted reasonably within the meaning of Section 65(6) in treating the Complainant's misconduct as a sufficient reason for dismissing the Complainant and, in particular, whether the process of dismissal was conducted in reasonable manner.
33. Clearly Mr Risso was entitled to seek an explanation for the absence of his employee when they met on 12th February. In Restsso's favour, it may be said that the Complainant had a chance to explain everything both before and after he was confronted with Mr Risso's knowledge of the conviction. The Shop Steward was present throughout the meeting and, incidentally, it appears (although this is not recollected by the Complainant), that Mr Risso rang Mr Nuza of the TGWU to explain that he had dismissed the Complainant – although Mr Nuza cannot recall when exactly Mr Risso rang him.
34. On behalf of the Complainant, Mr Nuza, however, argued that Mr Risso's failure to disclose in advance that he was aware of

the Magistrates' Court appearance amounted to entrapment. Mr Nuza contended that fairness required Restsso to put the allegation of misconduct to the Complainant and then let him answer the allegation. Mr Azopardi, replied that Mr Risso did not set up his employee in order that he would commit an act of misconduct, which is the essence of an entrapment. The Complainant, continued Mr Azopardi, had only himself to blame for his misconduct in committing the offence and subsequently concealing his Court appearance from his employer.

35. During the hearing, Mr Nuza put before the tribunal the Restsso Employee Handbook I have referred to earlier. Section 3 (Appendix E) of the Handbook deals with disciplinary proceedings and provides for a warning system in the case of minor or serious misconduct and for investigation and suspension for gross misconduct. Section 3(iii) of Appendix E of the Handbook provides as follows:

*“(iii) **GROSS MISCONDUCT***

As soon as it is believed that an Employee may have committed an act of gross misconduct, he or she will be informed of the nature of the allegation by the Department Manager and then suspended with pay pending further investigation. The period of suspension will not normally exceed five working days.

During the investigation the Employee will be given full opportunity to state his or her side of the case and the investigation will be carried out as quickly as possible.

If it is proved to the satisfaction of the Company that the Employee committed the alleged offence, he or she will be summarily dismissed, i.e. without notice or pay in lieu.”

36. The Complainant said that he had never seen such a handbook and Mr Risso himself gave evidence that it had not been used for many years, that it was only in force with some of the older employees and that he had not provided it to more recent employees, such as the Complainant.
37. Mr Nuza drew attention to Section 1.1 of the Handbook which states that the terms and conditions of employment “are laid

down in your statement of terms and conditions of employment and/or as detailed in the employee handbook”.

38. A standard covering letter issued by Mr Risso and attached of the handbook states that the handbook, together with any additional or amendments, formed part of an employee's contract of employment. According to the evidence, the Complainant had never seen this letter either.
39. No evidence was adduced before the Tribunal as to the terms of the Complainant's contract of employment, let alone of the fact that the terms of the Handbook were incorporated by reference or otherwise.
40. Although perhaps not incorporated in the Complainant's contract of employment, I would nevertheless regard the disciplinary provisions of this Handbook as providing guidelines within, Restsso of good practice which Restsso had bound itself with the TGWU to follow, albeit a few years back.
41. Whilst the final paragraph of Section 3(b)(iii), of Appendix E of the Handbook which I have set out in Paragraph 35 above, provides for summary dismissal once an offence has been proved, the question is whether this absolves the employer from any flaws in the procedure leading up to a summary dismissal in such circumstances. In this regard, clearly the need for “investigation” referred to in that Section does not really arise in this case because, in my view, once the conviction came to Mr Risso's attention, there was nothing to investigate or prove, just as there was nothing to investigate or prove once it became clear that the Complainant had deliberately failed to disclose his Court appearance and conviction to his employer.
42. On the other hand, Restsso did not follow its own recommended procedure as set out in its handbook, in that it failed to inform the Complainant from the outset (that is: “*as soon as is believed that the Employee may have committed an act of gross misconduct*”, in the words of the Handbook) of the nature of the misconduct alleged against him.
43. Whilst the fact that the Handbook procedure had been breached would not, of itself, render the dismissal automatically unfair, it is certainly a factor to be taken into

account and be given such weight as the circumstances warranted. See *Bailey v BP Oil Kent Refinery Ltd* [1980] 1 RLR 287 CA (in particular the head note and Paragraph 12 of the Judgment).

44. In the circumstances of this case I regard as significant the fact that no reasons appeared to exist and none were put forward to justify or explain why, despite the terms of Restsso's own handbook, the allegation of misconduct was not put to the Complainant at the earliest opportunity. In my view it was not burdensome or difficult for Restsso, nor was it unreasonable to expect Restsso to put its knowledge of the conviction and the consequent allegation of misconduct to the Complainant in a direct manner. In the circumstances of this case, I am unable to conceive that a reasonable employer might have declined to follow the procedure set out in his own handbook unless he had a genuine and honest belief, based on reasonable grounds, that this would have been futile. However, there is no evidence that Mr Risso's mind was directed to this issue when he decided to dismiss the Complainant.
45. For these reasons, I find that although the Complainant was guilty of misconduct in having committed and been convicted of a serious tobacco offence, Restsso, albeit not in bad faith, approached the procedure leading up to dismissal on the wrong footing, as a result of which the remainder of the procedure followed had no valid base to stand on and was thus irregular. On that basis, the fact that the Complainant concealed his Court appearance during the interview becomes academic, or at most, merely further evidence of the Complainant's untrustworthiness from Restsso's point of view.
46. I therefore conclude as follows:
 - (1) Restsso honestly believed that the Complainant was guilty of serious misconduct in having been convicted of an offence which was relevant to his particular employment and to his employer's business generally;
 - (2) Restsso had reasonable grounds upon which to base such a belief;

- (3) At the time that Restsso formed that belief, it had carried out as much investigation into the matter as was reasonable in all the circumstances;
- (4) Restsso, however, should have put the allegation of misconduct arising from the conviction to the Complainant at the start of their meeting of 12th February 2004 and should not have dismissed the Complainant without first giving him a proper opportunity to consider the allegation and take advice from his union or others if he so wished.
- (5) The procedure leading up to the dismissal was not in accordance with the Restsso Employee Handbook and no reasonable employer would, in these circumstances and without reason have disregarded the procedure set out in its own handbook.
- (6) The Complainant was therefore unfairly dismissed.
- (7) However, on the evidence I find that Mr Risso's honest, reasonable and very firm belief in the Complainant's misconduct in committing a serious tobacco offence was such, that even if a correct procedure had been followed, the result would, on a balance of probabilities, have been the same, that is, that the Complainant would have been dismissed. The result of this is that I find that in all likelihood, the Complainant has suffered no loss as a result of the correct procedure not having been followed in dismissing him. Consequently, whilst awarding the Complainant the basic award of £2,200 I find that the compensatory element of the award should be reduced to nil.



Lewis Baglietto
Chairman
15th October 2004