



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr M Brookes

Respondent

Mitie Ltd

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL **ON:** 19TH / 20TH JULY 2021
EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- IN PERSON

FOR THE RESPONDENT:- MR P STARCEVIC (COUNSEL)

JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claim of unfair dismissal;
- ii) The claimant's claim for unpaid holiday pay;

are not well founded and are dismissed

- iii) The claimant's claim for wrongful dismissal;

is well founded and upheld.

Reasons

1. By this claim the claimant brings claims of unfair dismissal, wrongful dismissal and unpaid holiday pay. I have heard evidence from the claimant, Mr Michael Auguste and Ms Diane Sockett; and for the respondent from Ms Sheridan Altass and Mr James Harvey.

Unfair Dismissal

Facts

2. The claimant was employed by the respondent and worked as a porter under the respondent's client contract at the NHS Royal Cornwall hospital from 9th July 2012 until his summary dismissal on 17th July 2020.

3. The events which led to his dismissal occurred on 1st June 2020. On that day his shift was due to end at 4.00pm and at 3.19 pm he was directed to take a female patient to the pharmacy to collect a prescription and then return her. It is not in dispute that there was a delay in providing the prescription, nor that at approximately 15.50 the claimant requested that another porter pick the patient up. He then switched off his device and left.
4. The respondent received a number of complaints about the claimant's conduct. Dealing first with the pharmacy staff, in a written complaint dated 4th June 2020 Ms Demelza Vinson describes him as becoming increasingly aggressive and raising his voice, that the patient was embarrassed and visibly upset by his conduct which she described as totally unacceptable. Ms Tamsin Pope described him as angry, raising his voice and also that the patient was visibly upset. The pharmacist described that he could hear the claimant being rude to Tamsin, and that the patient seemed stressful and embarrassed by the whole situation. Mr Ian Harris, the porter who replaced the claimant described the patient saying "She never thought she could ever meet someone so rude and abrupt who worked at a hospital" and that she was sobbing when telling him this. A security guard Sean Miller described him as extremely rude to pharmacy staff multiple times which upset the staff and the patient a great deal. He informed dispatch and his supervisor and relayed what he had witnessed to another security guard Mr Dan Bolton. The claimant contends that these descriptions are not accurate. They are either simply untrue or a misunderstanding of his forceful advocacy on the part of the patient.
5. The respondent submits that the behaviour described above, which Ms Altass subsequently found to have occurred, falls within the definition of misconduct in the respondent's disciplinary policy, specifically " Aggressive or other unacceptable behaviour towards suppliers, clients or colleagues", and " Any conduct ... that may have a negative effect on the company..".
6. The claimant's line manager was Ms Julie Rapson. His evidence is that she called him in for an informal chat approximately a week to ten days later and asked him to give his account of events which he did, and after which he thought the matter was closed. In fact he was invited to an investigatory meeting on 17th June 2020 again conducted by Ms Rapson. He gave his version of events again and denied being angry or rude.
7. The respondent determined that disciplinary proceedings should commence and Ms Altass was appointed as the disciplinary officer. By a letter dated 2nd July 2020 the claimant was informed that he faced allegations of gross misconduct in unprofessional and aggressive behaviour; failure to complete job role responsibilities; actions bringing the company into disrepute, and causing damage to the client relationship. Enclosed with the letter were the disciplinary policy, notes of the investigatory meeting of 17th June 2020; and the complaints and witness statements. He was warned that the allegations, if proven could constitute gross misconduct and could result in dismissal. The hearing was originally scheduled at 2.00pm on 7th July 2020. However the claimant's representative Mr Auguste was not available and on the morning of the 7th July the claimant requested an adjournment. That was granted and at 11.45 am Ms Altass requested that the claimant supply a time within the next five days for the rescheduled hearing and set out in the email the section of the respondents policy which allows for a postponement for up to five days in the event

that a chosen representative is not available but that if the chosen representative is not available on the second occasion then an alternative should be sought.

8. On the 9th July 2020 the meeting was rescheduled for the 15th July and the claimant was notified in writing. It is not in dispute that the claimant received the letter and was aware of the hearing. He did not personally request an adjournment but on 13th July Ms Sockett wrote to Ms Altass in relation to three disciplinary hearings stating that Mr Auguste could only attend on three dates at the end of July.
9. As a result in accordance with respondent's policy and the email from Ms Altass the meeting went ahead on 15th July without the claimant's attendance. The claimant accepts that he knew of the meeting and had not been told it had been adjourned, but asserts that he believed it would be to accommodate Mr Auguste's attendance and that he was not deliberately failing to participate. In his witness statement he accepts that he was in work that day and that if he had known the meeting was going ahead that he could have arranged alternative union representation.
10. The disciplinary outcome was conveyed by a letter of 17th July 2020. Ms Altass concluded that the claimant was guilty of gross misconduct. In relation to the allegations of aggressive and unprofessional behaviour she accepted the evidence of the seven witnesses who described his behaviour as rude and/or angry, stated that in the investigatory meeting he had shown no remorse and had not attended the disciplinary meeting. In relation to the allegation of failure to complete the job role and responsibilities she concluded that after the behaviour towards the pharmacy staff that he left the patient alone in order to leave site at the end of his shift. For the avoidance of doubt the respondent accepts that ordinarily there is no requirement for a porter to remain with a patient but in this case the task was precisely to take the patient to the pharmacy and then return her. She concluded that he either did not understand or accept the responsibilities of his role; and again that he showed no understanding or remorse at the investigatory meeting and had not attended the disciplinary meeting. In respect of bringing the company into disrepute she summarised the evidence contained in the complaints and witness statements, concluded that this had taken place in a public area in the presence of a patient which was wholly unacceptable. Again she concluded that in the investigatory meeting he had shown no remorse and had not attended the disciplinary meeting. Overall she concluded that given the seriousness of the misconduct, the reputational damage to the respondent and the absence of any remorse that dismissal was the appropriate sanction.
11. The claimant appealed on 18th July 2020. The grounds were that the pandemic had affected his ability to have the representative of his choice; that he had never seen the evidence against him; and that he had never before been the subject of any disciplinary allegations. On 25th July 2020 he was sent the witness statements by Mr Harvey. The claimant now accepts that his allegation that he had not previously received them is incorrect as they had been sent with the letter of 2nd July 2020 but that he had not seen them or realised this.
12. The appeal meeting took place on 17th August 2020. It was conducted by Mr Harvey and Mr Auguste represented the claimant. At the meeting a written submission which was subsequently copied to Mr Harvey was read out. Following the hearing Mr Harvey interviewed Sheridan Altass and Julie Rapson.

13. On 27th August Mr Harvey dismissed the appeal by letter. It is not necessary to set out all of his conclusions but he addressed all the points raised by the claimant. In summary he concluded that Ms Altass was entitled to proceed with the hearing; that Ms Altass had taken HR guidance but that the decision was hers; that Ms Altass had not lied about the claimant having received the witness statements (as is now accepted by the claimant); that the investigation was adequate; that the allegations which were proven amounted to gross misconduct and that dismissal was a reasonable sanction; that there was no inconsistency between the meeting conclusions and the dismissal letter in that whilst the allegation of leaving a patient alone is not in and of itself gross misconduct, that doing so in the circumstances of this case was a failure to follow best practice and that Ms Altass was entitled to consider it as part of her overall conclusions.

Submissions / Conclusions

14. As the purported reason for dismissal was misconduct there are four questions the tribunal has to answer. Misconduct is a potentially fair reason for dismissal (S98(2) Employment Rights Act 1996) and the first is whether the respondent has proven, the burden being on it, that a belief in the misconduct was the genuine reason for dismissal. Neither Ms Altass nor Mr Harvey were challenged about this and having heard their evidence I accept that the dismissal and dismissal of the appeal were genuinely for this reason.

15. The next questions are the Burchell questions. Did the respondent carry out a reasonable investigation, did it draw reasonable conclusions as to the fact of the misconduct, and was dismissal a reasonable sanction. The range of reasonable responses test applies to each of those questions.

Investigation

16. A large part of the claimant's case rests on the proposition that the investigation was fundamentally flawed, which meant that the disciplinary process could not subsequently reach reasonable conclusions.

17. The claimant contends that the respondent failed to comply with the ACAS guidance as to investigating disciplinary allegations, and that whilst it is only guidance where there has been a wholesale failure to follow it the respondent has necessarily failed to carry out a reasonable investigation. He contends in particular that:

- i) *He was not dealt with in a "fair and reasonable manner";*
- ii) *It did not look for evidence which supports the employee's case as well as evidence against it;*
- iii) *He was not notified that the meeting was a formal investigatory meeting which could lead to disciplinary action;*
- iv) *He was not given advance warning or time to prepare;*
- v) *He was not notified of the allegations against him or given the opportunity to speak to any potential witnesses/complainants;*
- vi) *He was not permitted to be accompanied by a trade union representative.*

18. To deal with the last point first the claimant relies on the fact that the policies of the NHS Trust allow for union representation at the investigatory stage, despite the fact

that this is not a statutory requirement, and that the claimant's understanding of the agreements between the trust and contractors such as the respondent is that their policies should mirror those of the trust itself. He should therefore have been permitted to be represented. The respondent contends that whatever the policies of the Trust (and there is in fact no evidence before me in respect of them) that the respondent's policy is clear and that it follows the statutory scheme and does not permit trade union representation at the investigatory stage. Whether the claimant believes that the respondent's policy should be different is immaterial; it isn't and as it is compliant with statutory requirements it cannot reasonably be criticised.

19. Secondly the claimant complains that his line manager was not an impartial person. The submission is difficult to follow but essentially the claimant contends that he had previously raised grievances about the conduct of colleagues who also fell under her line management and that grievances against them, of which she was aware, were therefore at least implicit criticisms of her herself. In addition she knew or should have known that he had a clean disciplinary record and should have realised that these allegations were totally out of character. She should have either discounted them, or at least allowed the claimant to discuss them with the witnesses to attempt to iron out any misunderstandings which may have prevented the need for disciplinary action at all.
20. In terms of the witness evidence the claimant complains that no attempt was made to obtain any evidence which might be exculpatory or contradict the assertions made by the complainants. In particular no attempt was made to secure CCTV footage, and no attempt made to contact or interview the patient. The respondent contends that for the hospital to have disclosed the patients identity would have been a breach of confidentiality but that in any event it would have been wholly inappropriate to involve a patient in an internal disciplinary matter.
21. The respondent submits that in reality this was essentially a simple case to investigate. Ms Rapson had three sources of complaints, from the pharmacy staff, from the security guards and from the porter who replaced the claimant all of which painted a very similar picture and were in essence corroborative of each other. All that was required was to give the claimant the opportunity to give his side of events which he was. In terms of procedure there are no specific procedural requirements for an investigatory hearing and that in any event the meeting notes are headed "Investigation Meeting Notes...", there was a notetaker, and the notes were signed by Ms Rapson and the claimant. In the circumstances the claimant cannot have failed to realise that this was an investigatory meeting. Looked at overall it necessarily fell within the range reasonably open to the respondent.

Disciplinary Process

22. There are a number of challenges to the procedural fairness of the disciplinary meeting. Firstly the claimant contends that it should not have proceeded without his representative Mr Auguste as there was an agreement between the respondent and the Trade Union that at any disciplinary action taken against a steward that he or she would be represented by a full time official. The respondent does not accept that there is any such agreement, at least no formal agreement, and contends that there is no evidence before me of this. Although it is mentioned in the ET1 it is not referred

to in any of the witness statements of the claimant or his witnesses or in the bundle. It is certainly correct that there is no evidence of any such agreement before me.

23. The central issue in respect of procedural fairness is whether it was reasonable of Ms Altass to proceed with the hearing in the claimant's absence. The claimant contends that she had been requested to adjourn the hearing on 13th July but had not replied. She either knew or could easily have discovered that he was at work and she made no attempt to contact him to discover whether he was genuinely not attending out of choice or whether there was a misunderstanding. The respondent contends that she acted entirely within its policy; that the claimant had been notified of the hearing and had not received any indication that it had been adjourned; he had not himself sought any postponement or given any indication that he could not attend. There was no basis to assume that it had been adjourned and as he himself says in his witness statement it would have been perfectly feasible to attend with a different union representative, which was precisely what he had been informed by Ms Altass that he should do. In the circumstances it was effectively his choice not to attend for whatever reason, and the decision to continue with the hearing was entirely reasonable.

Misconduct

24. The next question is whether the claimant had a reasonable opportunity to persuade Ms Altass that the allegations were false. The claimant contends that he had not had an opportunity to challenge them. It is not in dispute that he had not been shown the complaints / witness statements at the investigatory stage and could not comment at the hearing as he was not present. Even if it was reasonably open to Ms Altass to continue in his absence she could not simply take them at face value and accept the allegations without herself seeing the witnesses and assessing their reliability, particularly as the claimant asserts that there are significant discrepancies in the accounts and that at least one of the witnesses bore him a degree of animosity. The respondent submits that the claimant fundamentally misunderstands the internal disciplinary process. It is not a police investigation and there is no right to have the witnesses attend and be cross examined; and the hearing is his opportunity to give his side of events. If he chooses not attend the only information available to the decision maker are the written complaints/witness statements and the contents of the claimant's investigatory interview. The test is whether she drew reasonable conclusions from the information available to her which she clearly did. All the conclusions were based on the witness evidence. There were a number of witnesses all of whom essentially corroborated each other and all of whom painted a picture of the claimant behaving wholly unacceptably. There was no evidence before her to contradict this and in any event the number of witnesses who corroborated the accounts of the claimant's behaviour indicate that on any analysis on the balance of probabilities it likely have occurred. The conclusion that he had behaved as described, and that it constituted gross misconduct, clearly fell within the range reasonably open to her.

Sanction

25. The claimant contends that the sanction was too harsh, particularly given his exemplary disciplinary record. The respondent submits that his behaviour fell squarely within the definition of gross misconduct in its disciplinary policy and that the

ordinary sanction for gross misconduct is dismissal. It would be a very unusual case in which the decision to dismiss fell outside the range reasonably open to it. In any event the evidence was that the claimant had behaved in such a way that a patient was “sobbing” when describing his conduct, three members of the pharmacy staff and a security guard had complained about him; and he had breached the respondent’s policy by leaving and not completing the task allocated to him. Again on any analysis this was conduct sufficient to justify dismissal and the decision fell squarely within the range reasonably open to Ms Altass.

Appeal

26. The respondent submits that if there is any merit in the claimant’s procedural challenges, particularly in respect of Ms Altass’s decision to proceed in the claimant’s absence that the same is not true of the appeal. The claimant attended, he was represented by Mr Auguste and he presented a written document setting out all the matters he wished Mr Harvey to consider. The claimant accepted in evidence that he had been given the opportunity to say anything he wished to say in the appeal. Looked at overall the whole process was sufficiently fair (OCS Group v Taylor).

Overall Conclusions

27. I accept all of the respondent’s submissions set out above and my conclusions respect of the challenges to the procedural fairness of are:

- i) The investigation fell within the range reasonably open to Ms Rapson. The allegations were clear and all that was required was to give the claimant the opportunity to give his version of events;
- ii) It was reasonably open to Ms Altass to proceed in the claimant’s absence in the circumstances
- iii) Even if I had identified procedural flaws in the investigation or disciplinary hearing in my view the overall process was fair (See OCS Group v Taylor).

28. In respect of the substantive allegations my conclusions are:

- i) Although the claimant denies the allegations it is notable that at no point has he provided any explanation as to why the pharmacy staff or the security guard should make up any allegation against him; and insofar as he alleges that Mr Harris bore him some animosity the effectively independent witnesses support him and not the claimant. In the circumstances in my judgment the conclusion that the claimant was guilty of the misconduct was necessarily reasonably open to Ms Altass.
- ii) Similarly in my view the allegations fell squarely within the description of gross misconduct and dismissal was a sanction reasonably open to the respondent.

29. It follows that in my judgement the claim for unfair dismissal must be dismissed.

Wrongful Dismissal

30. In order to determine the wrongful dismissal claim it is not sufficient that I conclude that it was reasonably open to the respondent to have drawn the conclusion that he had committed gross misconduct and was fundamentally in breach of contract, but that as a matter of fact that he was.

31. The respondent has called no direct evidence before me as to the misconduct but relies on the written complaints and invites me to conclude that the evidence is overwhelming. The difficulty is that the evidence consists only of written letters of complaint; none of the witnesses has been called and the claimant has had no opportunity to challenge them. I have not found this entirely easy to resolve as the witness statements/complaints do paint a consistent picture of conduct clearly falling within the definition of gross misconduct. However in the absence of any direct evidence being placed before me, in the circumstances I am not persuaded on the evidence before me that I can determine as a matter of fact that the claimant was in fact guilty of the misconduct alleged or that the respondent was as a result entitled to dismiss without notice. It follows that this claim is upheld.

Holiday Pay

32. Although there is a pleaded claim for unpaid holiday pay it is not particularised and there is no evidence before me that there is any unpaid holiday pay owing. The claimant submitted that I could simply adjourn this claim to be determined at the remedy stage. However in order to get to remedy I have to determine that there is some liability. In the complete absence of any evidence there is simply no basis to make any such finding and this claim must be dismissed.

Remedy

33. As the claim for wrongful dismissal has been upheld the claimant is entitled to notice pay. That should be easy to calculate. In the circumstances the parties are directed to notify the tribunal in writing within 28 days whether a remedy hearing is required and if so what is in dispute.

Employment Judge Cadney

Date: 29 July 2021

Sent to the Parties: 11 August 2021

FOR THE TRIBUNAL OFFICE