



EMPLOYMENT TRIBUNALS

Claimant: Mr S Singh

Respondent: BCM Employment & Management Services Limited

Heard at: Nottingham On: Tuesday 28 February 2017

Before: Employment Judge Blackwell (Sitting Alone)

Representation

Claimant: Avneath Dosanjh, Representative

Respondent: Kathryn Duff, Representative

RESERVED JUDGMENT

The claim of unfair dismissal fails and is dismissed.

RESERVED REASONS

1. Ms Dosanjh ably represented Mr Singh and called him to give evidence. Ms Duff represented the Respondent and she called Mr Richard Eaton, the disciplinary officer. There was an agreed bundle of documents and references are to page numbers in that bundle.

Issues and the Law

2. Mr Singh brings a single case of unfair dismissal. Mr Singh alleges that through the conduct of Mr Eaton who conducted a disciplinary process on behalf of the Respondent's, Mr Singh was forced to resign on 30 June 2016. In particular Mr Singh alleges that at a disciplinary hearing which resumed on 30 June 2016 his trade union representative informed him "*that BCM were terminating my contract and it would be in my best interests to resign*".

3. The Respondent's say through Mr Eaton that no such pressure was put upon Mr Singh to resign and that the suggestion to resign did not come from Mr Eaton but on the contrary it came from Mr Hammond, Mr Singh's trade union representative.

4. As a matter of law it is for the Tribunal to determine "*who really terminated the contract of employment*". If it was BCM then Ms Duff accepts that the dismissal is unfair. If however Mr Singh resigned voluntarily on the advice of his trade union representative then it is common ground that there was no dismissal.

5. The second issue I have to determine, and this only arises if I find in Mr Singh's favour on the first issue, is to what extent any award should be reduced by the contributory conduct of Mr Singh.

6. The relevant law is mainly statutory. As to the basic award for unfair dismissal, Section 122(2) of the Employment Rights Act 1996 (the 1996 Act) reads as follows:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

10. As to the compensatory award Section 123, Subsection 6 reads as follows:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

11. It is well established that the conduct complained of must be culpable or blameworthy, that it must have led to or contributed towards the dismissal and finally that it must be just and equitable in all the circumstances of the case to make a reduction. BCM's case is that if Mr Singh is found to have been unfairly dismissed then on the facts there should be a one hundred per cent reduction in both awards.

Findings of Fact

12. Mr Singh began working for a predecessor of BCM in June 1990. He was a QC manufacturer in a department manufacturing a range of drugs and medicinal products.

13. The Respondent's are a very large employer and were better known to the general public as Boots.

14. On 25 May 2016 Mr Singh was deployed to the afternoon shift. One of his tasks was to prepare a "*hibi-scrub batch*". Mr Eaton described the product as a skin sanitizer used both pre and post surgery to prevent the infection of wounds. In other words it is applied directly to the skin of the patient undergoing the surgery.

15. It is common ground that during the process of preparing that batch, at step 22 Mr Singh instead of mixing the batch for a period of 30 minutes, only mixed it for 25 minutes. At step 26 he appreciated what he had done. At page 118 we see what Mr Singh then did, namely he altered the times recorded from step 22 to step 16. He altered the recorded times so as to make it appear that in fact the process at step 22 had in fact been carried out for the required period of 30 minutes rather than the 25 minutes it had actually had. It can be seen that the alteration at each point is described as "*clerical error*".
16. Mr Singh has always accepted that this was in breach of the standard operating requirement which we see set out in full at pages 61 to 63.
17. Mr Singh accepts that what he had done was "*a non clerical error*" which required further explanation. The difference between a "*clerical error*" and a non clerical error is set out clearly on page 62 and the steps required where there is a "*non clerical error*" are set out clearly on page 63.
18. It is apparent that Mr Singh on 25 May did not follow the SOP.
19. The consequence was that a batch of product was produced in a manner that did not fit the specification. Mr Singh attempted to rectify his earlier fault by adding an extra 5 minutes of mix at step 26 but he accepted in cross examination that he had never been instructed so to do and that he had no real idea whether it would have rectified the earlier reduction in mixing.
20. The difference between clerical error and non clerical error is illustrated at page 120 where on the very next day Mr Singh in producing a further batch of hibi-scrub had applied the correct times but had recorded them in error. He corrected that error and BCM accept that he had done so in accordance with the SOP and although this incident was investigated, no disciplinary process was follows.
21. The batch mixed on 25 May was also investigated because quality control were not satisfied with the entries that we see at pages 118 and 119. A process began which required BCM to inform both the customer and the regulator of what had occurred. There was of course analysis to establish that the batch met the correct standards which indeed it did.
22. Mr Eaton in his evidence made it clear that it was not inevitable that the error of 25 May would have been picked up by quality control. It could have been accepted as a pure clerical error and gone out to the customer without any further investigation.
23. Mr Singh was summoned to an investigatory interview which was carried out on 8 June. Mr Singh was frank throughout, accepting "*I had given it 25 mix instead of 30 minute mix*". The team leader Ms Whittle who conducted the interview recommended that the disciplinary process should be begun and Mr Singh was summoned by letter of 21 June to a disciplinary hearing to be held on 27 June to be conducted by Mr Eaton the Area Operations Manager. See page 126.

24. The notes of that hearing are at pages 127 to 131. Mr Eaton conducted the hearing with a note taker Ms Stephenson. Mr Singh was present and was represented by Mr Hammond a Senior Shop Steward with his trade union. Again Mr Singh admitted his error and put forward a number of mitigating matters, in particular that he was on a number of medications, one of which had recently been changed. Mr Hammond in addition put forward the proposition that since Mr Singh had failed an assessment on 8 April 2016 he should have been removed from the manufacturing process until he had passed that assessment.

25. Mr Eaton adjourned the meeting at 1.30 pm and reconvened it again 10 minutes later. The minutes record at page 131 the following paragraph from Mr Eaton:

"I can't make a decision, where I am at is based on what you have done and told me. I should be dismissing you, I haven't been given anything to say that you can make product without making changes to paperwork. I can't trust you to make a safe product for the customer. On the opposite side you have 25 good years' of service, that is a lifetime, you deserve more than a 10 minute adjournment. We will make the decision this week, it will be resolved one way or the other."

26. In fact the hearing was reconvened on 30 June and we see the notes at pages 134 to 135. The same people were present. Mr Singh put forward further mitigation which is set out in full in his witness statement at paragraphs 29 and 30 and concerned the abuse he had suffered as a child and the consequences of that abuse.

27. The meeting was adjourned to allow Mr Singh to recover his composure, partly to deal with Mr Singh's previous disciplinary record, a summary of which we see at page 132. Mr Eaton had obtained that record because at the 27 June hearing Mr Hammond described Mr Singh as having "exemplary service". In fact Mr Singh had a variety of warnings following disciplinary processes including two final written warnings.

28. There then followed a further adjournment in which Mr Eaton was to come to his decision. Mr Singh's evidence is that Mr Hammond was summoned back into the room and returned to him and "told me that BCM were terminating my contract and it would be in my best interest to resign". As a consequence Mr Singh did agree to resign following discussions with Mr Hammond on matters such as notice pay, holiday pay and the provision of a reference. That resignation which was written by Mr Hammond and signed by Mr Singh is at page 136.

29. Mr Eaton's evidence is that as all of the parties were going out of the meeting room, Mr Hammond approached him at the door and said "this isn't going well. Would you consider a resignation?" Mr Eaton said that he would and after at least 2 discussions with Mr Hammond as to what sums would be available in respect of notice pay and holiday pay and the terms of a reference, Mr Hammond came back with the letter of resignation. Mr Eaton accepts that he refused the request from Mr Hammond that there be a 24 hour period for consideration. Mr Eaton says that he did so because he did not want to be seen to be encouraging a resignation.

30. Mr Singh almost immediately regretted his decision having discussed it with his daughter. He also took advice from the CAB and a solicitor. On the next day he rang Mr Hammond telling him that he wished to retract the resignation. Mr Singh says that Mr Hammond undertook to contact BCM's HR department. This was on Friday 1 July. On Monday 4 July Ms Stephenson at BCM's HR department informed Mr Singh that he would not be able to retract the resignation.

Conclusions

31. In summary Mr Singh puts forward the following matters in support of his contention that he was forced to resign. Firstly he refers to Mr Eaton's comments at the conclusion of the hearing of 27 June which are set out in full at paragraph 25 above. Mr Singh relies upon the comments about trust and in particular "*I should be dismissing you*". In my view Mr Singh has not understood the full import of the whole paragraph which he accepts as being an accurate record. On any objective reading the paragraph is saying that there is a difficult decision to be made with a balance to be drawn between an admitted serious offence and mitigating factors such as 25 years' service.
32. Mr Singh also relies upon Mr Eaton's attitude throughout the disciplinary process, claiming that Mr Eaton was putting words into his mouth. There is no hint of such behaviour in the minutes of the two hearings and I prefer Mr Eaton's evidence on the point.
33. Mr Singh also relies on Mr Eaton's refusal to allow a 24 hour period within which to consider a resignation. Mr Eaton accepts that he did refuse that postponement.
34. Finally Mr Singh relies on the fact that notwithstanding BCM's own procedure a 24 hour cooling off period was not permitted.
35. Against this I have Mr Eaton's clear evidence, which I accept, the proposal to resign came from Mr Hammond, Mr Singh's trade union representative. I found Mr Eaton to be a straightforward and credible witness and I accept his evidence.
36. In conclusion on the evidence I have heard, and Mr Hammond has not been called as a witness, I accept that Mr Hammond advanced the concept of resignation. What precisely he said to Mr Singh is unclear given Mr Singh's evidence. I note that Mr Singh gave contradictory evidence as to whether there was discussion about the availability of notice pay, holiday pay and a satisfactory reference.
37. It is clear that Mr Hammond must have taken the view that dismissal if not inevitable was the likely outcome and he probably was doing the best he could in the circumstances for his member. The benefits were notice pay, full contractual holiday pay and a satisfactory reference.

38. In those circumstances I am satisfied on the balance of probability that Mr Singh's decision was taken after a process of discussion with his trade union official and that that decision was not brought about by the conduct of Mr Eaton, other than that which inevitably flows from a disciplinary process which involved the admission of a serious offence expressly defined as gross misconduct warranting dismissal in BCM's disciplinary code. Thus Mr Singh's claim of unfair dismissal must be dismissed.

Contributory Fault

39. Although it is not necessary for me to consider this issue given that the claim of unfair dismissal has been dismissed, I shall do so in deference to the fact that I have heard both the evidence and submissions on the point.

40. Firstly was the conduct of Mr Singh prior to the resignation culpable and blameworthy? There is no dispute that it was. Mr Singh accepts that he falsified documents and that he did not follow an SOP, the contents of which he was fully aware.

41. Secondly did that conduct contribute to or lead to the dismissal. In other words was there a causal connection? Again, plainly, there is no dispute that that was so.

42. The issues arise upon whether it would be just and equitable to make deductions. Mr Singh both in the disciplinary process and in its evidence, puts forward a number of mitigating factors. The first of which is long service in excess of 25 years. As Mr Eaton acknowledged "a lifetime". That service however was not exemplary as advanced by Mr Hammond. I have taken note of the disciplinary record set out at page 132.

43. The second matter put forward is that Mr Singh was on a variety of medications for a variety of conditions and his evidence on this point is to an extent supported by a letter from his General Practitioner at page 133 in relation to the thyroid treatment. However as Mr Eaton believes and I agree with him, whilst it may have been a mitigating factor in relation to the error of a failure to mix for the full period, it does not explain why Mr Singh took himself away from his normal work station to a position some 40 or 50 yards away in order to make the alterations which he did.

44. The next matter relied upon was advanced by Mr Hammond at the first disciplinary hearing, namely that because Mr Singh had failed an assessment, he should have been removed from the manufacturing process and its responsibility. Mr Hammond is noted as saying that this was standard practice. Mr Singh was cross examined on this point and his evidence was unclear. Mr Eaton on the other hand gave evidence that there was no such practice and that employees were given 3 chances to pass the assessment. There was a delay between the failure in April and a retest because Mr Singh had been absent from work through illness. I prefer Mr Eaton's evidence on the point.

45. The next mitigating factor is that Mr Singh admitted what he had done at the investigatory hearing on 8 June. I accept that that is so. However given Mr Singh's comments at page 127 it is hard to accept that he did not immediately realise what he was doing. In my view having heard Mr Singh and read the documents, I believe that he knew full well what he was doing when he altered the manufacturing record. He also knew full well that the consequence might be that a batch of a product was vital in terms of its sanitizing effect would go out to be used with consequences that Mr Singh could only guess at.

46. Finally Mr Singh advanced as a mitigating factor the abuse he had suffered as a child and its consequences including the fact that he became an alcoholic.

47. The question of what is just and equitable in these circumstances is a matter for me. I am satisfied that Mr Singh deliberately falsified documents and knew he was doing so from the moment that the alteration was made. And he did so recklessly ie not knowing what the consequences would be. Given the nature of the product and the consequences for the user and his employer I have no hesitation in deciding that had it been necessary to do so I would have made a one hundred per cent deduction from both basic and compensatory awards.

Employment Judge Blackwell

Date 17.3.2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS

