



EMPLOYMENT TRIBUNALS

Claimant: Mr M Boudali-Ouchfoun

Respondent: Bard Pharmaceuticals

HEARD AT: BURY ST EDMUNDS **ON:** 4th & 5th April 2017

BEFORE: Employment Judge Postle

REPRESENTATION

For the Claimant: Mr G Sankey (CAB Representative)

For the Respondent: Mr J Crosskill (Counsel)

JUDGMENT

- 1 The Claimant was not unfairly dismissed.
- 2 The Claimant was not wrongfully dismissed.
- 3 The Claimant is ordered to pay the Respondent's counter claim fee of £160.
- 4 The Respondent's counter claim in the sum of £710 succeeds, and the Claimant is order to pay to the Respondent £710.

REASONS

- 1 The Claimant brings two claims before this Tribunal, one for unfair dismissal under the Employment Rights Act 1996, secondly a claim for wrongful dismissal. There is a counter claim by the Respondents in respect of an over payment amounting to £710 at the termination of the Claimant's employment.
- 2 The unfair dismissal claim appears two fold and that is, Mr Matthews did not have reasonable grounds to form a reasonable belief that the Claimant had falsified a batch record and that the sanction of dismissal was outside the

band of reasonable response open to an employer. It does not appear that procedures leading up to and including the disciplinary hearing and the appeal hearing is said to be unfair or flawed in any way.

- 3 In this Tribunal we have heard evidence on behalf of the Respondents from Mr Matthews the Packaging Operations Manager who conducted the disciplinary, Mr Gray the Director of Supply Chain who conducted the Appeal and the Claimant all giving their evidence through prepared Witness Statements. The Tribunal also had the benefit of a bundle of documents consisting of 338 pages.
- 4 The facts of this case are relatively straight forward and undisputed. The company produces and supplies medicines including prolonged release technology pain and respiratory medicines. It's primarily involved in the manufacture of high strength opioid analgesics, such products as morphine sulphate and oxycodone. They are used primarily in the field of palliative care and conditions such as osteo-arthritis. They are used as pain relief by cancer patients and those suffering from Aids amongst others. They are controlled pharmaceutical products and as such their manufacture and distribution is subject to tight legal controls, audits and good manufacturing processes and procedures.
- 5 Pharmaceuticals are manufactured in what appears to be a highly regulated environment due to the associated health risks to patients if appropriate procedures are not followed the inevitable will happen. The Respondents have even tighter levels of control due to the narcotic nature of their products. The Respondents as I said are audited by the Regulatory Authorities in the territories that they supply and they are also audited by the Home Office which grants them a licence to manufacture these controlled products.
- 6 The Claimant was employed by the Respondents for 15 years, he started as a filling and packaging operator in 2001 and was promoted to Manufacturing Advanced Technician in 2016. The Claimant's role as an advanced technician was in the manufacturing department and involved working in the Respondent's suites for controlled medicine products manufactured in tablet form and implementing various stages of the manufacturing process. This includes sole responsibility for the product within the suite, preparing and applying the coatings to powders prior to their compression into the tablet form. His duties included the manufacture of a number of different controlled pharmaceutical products including those for human consumption such as oxycodone which is used to alleviate severe pain and is the subject of this case. In the Claimant's case he was required to work alone unsupervised within the manufacturing suite preparing the equipment required to apply a coating to a product already inside a large steel tank. The coating mix is stirred, mixed manually by the Claimant before being added to the process by means of a spray gun. This is apparently an automated process using settings and controls that are configured and tested by the Responsible Technicians.

- 7 The Claimant clearly had the training in his role as shown at pages 78-97 and 106. It is clear from those documents and the training that there is an emphasis throughout on the completion of batch records, other records to be accurate, legible, complete and sets out the consequences of not completing accurate records, and that checks are done strictly in accordance with the batch records and that is not surprising given the nature of the industry. Furthermore technicians such as the Claimant work alone so there is no overseeing of what they are doing, but there is a need clearly to follow and complete the batch records as they are set out, a great deal of trust is placed on technicians. The Claimants most recent training was on the 14th July 2015 and that is at 185-194.
- 8 The Claimant was fully trained to operate Suite 1 and during the course of the disciplinary hearing he confirmed he knew the process that he had to follow. The Company is therefore required by its Regulators to follow these good manufacturing procedures hence the batch records and their importance.
- 9 The Company's disciplinary procedure makes it clear that intentional or negligent breach of these manufacturing processes such as falsifying of records etc would normally constitute gross misconduct and we see that at 144.
- 10 On the 6th September the Claimant advised his Line Manager that a batch he'd been running had finished the spraying 30 minutes earlier than planned and that's at 254. On the 8th September Mr Allen met with the Claimant to establish what exactly had happened and a note of that meeting is at 255-256. On the 15th September an investigation meeting was held with Mr Allen, with HR in attendance and the notes of that meeting are at 257-258. As a result of what the Claimant said he was suspended on the 20th September on full pay pending a disciplinary hearing and the letter of suspension is at 261. The reason for it was the incident relating to the incorrect spray rate being applied or inserted.
- 11 The Claimant was invited to a disciplinary hearing by letter of 22nd September, and the meeting was due to take place on the 27th September and was to be Chaired by Mr Matthews. The letter at 262-263 sets out the allegations in that there was a failure to adequately follow batch record process, a wilful lack of care and attention when completing and signing the batch record process elements resulting in a breach of good manufacturing practice and an incorrect spray rate being applied to an OxyContin batch resulting in a stock right-off. In that letter minutes of the investigation had clearly already been sent. There was a reference to CCTV although not enclosed said it could be viewed if it was required at the disciplinary hearing. The letter went on to say that the Claimant had a right to be accompanied and a copy of the disciplinary procedure was enclosed, it also indicated the possible sanctions including dismissal were before the Respondents.

- 12 The meeting went ahead on the 27th September. Previous to the meeting Mr Matthews had read the notes of the investigation at which there were some concern, in that the batch had already been loaded, when he came into the suite, part of his duties was to check to see that the spray was 300 grams per minute and he had just forgot it. He then went on to say that sometimes you don't tend to read them and just sign them. Mr Matthews was surprised to read this given the nature of the work requirements to keep accurate records. Employees should always check and not make assumptions. At the meeting Miss Allen from HR was there to take notes, the Claimant was accompanied and the meeting as we know was Chaired by Mr Matthews, the notes of that meeting are at 264-268. At the meeting the Claimant was given the opportunity to explain his actions which seemed to be in a nutshell that he had no intention to mislead, it was a mistake, an error in which he had forgotten to carry out the spray test and he'd effectively anticipated the 300 grams per minute, and completed the batch record. What did arise was that the Claimant's insistence that his decision not to test spray rates at Step 5 of the batch record was justified. As a result of this Mr Matthews adjourned the meeting to make further investigations and statements taken from Clorley, Jones and Prime about the process at step 5 on the batch records. As a result of those statements Mr Matthews decided that he would discount allegation relating to the Step 5 tests.
- 13 The meeting was then re-convened on the 30th September and the Minutes of that meeting are at 272. At the meeting the Claimant was asked in relation to Step 10 on the batch records why he'd recorded the spray rate to be 300 grams per minute if he'd forgotten to do the step and that's seen at 273. The Claimant's response was he believed he'd "done everything he needed to do and he believed he had done the check". When asked about recording this step the Claimant maintained not being prompted in any way that the check had been completed when writing the value for that check on the batch record. The Claimant then went on to explain the process to calculate the value for the batch record, "using a timer and a spray into the batch and checking the scales as 0.3 on the scales for 300". Mr Matthews was surprised given that it was a process which required a full task including timing and weighing and recording, and the Claimant was simply advancing an explanation that it had "just slipped his mind completely". The Claimant was then asked how he could have completed the time taken on the batch record, clearly it was estimated, the Claimant would not accept this. The purpose of the batch record was to record a true and accurate account of each step taken for the production of each batch. The Claimant was questioned as to whether he prefilled the batch record in before the batch had been finished and to confirmed he had done so, though he had changed the entry when he realised it was different and had finished sooner and that was just an error on his part.
- 14 The Claimant was then asked when he realised he'd forgotten to check the spray test at Step 10 he did not record 0 on the batch record rather than record 300 which was clearly incorrect and false recording. Mr Matthews believed that appeared to be gross misconduct.

- 15 Mr Matthews adjourned to consider the sanction and equally applying weighting in his mind to the Claimants length of service of 15 years. This did weigh heavily on his mind however, he concluded that on the Claimant's own admissions namely "sometimes you do not read them, you just sign" to consciously chose not to follow the procedure and working alone required a great deal of trust and that had been lost. Mr Matthew then considered, other employees who had been dismissed for the same offence and there were four certainly he was aware of Freshney, Bailey, Whiting and Bagnall. At the same time he considered whether the Claimant should receive a final written warning but to be consistent given the Claimant's conduct he felt that even weighing his length of service he should be dismissed. He believed that the Claimant had pre-empted Step 10 spray rate without doing the test, recording it as if done and thereby falsifying the batch record.
- 16 The Claimants dismissal was confirmed by letter of 4th October and the Claimant was given a right of appeal which he exercised and that was conducted by Mr Gray. The grounds for the appeal are set out in the Claimants letter of 7th October (279). Mr Gray after hearing from the Claimant concluded following his review, that the decision and sanction administered by Mr Matthews was appropriate in the circumstances even allowing for the Claimants length of service bearing in mind the nature of the job and the requirement of trust and the importance of completing batch records accurately and honestly.

THE LAW

- 17 Firstly, an employer must show the reason for dismissal and that is one of the potentially fair reasons set out in Section 98(1)(2) of the Employment Rights Act 1996. If a potentially fair reason is shown and in this case it is conduct the Tribunal must consider the fairness under Section 98(4). This is a conduct case Tribunals should follow the guidelines of British Home Stores & Burchell. Firstly the employer believed the employee guilty of misconduct, secondly it had in mind reasonable grounds upon which to sustain that belief and at the stage which the belief was formed had carried out as much investigation as was reasonable, this means that the employer need not have conclusive proof of an employees conduct only a genuine and reasonable belief formed at the time they took the decision to dismiss.
- 18 Finally whether the sanction of dismissal falls within the bands of reasonable response test. The Tribunal has to look at the words firstly of Section 98(4) and in applying that section the Tribunal must consider the reasonableness of the employers not simply whether the dismissal to be fair and in Judging the reasonableness of the employers conduct a Tribunal must not substitute it's decision as to what was the right course to adopt for that employer. In many but not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee

fell within the band of a reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair and if the dismissal falls outside the band it is unfair.

CONCLUSIONS

- 19 It is clear that the reason for dismissal in this case is conduct, and that was the belief that the Claimant had falsified batch records in inserting incorrect data and information to the effect that a test had been carried out which had not been carried out, the result of which the drugs produced had been disposed of. Mr Matthews had an honest and genuine belief that the Claimant had inserted false information in those batch records and was thus guilty of misconduct, he simply did not believe that the Claimant forgot to do the test, his explanation was not accepted and to his mind was unbelievable bearing in mind what was required in order to do the test in the first place. It is simply not something that Mr Matthews thought that an individual would forget. When Mr Matthews formed that belief the Claimant had been given every opportunity to explain his actions and following the initial explanation Mr Matthews sensibly adopted a course of adjourning the hearing to carryout further investigations in relation to Step 5 procedures. As a result of those further investigations the allegation relating to Step 5 was disregarded.
- 20 Mr Matthew's reasons for dismissal are clear and he identifies his reasoning for them and that is quite simply a falsification of batch records which one would normally lead to gross misconduct. The Claimant's motive was irrelevant, the fact of the matter was he said he had done something on batch record when he patently hadn't and had then completed false information.
- 21 So was the decision or the sanction of dismissal fair? The disciplinary process and appeal process was fair and it's not advanced before me that, it was in any way flawed. The crux of the matter is whether the sanction is fair or unfair. Now it's accepted that when Mr Matthews adjourned on the 30th September it weighed on his mind the Claimants length of service, it would be surprising if it didn't. The Claimant had 15 years and seemingly an unblemished record or at least nothing on his file at the time against that Mr Matthews concerns that the Claimant was a lone worker, a technician holding a highly responsible job in a heavily regulated industry which is licensed and presumably that license can be removed at any stage for false accounting or audits. Simply just to sign records and not question whether that part of the process has been done where somebody has been properly trained, an employer is entitled to say I think there is a breach of trust here, I'm not sure that I can trust this employee anymore given the job that he's employed to do. So given the facts and circumstances known to Mr Matthews at the time of the dismissal the sanction of dismissal does fall within the band of reasonable response open to this employer.
- 22 Wrongful dismissal – it's clear that the Respondents are entitled contractually to dismiss summarily and we see that at 244. Employees

should not act in a manner which is calculated to seriously damage the relationship of trust and confidence without reasonable cause. Clearly the Claimant did go down that route in this case and in those circumstances the claim for wrongful dismissal does not succeed.

- 23 Dealing with the Respondent's counter claim it is clear that Clause 8 of the Claimant's contract which he has signed entitles the Respondents to recover any over payments and in the Claimant accepting that those overpayments have been made then the counter claim succeeds.
- 24 The Claimant is also ordered to pay the Respondent's Issue Fee in respect of the counter claim in the sum of £160.
- 25 The Respondent's application for a contribution towards their legal costs, whilst this has some merit under the rules in the 2 stage test whether any of the circumstances under the rules apply. However, the second stage of the test is whether I should exercise my discretion having heard from the Claimant as to his complete lack of means it would seem therefore rather pointless in making such an order as the Respondents in the foreseeable future are very unlikely to recover any such sums. In saying that I am minded that I am entitled to take into account the Claimants future prospects but at present they look extremely limited.

Employment Judge Postle, Bury St. Edmunds.
Date: 16 May 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS