



EMPLOYMENT TRIBUNALS

Claimant: Mr D Wilkinson
Respondent: Emovis Operations Leeds Limited
Heard at: Leeds
On: 29 and 30 January 2019
Before: Employment Judge Cox
Members: Mr D Wilks
Mr J Howarth

Representation:

Claimant: In person
Respondent: Mr Ryan, counsel

REASONS

1. Mr Wilkinson presented a claim to the Tribunal alleging that Emovis's decision to dismiss him amounted to an unfair dismissal and an act of unlawful discrimination because of something arising in consequence of his disability.
2. At the Hearing, the Tribunal heard oral evidence from Mr Wilkinson. On behalf of Emovis ("the Company"), the Tribunal heard oral evidence from Mr Darran Musgrave, Operations Director, who made the decision to dismiss Mr Wilkinson, and Miss Beatriz Fuentes, Human Resources Manager, who heard Mr Wilkinson's appeal against dismissal.
3. On the basis of that evidence and the documents to which the witnesses referred it, the Tribunal made the following findings on Mr Wilkinson's claim.

Background facts

4. Mr Wilkinson is a disabled person under the Equality Act 2010 because of depression. The Company knew at all material times that he was a disabled person because of that condition.
5. The Company operates "Dart Charge", the tolling system for the road crossing of the Thames at Dartford, on behalf of its client, Highways England ("HE"). In

summary, the contract involves the Company capturing an image of the number plate of a car as it approaches the tunnel or bridge, linking that to the record held by the DVLA of the car's registered keeper, receiving payment for the crossing via a pre-paid account or a one-off payment via the internet, Payzone or a mobile phone, linking the payment to the car or issuing a penalty charge notice if the payment is not received by the due time. If the penalty charge is not paid, HE uses private bailiffs to recover it.

6. The Company also provides a customer service function to answer queries from Dart Charge customers and HE and deal with matters arising from those queries. Mr Wilkinson's job was as a customer service representative in the Correspondence Team, dealing with correspondence received from customers via email, letter (which was then scanned into email form) or an online facility on the Dart Charge website. (Another team deals with telephone queries.) The Team also deals with requests or queries from HE, which can arrive by email via a system called HAIL or as a query input into a system called Taranto. The correspondence received in this way is referred to as the Taranto work queue. Only Mr Wilkinson and one other customer service representative dealt with the Taranto work queue.
7. As part of its obligation to demonstrate that it is meeting the contract service standards, the Company must provide data to HE each month setting out the number of pieces of work it has received, the number completed, the number outstanding at the end of each month and the date of the longest-outstanding piece of work. The Company is also audited by the National Audit Office at the end of each year, which can involve the NAO examining the evidence supporting the information provided by the Company in its monthly reports.
8. In around August 2017 Mr Stephen Pinder became the Team Manager of the Correspondence Team. He decided to change the way in which customer service representatives recorded the work they did on the Taranto work queue. Work done on correspondence from other sources was recorded by the customer service representative marking the relevant email to indicate that it had been dealt with and giving the date. This data was then collated automatically by computer. In contrast, Mr Wilkinson and his colleague working the Taranto work queue were recording the number of items they had dealt with from that queue by marking them up on a "sticky note" on their computer screens. At the end of the day, they sent the Team Manager an email to let them know how many of these items they had completed so that they could be collated manually.
9. In collaboration with the Company's management information team, Mr Pinder developed and introduced a new computer system that automatically recorded the work done on the Taranto work queue. He decided to trial this over February and March 2018 in tandem with the old manual system so that he could compare the figures produced by the two systems and confirm that the computerised system was working correctly. He did not inform Mr Wilkinson and his colleague that he was doing this, but they were both aware that their work could be monitored. At the end of the trial, Mr Pinder compared the manual data with the automated data and found that while Mr Wilkinson's colleague's manual records tallied exactly with the automated

data, Mr Wilkinson's manual records recorded 230 pieces of work that were not reflected in the automated data. Based on the target time to deal with each item of work, that was equivalent to around 38 hours' work.

10. Mr Pinder put this information together and discussed it with Mr Wilkinson at a disciplinary investigation meeting on 11 April. Mr Wilkinson said that sometimes he forgot to record the work as he went along and had to guess how many items he had worked.
11. Mr Pinder suspended Mr Wilkinson from work because he considered that he might have committed acts of gross misconduct by knowingly recording incorrect data about his work.
12. Mr Musgrave sent Mr Wilkinson a letter inviting him to a disciplinary hearing to answer charges that he had falsified work records and avoided work. The letter enclosed copies of the Taranto data for Mr Wilkinson and his colleague, the investigatory meeting notes and a copy of the Company's disciplinary procedure. Before the hearing, Mr Musgrave reviewed Mr Wilkinson's appraisals and his 1-2-1 meetings with his line manager where his work was discussed. These confirmed that no issues had been identified with Mr Wilkinson's work.
13. In advance of the hearing, Mr Wilkinson wrote to Mr Musgrave and said that "the mistakes I have made . . . was due to lack of concentration as 80% of people suffering with mental health find difficult to do". At the hearing itself he said that he had mental health issues that meant that concentration was difficult. He also complained that Mr Pinder was not doing his job properly and was "scapegoating" him.
14. As Mr Wilkinson had said his mental ill-health had affected his performance, Mr Musgrave adjourned the hearing to enable the Company's occupational health (OH) advisers to interview Mr Wilkinson. The resultant report confirmed that Mr Wilkinson had depression. In its referral, the Company had asked whether Mr Wilkinson's condition would cause him to fail to record work accurately or falsify figures. The adviser's response was: "Whilst cognition (e.g. memory, recall) can be impaired, there was no evidence today Daniel's underlying mental health issues would be the direct cause of his inability to accurately record work and figures."
15. Mr Musgrave considered this additional information and decided that the inaccuracies in Mr Wilkinson's figures could not be attributed to his mental ill-health. He concluded that Mr Wilkinson had deliberately falsified the figures to cover for the fact that he was not working as he should have been. He decided that dismissal was the appropriate sanction. Although most of the work Mr Wilkinson did was now recorded automatically, there remained records that the Company would need to trust him to complete accurately himself, including work on an "open call" spreadsheet the HE sent the Company of calls it had received itself but which the Company needed to follow up. Mr Musgrave no longer had trust in Mr Wilkinson's honesty or accurate reporting of data. If the Company provided inaccurate data to HE, that would raise a real risk of damage to the reputation of the Company, with

HE and more widely, and could have serious contractual repercussions, including financial penalties for failure to meet key performance indicators.

16. Mr Wilkinson appealed against his dismissal.
17. The appeal hearing was held on 25 May. At the hearing, Miss Fuentes discussed with Mr Wilkinson the issues he had raised in his appeal letter. Mr Wilkinson said that Mr Musgrave had always intended to dismiss him and had only referred him for an OH assessment when there was a prospect of him being dismissed. He pointed out that the OH adviser had confirmed that depression can affect cognitive behaviour and he asserted that 80% of depressed people find it hard to concentrate. He said that the adviser had no basis for her conclusion that his depression had not affected his ability to record accurately because she had not carried out any tests. In any event, he said, the effect of his depression fluctuated from day to day. He said that if there were any issues with his performance that should have been raised with him earlier and he should have been given a chance to improve. His mental ill-health should be taken into account as mitigation. He also criticised the investigation, saying that only one month's figures had been used and no supporting evidence had been provided. Some of the discrepancies were in Mr Wilkinson's favour but that had not been mentioned. Miss Fuentes asked him to explain his position that his mental ill-health did not affect the quality of his work, only his memory of how many items of Taranto work queue work he had done. His response was that nothing had been brought to his attention about the quality of his work but he might have been sending repeat emails.
18. As Mr Wilkinson had said that his mental ill-health had been particularly bad in the period before his suspension, Miss Fuentes asked Mr Pinder to collate further data for a longer period before she made a decision on Mr Wilkinson's appeal. The data for 1 October 2017 to 11 April 2018 showed that Mr Wilkinson had over that period recorded the equivalent of 125 hours' work on the Taranto work queue that he had not in fact completed. There were days during the period where Mr Wilkinson had under-recorded his work but these were minimal compared with the number of days on which there was over-reporting.
19. Miss Fuentes also reviewed Mr Wilkinson's appraisals and the records of his 1-2-1s with his line managers and could find no evidence of any issues with his performance.
20. Miss Fuentes dismissed Mr Wilkinson's appeal. She was satisfied Mr Musgrave had reasonable grounds, on the information in front of him, to conclude that Mr Wilkinson was guilty of gross misconduct and that his mental ill-health was not a mitigating factor. She was also satisfied that the decision to dismiss was reasonable, in the light of the contractual repercussions with the HE of the Company providing inaccurate data, the wider issue of reputational damage and the Company's loss of trust in Mr Wilkinson.

Applying the law to the facts: unfair dismissal

21. Where an employee alleges unfair dismissal, it is for the employer to show that the reason for the dismissal was one of the potentially fair reasons for dismissal set out in Section 98(2) and 98(1)(b) of the Employment Rights Act 1996 (the ERA). These include a reason relating to the conduct of the employee (Section 98(2)(b)). In this case, the Tribunal accepts that Mr Musgrave decided to dismiss Mr Wilkinson for a reason relating his conduct, namely, the falsification of work records.
22. If the Tribunal is satisfied that the employer has established that the reason for dismissal fell within the potentially fair reasons for dismissal, it must then go on to decide whether, in all the circumstances of the case, the employer acted reasonably or unreasonably in treating the employee's conduct as a sufficient reason for dismissal. That question must be determined in accordance with equity and the substantial merits of the case, and by reference in particular to the employer's size and administrative resources (Section 98(4) ERA).
23. In the context of a dismissal for misconduct, the issue for the Tribunal is not whether the employee committed the act of misconduct, but rather whether the employer had a genuine belief that the employee committed the act of misconduct, based on reasonable grounds after a reasonable investigation (British Home Stores Ltd v Burchell [1978] IRLR 379). In determining the question of fairness, the Tribunal's role is not to decide whether it would have dismissed the employee had it been in the employer's shoes, but rather whether the employer's actions fell within the range of possible reasonable responses that a reasonable employer might have adopted (Post Office v Foley [2000] IRLR 827).
24. In this case, the Tribunal accepted Mr Musgrave's evidence that he genuinely believed that Mr Wilkinson was guilty of the misconduct in question. The Tribunal also accepts that he had reasonable grounds for that belief. He had before him a record produced by Mr Wilkinson's line manager showing a large volume of discrepancies between Mr Wilkinson's report of the work he had done from the Taranto work queue and the computer-generated record over a two-month period. In contrast, the other employee working on the same work had produced manual reports that were entirely in line with the computer-generated record.
25. Mr Wilkinson did not dispute the accuracy of those records. He said that the reason his record was inaccurate was that his concentration and memory had been affected by his depression. Mr Musgrave did not accept that explanation, and the Tribunal considered that he had reasonable grounds for not doing so. First, there was no issue with the quality of Mr Wilkinson's work, as might be expected if his concentration at work was poor. Secondly, in the light of the size and number of discrepancies between Mr Wilkinson's record and the computerised record, it was unlikely that the differences could be explained by a lapse of memory. Finally, the occupational health adviser, who had been asked to report on whether the inaccuracies could be explained by Mr Wilkinson's mental ill-health, had said that she could not identify a link. Her

assessment did not involve anything more than asking questions of Mr Wilkinson and he was not asked to undergo any formal assessment of his cognitive functioning. The Tribunal nevertheless considers that her report was material that a manager in Mr Musgrave's situation, with no specialist knowledge, was entitled to take into account.

26. The next issue for the Tribunal was whether Mr Musgrave acted reasonably in deciding to dismiss Mr Wilkinson for his conduct rather than impose some lesser disciplinary sanction. The Tribunal accepted that the decision was reasonable in all the circumstances. Mr Musgrave had concluded that Mr Wilkinson had been dishonest, both in recording false information about his work and then by failing to admit what he had done. There were still aspects of Mr Wilkinson's work that had to be recorded by him and the Company could not trust Mr Wilkinson to act honestly. The consequences for the Company of inaccurate records were potentially very serious, as it could damage the Company's reputation with its client and more widely and could also have contractual repercussions.
27. Mr Wilkinson made no criticism at the Tribunal Hearing of the procedure that the Company adopted in dealing with his dismissal. In the light of the facts set out above, the Tribunal was satisfied that the Company met the requirements of the ACAS Code of Practice on disciplinary procedures. For completeness, the Tribunal records that the Company respected Mr Wilkinson's right to be accompanied at the disciplinary and appeal hearings.
28. As the Tribunal found that the Company had reasonable grounds for concluding that Mr Wilkinson was guilty of gross misconduct and the decision to dismiss was reasonable in all the circumstances, his claim of unfair dismissal failed.

Applying the law to the facts: disability discrimination

29. It is unlawful for an employer to dismiss an employee because of something arising in consequence of the employee's disability (Section 39(2)(c) read with Section 15 of the Equality Act 2010). In relation to Mr Wilkinson's claim of disability discrimination, the first issue for the Tribunal to decide was whether Mr Wilkinson's inaccurate recording of his work on the Taranto work queue, which was the reason for his dismissal, was something that arose in consequence of his depression. Mr Wilkinson's case was that his records were inaccurate because his cognitive functioning had been adversely affected by his depression. He did not argue that he had deliberately inflated the figures to conceal the fact that he did not feel up to working because of his depression.
30. The Tribunal did not accept, on the evidence with which it was presented, that the inaccuracies in Mr Wilkinson's reporting arose in consequence of his depression.
31. The Tribunal accepted that the effects of Mr Wilkinson's depression fluctuated and that there would have been days when it would have been difficult for him to concentrate on his work. Mr Wilkinson referred the Tribunal to some printed

material headed “Disability awareness: depression” produced by Remploy, which says that depression can cause “issues with memory and concentration affecting ability to focus on simple tasks”. Nevertheless, the Tribunal did not consider it credible that Mr Wilkinson’s depression affected only one aspect of his cognitive functioning, namely his memory of what work he had done on the Taranto work queue. Mr Wilkinson’s job performance overall was consistently recorded as being good or even very good in 1-2-1s and appraisals. Indeed, his experience and competence at his job were such that he routinely helped other employees with their work.

32. Mr Wilkinson told the Tribunal that he usually recorded his work on the Taranto work queue as he went along on the “sticky note” on his computer screen. He said it was the work that he did before he was called away to help other staff with queries that he lost track of and could not accurately recall and record. He explained that he was called away up to six times a day for up to 15 minutes at a time. Even if that was the case, and even assuming he had not recorded two or three items of work at the point when he was called away from his desk, it would not explain why there was a difference of up to 31 between his manual record of the items he had completed on a day and the computer-generated one. It would also not explain why on a large majority of the days where there was a discrepancy, Mr Wilkinson had over-recorded rather than under-recorded his work.
33. Because the Tribunal did not accept that Mr Wilkinson’s inaccurate recording of his work on the Taranto work queue arose in consequence of his depression, his claim of disability discrimination failed.

Employment Judge Cox
Date: 14 February 2019

REASONS SENT TO THE PARTIES ON:

21 February 2019