



EMPLOYMENT TRIBUNALS

Claimant:
Mr D Swain

v

Respondent:
Guildford Borough Council

Heard at: Reading

On: 9 January 2019

Before: Employment Judge Hawksworth (sitting alone)

Appearances For the Claimant: In person
For the Respondent: Ms G Cheng of Counsel

RESERVED JUDGMENT

The Claimant's complaint of unfair dismissal fails and is dismissed.

REASONS

1. In a claim form presented on 10 December 2017, the Claimant complained of unfair dismissal arising from his dismissal by the Respondent for gross misconduct. The Respondent filed its ET3 on 29 January 2018.

Preliminary matters

2. At the start of the hearing, a question arose as to the complaints being brought by the Claimant and the issues for determination by the Tribunal.
3. The ET1 claim form recorded that the Claimant wished to bring a claim for unfair dismissal. Although he had indicated in section 3 of the form that he did not work a period of notice and was not paid for a period of notice, he did not tick the box in section 8 of the form indicating that he was claiming notice pay. The details he gave in sections 8.2 and 9.2 did not refer to loss of notice pay, to any claim for notice pay or to breach of contract (another way of putting a claim for notice pay). However, the Claimant's schedule of loss which was sent to the Tribunal and the Respondent on 25 January

2018 refers to notice pay and states: "I will only seek an award under this heading if no compensatory award is made for loss of earnings in the same period."

4. The Respondent's draft list of issues included only an unfair dismissal claim and the Respondent's representative indicated that the Respondent had not prepared the case on the basis that any notice pay claim was being brought.
5. I explained to the Claimant that he had not included a notice pay claim in his ET1 claim form. I explained that is important for the parties and the tribunal to understand what claims are being brought, in particular because the legal tests for unfair dismissal and notice pay claims are different. In an unfair dismissal, the tribunal will be focusing on the fairness of the Respondent's procedure; it is not part of an unfair dismissal claim for the tribunal to decide whether "the Claimant did it", i.e. whether he actually committed the misconduct for which he was dismissed. In a notice pay claim on the other hand, the tribunal does need decide whether "the Claimant did it", in other words whether the misconduct took place as alleged by the Respondent.
6. Because of the different legal tests, the evidence which a tribunal needs to consider when deciding an unfair dismissal claim is different from the evidence required to decide a notice pay claim. In the Claimant's case, as his ET1 claim form did not indicate any notice pay claim, the Respondent did not prepare to defend a notice pay claim. The Respondent has served witness statements and brought witnesses to the hearing who can give evidence about the disciplinary process which was followed prior to dismissal, the decision to dismiss and the appeal. It has not brought any witnesses who can give evidence about the alleged acts of gross misconduct themselves.
7. I explained that it was up to the Claimant to consider whether to make an application for amendment of his ET1 claim form to include a notice pay claim. I explained that at this stage I was not saying whether that application would succeed or not, but if it did succeed, the Respondent had indicated that it was likely to apply for a postponement of the hearing so that it could bring witnesses who could give evidence about the alleged acts of gross misconduct. If that postponement application succeeded (and, again, I was not saying whether it would or not), the parties would come back on another day with additional witnesses. That hearing would probably be in September 2019.
8. Alternatively, the Claimant could decide not to pursue an application to amend his claim to include a notice pay claim. In that case, the hearing today would proceed but I would only consider and determine an unfair dismissal claim. The legal test for determining the unfair dismissal claim

would mean that I would not be considering whether he was guilty of the misconduct as alleged. I explained that I could not advise the Claimant what to do. He asked if he could have 10 minutes to consider this.

9. After taking some time to consider his position, the Claimant indicated that he did not wish to make any application to amend his claim to include a notice pay claim. He said that the case had gone on for so long he would like to get it dealt with. He indicated that he understood that I would only be looking at the fairness of the Respondent's decision when determining the unfair dismissal claim.

Evidence

10. After this preliminary matter had been dealt with and I had read the witness statements, the witness evidence started at 11.30 am.
11. I explained to the parties that in an unfair dismissal claim such as this, the usual practice would be for the Respondent's witnesses to give evidence first with the Claimant cross-examining and for the Claimant's evidence to be heard after that. I suggested that in cases where the Claimant is unrepresented as in this one, it would be possible to hear the evidence in a different order so that the Claimant had the experience of being questioned by the Respondent's representative before having to question the Respondent's witnesses himself. The Claimant had prepared questions for the Respondent's witnesses. He indicated that he did not mind questioning the Respondent's witnesses first and was happy to go ahead with the usual order.
12. I therefore heard evidence from the following witnesses in this order:
 - i. Mr K McKee (Parking Manager for the Respondent);
 - ii. Mr P O'Connell (Director of Environment for the Respondent);
 - iii. Mr P O'Dwyer (Director of Communities for the Respondent);
 - iv. the Claimant; and
 - v. Mr N Risk (a colleague of the Claimant).
13. There was an agreed bundle of 111 pages.
14. After the evidence the parties had the opportunity to make submissions. Prior to making submissions, the Respondent handed up a written position statement. This had not been sent to the Claimant in advance so we had a short adjournment to allow the Claimant time to consider this before he made his submissions.
15. Judgment was reserved.

The issues

16. The issues for the Tribunal are:
 - 16.1. What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) of the Employment Rights Act.
 - 16.2. Did the Respondent have a genuine belief in the Claimant's misconduct?
 - 16.3. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds after carrying out such investigation as was reasonable in the circumstances?
 - 16.4. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses open to a reasonable employer? This includes the question of whether the Respondent followed a fair procedure overall.
 - 16.5. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?
 - 16.6. Has the Respondent proved that if it had adopted a fair procedure, the Claimant would have been fairly dismissed in any event?
 - 16.7. If the claim succeeds in whole or part, the Tribunal will be concerned with issues of remedy.

Findings of fact

17. The Claimant was employed by the Respondent from 13 July 1998 until his dismissal on 19 September 2017 for gross misconduct. He was employed as a civil enforcement officer in the parking office.
18. On 12 June 2017, one of the Claimant's colleagues (LR) reported an incident to the Respondent. The incident had happened on 11 June 2017. LR said the Claimant had approached him and a colleague, DG, while they were speaking together in their own language. It was alleged that the Claimant asked LR to speak in English and then shortly afterwards made further comments to him which he found intimidating.
19. On 15 June 2017, the Respondent conducted a preliminary interview with the Claimant. The Claimant admitted that he had asked LR to speak in English but denied making the further comments and denied shouting. DG was also spoken to, he confirmed in an email that the Claimant had asked

LR to speak in English but said he was not present for the second half of the conversation and could not confirm whether or not the further comments were said.

20. The Respondent wrote to the Claimant to say that a formal investigation would be undertaken by Mr McKee, the Council's Parking Manager, into the allegations against the Claimant.
21. Mr McKee took a statement from LR in which LR confirmed the allegations he had made on 12 June 2017. Mr McKee also took statements from other members of staff. JC, who was nearby, reported overhearing shouting and the Claimant saying that it was rude to speak another language in front of him. Another member of staff, RC, reported that the day after the incident, he overheard the Claimant discussing the incident with a colleague and saying that he found it rude that LR and DG had not been speaking English.
22. Mr McKee also interviewed the Claimant who admitted that when he spoke to LR he had said words to the effect that it was rude to speak his own language in the workplace. The Claimant denied the further comments. He said that he had previously raised concerns with LR about his work, and had reported JC for breach of policy. The Claimant thought that as a result, they had made up the allegations against him.
23. Mr McKee viewed CCTV footage from the area and conducted an analysis of the log in and out details on the internal and external doors. He summarised the CCTV and log in evidence in his report. The investigation report was produced on 28 July 2018.
24. A disciplinary hearing took place on 6 September 2017 before Mr O'Connell. Mr McKee and an HR partner were present. The Claimant was accompanied by Mr Risk. Mr McKee had brought the CCTV footage to the hearing, but the Claimant did not ask to view it.
25. Mr O'Connell decided that as there were differences in what people were saying about the incident, the disciplinary hearing should be adjourned to allow witnesses to attend. The hearing was reconvened on 19 September 2017 with LR, JC and RC attending as witnesses.
26. At the disciplinary hearing, LR, JC and RC were questioned by the Claimant about what had happened on 11 June 2017. After the evidence of LR, Mr O'Connell suggested that DG could be asked to come as a witness. The Claimant replied, "I don't think there is any point as he sleeps during the day and works nights".

27. Mr O'Connell found on the balance of probability that LR's account was correct and that the charges against the Claimant were proven. He took into account the Claimant's long service and previous good record, but considered that the misconduct was serious and that the Claimant should be dismissed. The Claimant was summarily dismissed on 19 September 2017.
28. The Respondent wrote to the Claimant on 21 September 2017 confirming the outcome of the disciplinary hearing and the dismissal. The letter summarised in detail the reasons for the dismissal.
29. The Claimant appealed against the dismissal in a letter dated 30 September 2017.
30. An appeal hearing was arranged for Monday 23 October 2017, chaired by Mr O'Dwyer. He upheld the dismissal decision. The Respondent confirmed the outcome of the appeal hearing in a letter dated 24 October 2017.
31. In the appeal, Mr O'Dwyer addressed the points made by the Claimant in his letter of appeal. He found that the council's disciplinary procedure had been followed. He found that there were slight differences in the statements on which the dismissal decision was based but no fundamental discrepancies. A statement (in email form) had been taken from DG. The Claimant's suggestion that LR and JC had made up the allegations against him was considered and rejected.
32. In the course of the appeal the Claimant made allegations against one of the witnesses which were not previously known to the Respondent. The Respondent's witnesses said that these allegations were investigated after the appeal hearing, but there was insufficient evidence to take any further action.

Relevant Law

33. A reason that relates to the conduct of an employee is a potentially fair reason for dismissal pursuant to section 98(2)(b) of the Employment Rights Act 1996.
34. Fairness in the circumstances in misconduct cases should be considered by reference to the guidance set out in the case of British Home Stores Ltd v Burchell. This requires consideration of:
 - (i) whether at the time of dismissal the employer believed the employee to be guilty of misconduct;

- (ii) whether at the time of dismissal the employer had reasonable grounds for believing the employee was guilty of that misconduct; and
 - (iii) whether at the time the employer formed that belief on those grounds it had carried out as much investigation as is reasonable in the circumstances.
35. In determining whether the dismissal was fair, the tribunal must also consider whether the Respondent followed a fair procedure overall and whether dismissal is a fair sanction to impose in the circumstances, namely whether dismissal was within the range of reasonable responses open to the employer. In considering this, the Tribunal must not substitute its own view of the appropriate penalty for that of the employer.
36. I have also referred to the ACAS Code of Practice on Disciplinary Guidance and Grievance Procedures.

Conclusions

37. I find that the Claimant was dismissed for a reason related to his conduct which is a potentially fair reason for dismissal.
38. In relation to the first stage of the Burchell test, I find that at the time of dismissal, the Respondent believed the Claimant to be guilty of gross misconduct, namely the comments that were made to LR on 11 June 2017.
39. Stage 2 of the Burchell test requires consideration of whether the Respondent had reasonable grounds for believing that the employee was guilty of misconduct. I have concluded that there were reasonable grounds for the belief that the Claimant was guilty of misconduct, in particular the statements of LR and JC. The accounts provided by LR and JC were consistent; the dismissing officer accepted their evidence even though it was different to the Claimant's evidence. DG's account agreed with the Claimant's in respect of the first part of the incident, but DG was not present during the second part of the incident. The Claimant was offered the opportunity to call DG as a witness in the disciplinary hearing but chose not to.
40. As to the third part of the Burchell test, I find that the employer had carried out as much investigation as was reasonable in the circumstances at the time it formed the belief that the Claimant was guilty of misconduct. A detailed investigation was carried out. Accounts were taken from all of those present or nearby at the time of the incident (including DG). CCTV footage and entry times were investigated. Further, the dismissing officer recognised the importance of witness evidence and adjourned the hearing so that witnesses could attend and be questioned. The Claimant did not

ask for DG to be called to the hearing. In any event, DG said that he had not heard the second part of the conversation, which was the part denied by the Claimant.

41. The overall procedure which the Respondent followed was fair. The Claimant was notified of the allegations against him and advised that the outcome of the disciplinary hearing may result in the termination of his employment. Disciplinary hearings were held at which the Claimant was accompanied by a colleague and given the opportunity to question witnesses. The Claimant was afforded an appeal and an appeal hearing at which his grounds of appeal were considered in detail.
42. There was a suggestion by the Claimant that there was inconsistent treatment, namely of a witness against whom the Claimant had made allegations. However, the Respondent was not aware of the conduct of the witness until it was reported by the Claimant, at which point it was investigated. The outcomes of the investigations against the Claimant and the witness were different, but the allegations and the circumstances as a whole were also different.
43. Finally, I need to consider whether dismissal was a fair sanction in all the circumstances of this case. I have concluded that it was. I emphasise that in determining the Claimant's unfair dismissal claim, I do not need to make (and I have not made) any decision as to whether the events of 11 June 2017 took place as the Respondent decided they did. I have however decided that, in all the circumstances of the case, the decision to dismiss was within the range of reasonable responses which were open to the Respondent.
44. For these reasons, I have concluded that the Claimant's claim for unfair dismissal fails and is dismissed.

Employment Judge Hawksworth

Date: 18 / 1 / 2019

Sent to the parties on: 25 / 1 / 2019

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For the Tribunals Office