



EMPLOYMENT TRIBUNALS

Claimant

Mr S Farnish

v

Respondent

Lowri Beck Services Ltd

Heard at: Norwich (by CVP)

On: 02 & 03 August 2021

Before: Employment Judge Postle

Members: Ms S Limerick and Ms L Davies

Appearances

For the Claimant: In person.

For the Respondent: Mr J Boyd (Counsel).

JUDGMENT

1. The claimant was not unfairly dismissed under the Employment Rights Act 1996.
2. The claimant's claim under the Equality Act 2010 for the protected characteristic of disability namely s.15 is not well founded.

REASONS

1. The claimant brings two claims to the Tribunal namely he was unfairly dismissed under the Employment Rights Act 1996 and that his dismissal was contrary to s.15 of the Equality Act 2010 and that it was in consequence of the claimant's disability namely the claimant's behaviour and/or conduct on 6 June 2019 by dismissing him and if so, was it a proportionate means of achieving a legitimate aim.
2. The disability relied upon is generalised anxiety disorder which the respondent accepts at the relevant time is a disability within the meaning of s.6 of the Equality Act 2010.

3. In this Tribunal we heard evidence from the claimant through a prepared witness statement. For the respondent we heard evidence from: Mr Deacon the Electrical Technical Manager whose evidence was unchallenged by the claimant; from Mr Hill the Operations Manager who conducted the disciplinary hearing, his evidence was unchallenged; we heard evidence from Mrs Howell HR Advisor; Mr Singleton HR Advisor and Mr Donnelly HR Director, his evidence was unchallenged. There was a further witness statement from Mr Griggs who was the Field Team Manager, he was not called to give evidence.
4. The Tribunal also had the benefit of a bundle of documents consisting of 457 pages.
5. Dealing with the Law, the Employment Rights Act 1996, conduct is a potentially fair reason to dismiss. That is not the end of it, the Tribunal then has to consider s.98(4) of the Employment Rights Act which says:

“Where the employer has fulfilled the requirements of sub-section 1 the determination of the question of whether the dismissal is fair or unfair having regard to the reasons shown by the employer depends on whether in the circumstances including the size and administrative resources of the employers undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.”
6. In considering s.98(4) the Tribunal also looks at the well-trodden case law of British Home Stores Ltd v Burchell, in summary was there a reasonable investigation, did the respondent have reasonable grounds for its belief in the alleged misconduct of the claimant and was the dismissal within the band of a reasonable response that was available to the respondent and was the dismissal in all the circumstances fair?
7. In dealing with the question of reasonable responses, was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him then the dismissal would be unfair, but if a reasonable employer might reasonably have dismissed him then the dismissal was fair.
8. So when the Tribunal is considering s.98(4) and the reasonable response test, the starting point should always be the words of s.98(4) themselves and in applying that section a Tribunal must consider the reasonableness of the employer's conduct not simply whether they the members of the Tribunal consider the dismissal to be fair. In judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.
9. In many cases although not all, there is a band of reasonable responses to the employer's conduct within which one employer might reasonably take one view 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 that band the dismissal is fair and if the dismissal falls outside that band it is unfair.

10. Turning to s.15 of the Equality Act 2010, that says a person discriminates against a disabled person if A treats B unfavourably because of something arising in consequence of B's disability and A i.e. the respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. In order for a claimant to succeed under s.15 there must be unfavourable treatment, there must be something that arises in consequence of the claimant's disability, the unfavourable treatment must be because of i.e. caused by something that arises in consequence of the disability and the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.
11. The facts of this case show that the respondent is part of a group of companies which provides meter reading, data collection and contact centre services on behalf of utility companies and other commercial organisations. Specifically the respondent deals with and provides domestic gas, electric and smart meter installation, maintenance and reading services on behalf of many of the UK energy suppliers.
12. The claimant commenced employment with the respondent on 28 September 2009 as a meter operative. In or around 2011 the claimant was provided with training as a meter fixer which resulted in him being authorised to carry out the installation of electric meters feeding off one source of supply and any necessary repair work in addition to his duties as a meter operative. In order to obtain this accreditation the claimant was required to undergo an assessment carried out by the respondent at its training centre in order to demonstrate that he was competent in accordance with industry standard requirements as governed by the Meter Operative Code Of Practice Association.
13. On March 2013 the claimant completed his phase 3 meter accreditation which meant that he was now qualified to work on electric meters feeding off a supply into three meters.
14. All operatives are subject to a rigid audit routine carried out by an external independent company. This usually involves carrying out two post completion audits and one work in progress audit each month in relation to each of the operative's work.
15. On the 6 June the claimant attended a property for the purposes of completing an electric meter exchange. On that occasion a Mr Money one of the respondent's senior meter technicians attended to complete a work in progress audit observation of the claimant's work. Mr Money witnessed the claimant prepare the new meter and undertake a plug socket test. Mr Money then saw the claimant remove the fuse and meter cover without wearing his PPE gloves or visor. In accordance with Chapter 4 of the respondent's Safe Systems of Work Manual at page 201 of the bundle, all

operatives are required to complete a number of tasks before and after meter exchange which includes the following:

“Test 03 – test the polarity of the incoming supply to identify and prove that the incoming supply point is electrically correct with regards to the polarity of live phase(s) and neutral phase;

Test 04 – prove the installation is dead prior to any work being undertaken;

Test 12 – test the complete installation to ensure the polarity is correct and that it is not crossed.”

16. The claimant failed to undertake any of the above tests during the meter exchange observed by Mr Money on the 6 June, this meant that he worked unsafely during the job and had failed to adhere to the manual and MOCOPA Guidelines.
17. In addition to the above, when the operative identifies a Category B07 issue on a job the MOCOPA states that the operative must stop work, make the site safe and report the issue via the data flow process. Whilst the claimant did make a note of the issue he did not stop work and instead continued with the installation. In addition to PPE operatives are required to wear appropriate PPE at all times when undertaking any meter exchange as set out in Chapter 4 of the manual. Clearly PPE is vitally important as the operative works with live electricity which poses significant risks to not only their health and safety but also anyone in close proximity. Again the claimant failed to comply with the respondent's policies and procedures by not wearing his gloves or visor.
18. Furthermore, although in dispute, in accordance with the manual, operatives must also undertake a risk assessment to identify any potential risks and are expressly instructed that in the event of uncertainty regarding the process they must contact their manager.
19. Once the claimant had left site Mr Money completed an intrusive inspection and proved correct polarity of the whole installation. Mr Money then notified Mr Griggs the claimant's line manager of his concerns of the claimant's activities that day in accordance with the respondent's standard procedures. The respondent then initiated its high risk procedure which involved immediately suspending the claimant on full pay pending an investigation.
20. On the 6 June (page 174) the respondent informed the claimant of the decision to suspend him from work on full pay and the decision was confirmed to him in writing by letter dated 10 June 2019.
21. As part of the respondent's High Risk Non-Compliance Procedure a root cause analysis form is completed to establish whether the non-compliance is conduct related i.e. the individual knew what they should be doing and had failed to do it or performance related i.e. the individual did not understand what was expected of them. The severity of the

non-compliance concern also determines whether an employee is stood down, suspended or no further action is taken. If the concern is conduct related this would mean the employee is suspended and that the disciplinary procedure is invoked. If the concern is performance related this would mean the employee would be stood down and the performance management procedure would be invoked.

22. Mr Griggs telephoned the claimant on the 12 June to complete a root cause analysis. The claimant confirmed that he was fully aware of the safety checks he should have completed and he should have been wearing his PPE. The claimant explained that he deliberately chose not to do so but rather to test Mr Money and to expose his failings as confirmed at 176 of the root cause analysis form. In view of the above Mr Griggs was satisfied that this was a conduct related issue, he completed the form and recommended that the claimant should be suspended and that disciplinary proceedings commenced.
23. On the 26 June 2019 (page 191) the respondent wrote to the claimant and invited him to attend an investigation meeting scheduled for Tuesday 9 July. The letter confirmed the time, date, location of the meeting, informed the claimant the purpose of the meeting was to investigate the following non-compliance namely; failure to confirm the polarity of the incoming supply, failure to prove the installation was electrically dead, failure to test the polarity of the meter tails, failure to wear correct PPE and failure to conduct a full risk assessment. The claimant was also informed in that letter he could be accompanied to the meeting by a colleague or Trade Union Official or Representative.
24. At the investigation meeting on the 9 July the minutes of which are at page 215, the claimant admitted that he was guilty of the above non-compliances but explained that he had deliberately failed to follow the correct procedure as a means of testing the skills and ability of Mr Money. The claimant explained that he had considered Mr Money to be complicit in his non-compliance by failing to take action to stop him doing the exchange. At no stage during this meeting did the claimant give any indication whatsoever that he considered the reason for his actions on that day were in any way related to health issues or issues arising from his disability.
25. On the 19 July (page 230) the respondent wrote to the claimant inviting him to attend a disciplinary meeting which was due to take place on Thursday 25 July. The letter confirmed the date, time and location of the meeting, informed the claimant of his right to be accompanied by a colleague or Trade Union representative. It also confirmed that the meeting would be chaired by Mr Hill a Meter Operations Manager. The letter also set out the allegations which included the non-compliance as set out in the following allegations: serious breach of Health & Safety Rules, gross negligence, deliberately testing a fellow work colleague and in so endangering the lives of himself and others, damaging the respondent's reputation and loss of trust. The letter made it clear that one

potential outcome could be dismissal without notice on the grounds of gross misconduct in the event the allegations were found against him.

26. At the disciplinary meeting the claimant was accompanied by his Trade Union representative. He explained that there was some additional information that he would like the respondent to consider before the hearing commenced. That information was in the form of a mitigation statement which was dated 25 July, a copy letter from a consultant psychiatrist, Dr Bellhouse dated 24 July 2019 and some private medical documents. Mr Hill adjourned the hearing whilst he read the letters.
27. The meeting reconvened and the claimant admitted all of the non-compliance save for the alleged failure to carry out a risk assessment. The claimant confirmed again that he had deliberately failed to complete the relevant test to try and test Mr Money. According to the claimant he heard several other operatives complaining about Mr Money and he wanted to push him to see how far he would let him go. The claimant admitted that he had failed to follow the correct company procedure and it was sheer stupidity not to have done so on this occasion. He recognised the potential risk of flash over which usually caused an inadvertent contact between an energised conductor with another conductor.
28. In terms of the mitigation in relation to the medical evidence from Dr Bellhouse, that suggested that the claimant was emotionally unstable and personality disorder. As a result of the above disclosures about the claimant's health a referral was made to Occupational Health as to potential impact on his behaviour. Dr Olayinka provided a report on the 4 September. In that report he indicated that the claimant's medication had been adjusted in May and June and that the claimant had reported feeling irritable and antagonistic at the time. The report however confirmed that the claimant showed insight into his medical problems and that he was fully aware of his actions during the incident on the 6 June.
29. What the report did not do was address specific questions that had been raised by the respondent and as a result of that the respondent raised these again in a letter of 9 September particularly were the claimant's actions in any way related to or associated with the condition of borderline personality disorder. If they were then what measures or adjustments could the respondent take to prevent or minimise the possibility of him behaving in a similar way in the future and if the doctor did recommend any measures or adjustments to what extent would those reduce or remove the risk of him acting in a similar way.
30. The respondent received a further response from Dr Olayinka on 12 September, unfortunately that did not address the specific questions raised so the respondent wrote again on 23 September and explained that they were seeking to establish whether there was any risk of the claimant behaving in the same way again, and if so how it could be dealt with.

31. The respondent did receive a response, this time from Dr Lindsay Wright (page 284) who had been discussing the case with Dr Olayinka, she was the clinical director at the Occupational Health provider. In her report she confirmed that she had agreed with Dr Bellhouse's original assessment that the claimant's mood instability is redolent of someone with an emotionally unstable personality disorder albeit he did not meet the full criteria for that condition. She went on to confirm that she considered that the claimant had insight also into his actions and his behaviour when he failed to undertake the prescribed safety checks on the 6 June. In terms of measures and adjustments Dr Wright recommended the claimant be given clear instructions and that he remained familiar with the company policy and procedures. Dr Wright explained that aside from these suggestions there was little the respondent could do to alter his premeditated behaviour and that in a safety critical task they could consider intervention or ultimately removing him from that type of work. Clearly the respondent did have company policies and procedures which the claimant would have been fully aware of and familiar with.
32. Mr Hill conducting the disciplinary hearing having reviewed the root cause analysis document, investigation minutes, disciplinary minutes and Occupational Health reports formed the view that the claimant had committed a serious and deliberate breach of the respondent's Safe System of Work Procedures by failing to carry out a polarity test of the incoming supply in contravention of the respondent's procedures contained in their manual. He had failed to prove the installation was dead before commencing work in contravention of the respondent's manual, he had failed to test the polarity of the meter tails in contravention of the respondent's manual, he had failed to wear the appropriate PPE in contravention of the manual and failed to carry out a risk assessment in contravention of various briefing notes the respondent had.
33. The claimant himself had admitted that he had deliberately not carried out those essential safety checks in an attempt to test the skills and ability of Mr Money. Mr Hill considered this demonstrated a wilful disregard for the safety of not only himself but also colleagues and members of the public. Mr Hill believed that those actions amounted to gross misconduct and damaged the respondent's reputation and brought the respondent's name into disrepute. Mr Hill took into consideration the Occupational Health reports but viewed those that the claimant was fully aware of his actions on the 6 June and in terms of potential measures or adjustments advised by Dr Wright the respondent clearly had given clear instructions and that the claimant would have been familiar with the respondent's policies and procedures so really there was nothing further the respondent could do to adjust the claimant's behaviour.
34. That being so Mr Hill also considered whether he could be re-deployed in another role. He felt that the claimant in deliberately testing a colleague and in doing so endangering not only his own life but that of his colleague's was not safe to consider continuing in his role or re-deployment.

35. On 8 October Mr Hill therefore telephoned the claimant to confirm the decision to terminate the claimant's employment without notice on the grounds of gross misconduct and a letter of 10 October (page 286) confirmed the respondent's decision to terminate the claimant's employment giving the claimant a right of appeal. We know the claimant appealed the decision although there does not appear to be any dispute about the procedure adopted at the appeal.
36. The Tribunal do not accept the claimant's behaviour on the 6 June was a feature or as a result of the claimant's disability. The claimant advances the view that his irritability as set out in Dr Bellhouse's letter of 24 July 2019 is evidence of the claimant's behaviour and a feature of his disability. Clearly it does not. The claimant's behaviour on his own admission was premeditated, stupid, irresponsible and reckless. That cannot amount to irritable behaviour.
37. Furthermore there is no medical evidence before this Tribunal that as a result of the claimant's disability that would cause him to act recklessly. The Tribunal repeats the reason for the claimant's behaviour on the claimant's own evidence was complaints by colleagues about Mr Money and that the claimant decided to test Mr Money to see how far he could push him. That was a clear premeditated decision by the claimant as admitted by the claimant during the investigation meeting and the disciplinary hearing and also under cross examination yesterday afternoon. It is accepted that the decision to dismiss under s.15 would amount to unfavourable treatment however the Tribunal do not accept the claimant's behaviour arose in consequence of the claimant's disability and therefore the claim under s.15 fails.
38. However even if the Tribunal were wrong in that conclusion the respondent has the defence in advancing that it was a proportionate means of achieving a legitimate aim to dismiss the claimant in the circumstances namely the safety of all personnel and the public. Electrical matters are by their very nature are extremely dangerous and every employee involved in such work should do all they can to protect themselves against danger and the public. The claimant failed to do so. There is also the added legitimate interest by the respondent of protecting major commercial interests. There is apparently a form of a league table about companies that have fallen foul of the procedures and policies, clearly if it was to get out that the claimant behaved in the manner he did on the 6 June then that could clearly jeopardise the commercial interests of the respondent with other companies.
39. Dealing with the ordinary unfair dismissal under the Employment Rights Act, clearly the claimant was dismissed for a potentially fair reason namely conduct, events of the 6 June. The respondent clearly had a genuine belief and evidence of the claimant's conduct and at the time carried out a reasonable investigation. The claimant at the disciplinary, indeed in the investigation admitted certainly four out of five charges and that his actions were sheer stupidity, reckless and foolhardy. There clearly was no

procedural failings by the respondent and indeed the claimant was represented throughout the investigation and disciplinary by his Trade Union Representative. The claimant was given every opportunity to state his case, mitigation and medical evidence and indeed the respondent adjourned the decision to take further medical evidence. On the facts known to the respondent at the time they took the decision to dismiss that decision clearly and plainly falls within the range of a reasonable response of a reasonable employer.

40. As to inconsistency, the Tribunal simply do not accept the claimant was treated inconsistently with Mr Horton. The circumstances of his case were about Mr Horton's capability rather than a premeditated conduct by Mr Horton and therefore the argument advanced by the claimant he has been subjected to inconsistent treatment simply does not stand the test.

Employment Judge Postle

Date: 16 August 2021

Sent to the parties on: 26 August 2021

S. Bhudia

For the Tribunal Office