



EMPLOYMENT TRIBUNALS

Claimant: Mr C Fowler

Respondent: J H Shouksmiths & Sons Limited

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BEFORE: Employment Judge Shulman

REPRESENTATION:

Claimant: In person

Respondent: Mr P Paget, Solicitor

JUDGMENT

1. The claimant's complaint for unfair dismissal is hereby dismissed.

REASONS

1. **The claim**

- 1.1. Unfair dismissal.

2. **Issues**

The issues in this case relate to:

- 2.1. What was the reason for the dismissal?
- 2.2. Whether the dismissal was fair.

3. **The law**

- 3.1. The Tribunal has to have regard to the following provisions of the law.

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3.2. Section 98(1) Employment Rights Act 1996:

(1) “In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) The reason (or, if more than one, the principal reason) for the dismissal, and

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

3.3. Section 98(2) Employment Rights Act 1996

(2) “A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, ...”

3.4. Section 98(3) Employment Rights Act 1996

(3) “In subsection (2)(a) –

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.”

4. **Facts**

The Tribunal, having carefully reviewed all the evidence both oral and documentary before it, finds the following facts (proved on the balance of probabilities):

4.1. The claimant was employed as an apprentice electrician by the respondent, who are electrical contractors, from 17 September 2017 until his dismissal on 6 April 2022. The claimant should have qualified as an electrician by June 2021.

4.2. Unfortunately the claimant failed his qualifying exam, known as AM2, in that month, but the respondent agreed to fund the claimant for a further attempt at AM2, which the claimant took on 3 December 2021. Sadly the claimant failed again. On the positive side he had passed his NVQ level 3 in May 2021.

4.3. The claimant was not as frank as he might have been about his second AM2 failure, not telling the respondent immediately, but the respondent found out and called the claimant to a meeting on 20 January 2022. The meeting was led by Mr Robert Bateman, the electrical manager, who gave evidence before us.

4.4. At that meeting the Tribunal finds that the claimant was left in no doubt that the question of qualification was an urgent matter, that his employment was at risk and that he had to pass AM2, at his expense by April 2022. The Tribunal finds as a fact that the claimant clearly

understood what was being asked of him and the meeting notes say so. The claimant described the encounter as a bit of a telling off.

- 4.5. The Tribunal also finds as a fact that on at least three occasions between 20 January 2022 and 10 March 2022 Mr Bateman reminded the claimant of the urgency for him to pass AM2.
- 4.6. Despite all this the claimant did not rebook AM2 until 4 April 2022 and then for the exam not to take place until 15 August 2022. The reason the claimant gave for this was that he did not get any testing experience at work. Knowing that the claimant's job was at risk he made no attempt to book on the course between January and March 2022.
- 4.7. The claimant knew he had to find the course fee of £684.00 himself and to this day he has never sat the AM2.
- 4.8. On 23 March 2021, as April was fast approaching, Mr Bateman reminded the claimant that his job was at risk. The claimant was called to a formal meeting on 6 April 2022.
- 4.9. The claimant was accompanied by a colleague. Mr Bateman ran through the allegations and the Tribunal finds that the claimant agreed all the points as per the notes.
- 4.10. On the same day the claimant was dismissed. The respondent found that AM2 was not completed, making the claimant's employment with the respondent untenable. The claimant's employment was terminated with four weeks' notice.
- 4.11. The claimant chose not to exercise his right of appeal but he did after termination write to say he had really appreciated his job.
- 4.12. The respondent has a disciplinary and grievance procedure. As the claimant was not dismissed for gross misconduct it was open to the respondent to dismiss him for failure to comply with the terms of the respondent's policy. The respondent chose not to do so. The disciplinary policy itself specified a first written warning and a final written warning. An email/letter dated 23 March 2022 the Tribunal finds could have been construed as a warning. The disciplinary procedure also dealt with capability issues but did not specifically as far as capability issues were concerned incorporate the warning procedure. The capability section clearly encompassed training issues. It envisages discussions taking place between the parties to agree a course of action. Mr Bateman thought that he had followed the disciplinary procedure.
- 4.13. The claimant has said that there was nepotism in the company and he was on the wrong end of it. The Tribunal finds that there was none such. When a colleague, Simon Edgar, had lost his father he was helped with his portfolio, with which of course the claimant had succeeded in his own right. The claimant never raised a grievance about this or his suggestion that he had never had sufficient testing experience to help him with his AM2.

5. Determination of the issues

(After listening to the factual and legal submission made by and on behalf of the respective parties):

- 5.1. I will deal first with the reason for dismissal. Mr Paget submitted it was some other substantial reason and capability in the alternative. Some other substantial reason is actually some other reason of a kind to justify dismissal. Alternatively was the reason related to capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do?
- 5.2. Section 98(2)(a) specifically mentions the word "qualification". Further section 98(3)(b) defines qualifications as meaning any degree, diploma or other academic, technical or relevant qualification relevant to the position he held.
- 5.3. The claimant was dismissed because AM2 was not completed by him. AM2 is a qualification and the claimant was dismissed for not having it.
- 5.4. Further some other substantial reason, as I have indicated, majors on the word "other" not being a reason within section 98(2) which includes qualifications.
- 5.5. Therefore, the Tribunal finds that the reason or principal reason for the dismissal was capability and not some other substantial reason.
- 5.6. As to the reasonableness the Tribunal finds that the disciplinary action in the respondent's disciplinary and grievance procedure does not necessarily apply to cases of capability. What the capability section requires is discussion between employer and employee.
- 5.7. I am satisfied that such discussions took place and I am further satisfied that the claimant did not heed them.
- 5.8. The claimant was dismissed because he was the author of his own misfortune. He failed his exams, he did not move quickly enough to take them again, and despite the respondent making it clear that his job was on the line.
- 5.9. In all the circumstances the claimant's complaint of unfair dismissal is hereby dismissed.

Employment Judge Shulman

Date: 4 October 2022

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