

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 26 February 2015

**Before**

**THE HONOURABLE MR JUSTICE MITTING**

**(SITTING ALONE)**

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MR G MATUPA

APPELLANT

ST JOHN'S WINCHESTER CHARITY

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR GREYSHAM MATUPTA  
(The Appellant in Person)

For the Respondent

MR TIM FORER  
(of Counsel)  
Instructed by:  
Blake Morgan  
New Kings Court - Tollgate  
Chandlers Ford  
Eastleigh  
Hampshire  
SO53 3LG

## **SUMMARY**

### **UNFAIR DISMISSAL**

Whether the Employment Tribunal were entitled to find that the allegation of misconduct had been properly investigated - it was.

## **THE HONOURABLE MR JUSTICE MITTING**

### **The Facts**

1. The Claimant was employed by the employers as a Care Assistant from 2005 or 2006 until his dismissal on 31 October 2012 at Moorside Nursing Home. The employers are a charity providing sheltered accommodation and day and nursing care for vulnerable elderly people. From 2007 onwards, the employers had had cause to write to the Claimant about his lateness for work, sleeping on duty and inaccurate recording of time worked on his timesheets. Letters were sent to him complaining about these shortcomings. On 15 September 2011 the Claimant was warned that he would be dismissed in the event of further inaccurate recording on his timesheets.

2. On 16 May 2012, three members of staff arriving for the day shift reported their concerns about what they found following the night shift which had been worked by the Claimant: that no-one was present when they arrived at 7:20 or 7:30am, that two male residents were in bed in their day clothes, worn the previous day, and that the sandwiches that had been prepared for their supper were in the fridge untouched.

3. I should explain something which is not apparent from the reasoning of the Employment Tribunal about the organisation of the nursing home and its complement of night shift staff. On the night of 15/16 May 2012, four people were working on the night shift under the overall supervision of one of them, Mary Mafleka, an agency nurse, but a nurse who had worked frequently at the home. There were 24 patients gathered into three clusters. Each of the three people working under Mary Mafleka were responsible for one cluster of eight residents. The Claimant's cluster was known as "the green cluster", and the complaints made by those who

attended on the early hours of the following day, 16 May, were complaints about patients in his cluster.

4. On 16 May 2012, the Assistant Director, Mrs McLaird, sent the Claimant a letter inviting him to a disciplinary meeting on 24 May 2012. The Claimant did not attend and was absent through sickness until he declared that he was fit to work on 1 October 2012. A back to work interview took place on 9 October 2012, during which the Claimant was alleged to have been belligerent and aggressive. He was, as he accepts, escorted from the premises following that meeting. He raised a written grievance about it. The employers caused a grievance and disciplinary meeting to be held on 23 October 2012. By a letter of 31 October 2012, the employers notified the Claimant that his grievance was rejected and that he was dismissed with effect from the same day, although pay in lieu of notice would be paid.

5. The Claimant appealed by the internal appeals process. His appeal was rejected on 26 November 2012. The Claimant filed an ET1 form at Southampton Employment Tribunal on 11 January 2013, alleging both racial discrimination and unfair dismissal. By a decision sent to the parties on 28 January 2014, Employment Judge Coles and two lay members dismissed both claims. The Claimant appealed to the Employment Appeal Tribunal.

### **The Rule 3(10) Decision**

6. His appeal has been dismissed at a Rule 3(10) Hearing save for one ground. That ground was explained by HHJ Eady QC in the note following the hearing in these terms:

**“On its face, this would seem to be an unmeritorious challenge to firm findings of fact. I was persuaded, however, that the reasons provided for the judgment on the unfair dismissal claim fail to demonstrate that the ET actually engaged with the question of fair investigation. ...**

**It was apparently [the Claimant’s] case below that there were no statements from any of the staff who were said to have raised concerns as to his care of residents and none were (he says) interviewed as part of any investigation. If so (and the ET makes no findings in this respect), what would this mean in terms of the reasonableness of the investigation? Similarly, it is**

**unclear what, if any, inquiry was made into the care/hand-over records and time-sheets so as to properly investigate the fraud allegations. The point can also be made as to events at the return to work interview: who was interviewed as part of any investigation as to what actually happened at this meeting?"**

7. It may be that Judge Eady did not fully grasp the nature of the Claimant's complaint. It was, in a nutshell, that the events of the night shift of 15 and 16 May 2012 which were to prove decisive in the decision to dismiss were not properly investigated, principally for two reasons: first, that the nurse in charge of the night shift, Mrs Mafleka, was not interviewed and secondly because the handover note which she would have completed for the information of the nurse in charge of the day shift had not been produced. It was explained by Mr Forer today for the employers that that note has gone missing. It was not available to be produced to the Employment Tribunal and it is has not been found since.

### **The Employment Tribunal Decision**

8. The reasons given by the Employment Tribunal as to the issue of investigation were laconic. A single sentence in one paragraph dealt with it:

**"52. The Tribunal was unanimously satisfied that the respondent carried out a reasonable investigation into the disciplinary allegations against the claimant, there was a fair disciplinary hearing and the appeal was properly conducted."**

9. The brevity of its reasons has meant that, contrary to usual and good practice, it has been necessary to enquire with some care into the material that underlay that conclusion to see if it is capable of being justified. The Tribunal did, however, make two further findings that are of relevance. In paragraph 43 it found that:

**"... In the Tribunal's judgment, the respondent's witnesses gave consistent, convincing and reliable evidence in relation to the matters about which the claimant makes complaint. ..."**

10. That was principally directed to his complaint of race discrimination, but it can safely be taken to be a fair reflection of the Employment Tribunal's assessment of the truthfulness and reliability of the employer's witnesses generally.

11. In paragraph 53 it stated:

**“Having regard to the matters identified in the letter of dismissal, the Tribunal was unanimously satisfied that the decision of the respondent to dismiss the claimant was within the range of reasonable responses from a reasonable employer.”**

12. Again, it is true that that goes to a specific question, the reasonableness of the response, dismissal, rather than to the nature of the investigation it carried out and to its appropriateness. However, because the letter is detailed in that it sets out not only why the employers could conclude that it was necessary to dismiss the Claimant but also what steps the employers had taken to investigate the complaints made against him, it can safely be inferred that the Employment Tribunal accepted that the letter accurately set out what had been done to conduct the investigation. If it did not, then it is difficult to see how it could have reached its conclusion in paragraph 52 that the employers carried out a reasonable investigation into the disciplinary allegations. Accordingly it is legitimate for the purposes of determining this appeal to look in greater detail than did the Employment Tribunal at the terms of the letter. I quote extensively from it:

**“Dr Morris and I have now had a chance of considering the issues raised and your written submissions. We have also carried out further investigation and sought the comments of Mrs McLaird and some amplification from the Deputy Matron and Mr Wrightson. Copies of their statements are attached.”**

Those documents were and are at pages 144 and 138 in the bundle. 144 is a statement by Conchita Collins, the Deputy Matron, in charge if I have understood the position correctly of the day shift that took over from the Claimant. It set out the complaints which I have already recited in the note provided by three of the carers who took over at the same time and does so in

similar terms to that note. She also says that she attempted to raise the matter with the Claimant but when she asked him where he was at 7:20 he put the telephone down.

13. The statement of Ian Wrightson concerned the return to work meeting on 9 October 2012 and confirmed that at that meeting the Assistant Director and the Matron appeared to feel threatened and that the situation was getting out of control.

14. The dismissal letter of 31 October 2012 goes on to state:

**“a) Your continued lateness to work**

We are satisfied that there has been ongoing concern over your lateness to work which fully justifies the reference to ‘continued lateness’. The fact that this has been raised by three separate matrons is evidence of this. Indeed, had there not been changes in matron we believe that the matter would have come to a head more swiftly, and you have effectively received more warnings prior to disciplinary action than you might reasonably have expected. There have been six letters prior to the letter in May. ...

**b) Your continued falsification of time sheets**

Again we consider the use of the word continued is justified and borne out by this having been raised on three prior occasions to the letter in May. We do not accept that these incidents can be explained away as misunderstanding ...

**d) Unacceptable work performance**

There appears to have been ample grounds for concern about your conduct on the night shift of 15<sup>th</sup>/16<sup>th</sup> May. Because you went off sick immediately after these matters were raised with you, they were not fully debated with you contemporaneously. We have though as part of our investigation sought statements from the carers involved which are attached. We have grave concern at the lack of care on your part. We have no evidence that you were asleep on duty but feel it right to note that you have had to be written to individually about that on three previous occasions which is a backdrop to our concern.”

The statements were before the Employment Tribunal and are in the bundle which I have and are at pages 141, 142 and 143. I need not set them out in full because they simply expand and give detail of the complaints recorded in the note of 16 May 2012 to which I have already referred.



15. The letter continues:

**“(e) Aggressive, insubordinate and inappropriate conduct**

**We do not accept that you had been contacted inappropriately prior to the back to work interview held on 9<sup>th</sup> October. We believe the evidence of three witnesses that your behaviour was unacceptable, particularly for someone charged with the responsibilities of a carer. We have concerns at the volatility this suggests which is borne out by prior concern on the subject, and we regard this misconduct as very serious. It is clear that those involved felt threatened. We are satisfied that you were not manhandled and find the allegation therefore of concern, and indeed also the alleged failure of prior contact by telephone in the light of a statement from the Administrator with regard to that call, a copy of which I attach.**

**Having considered these matters and their collective impact, we are of the view that the Charity cannot maintain trust or confidence in your ability to continue in your work with highly vulnerable older people with dementia or to perform your contract of employment satisfactorily. ...”**

16. As is apparent from the terms of that letter and the documents to which it refers, and to which I have referred, it is obvious that the employers carried out a thorough investigation of the allegations made against the Claimant. The terms of the letter and the documents to which I have referred justify the conclusion of the Employment Tribunal that the Respondents carried out a reasonable investigation into the disciplinary allegations. It is true that there remains the unexplained omission, if it was an omission, to interview the nurse in charge of the night shift. One would have thought that that was an elementary part of an investigation into these complaints and that the explanation that she was an agency nurse, given her apparent familiarity with the home, would not by itself have justified omitting to interview her if the evidence which she could give was critical to the findings of the investigation. Plainly it was not. What the three carers who complained about the Claimant on the morning of 16 May spoke of was a failure by him to perform duties of an elementary kind which he would have had to have performed as a carer for these vulnerable elderly people. The fact that the sandwiches were in the fridge, that two of them were in their day clothes, is simply inexplicable if proper care had been given by the Claimant to them. Only he could explain why they were in that condition. Plainly the Tribunal did not accept explanations which he had given about the matters raised against him. In the paragraph in which they express their belief in the Respondent’s witnesses,

they found that his evidence was less convincing; it was confusing, contradictory and inconsistent.

### **Conclusion**

17. Accordingly it seems to me therefore that, although the laconic finding of the Tribunal into the adequacy of the investigation was unhelpful to anyone seeking to understand its reasons, once one examines the background with care, as I have attempted to do, it is plain that their conclusion was justified. If it was justified, then the fact that it was not fully explained in the decision as it should have been does not require that this matter is remitted to the Tribunal to make further findings. The Tribunal's findings are justifiable on an analysis of the underlying material they contain no material error of law. This appeal must therefore be dismissed.