



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Amin

**Respondent:** Commissioners for HM Revenue and Customs

## REASONS OF THE EMPLOYMENT TRIBUNAL

**HELD AT:** North Shields                      **ON:** 21 August 2017

**BEFORE:** Employment Judge Shepherd

### REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Bayne

Judgment having been sent to the parties on 4 September 2017 and written reasons having been requested in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The claimant represented himself and the respondent was represented by Mr Bayne.

2. I heard evidence from:

Steven Lumsden, Operational Manager;

Jayne Storey, Head of Direction, Benefits and Credits:

Mohammed Rashid Amin, the claimant.

3. I had sight of a bundle of documents which was numbered up to page 154. I considered those documents to which I was referred by the parties.

4. The issues to be determined were discussed at the commencement of this hearing, and agreed as follows:

Was the claimant dismissed for a potentially fair reason pursuant to section 98 of the Employment Rights act 1996?

If so, was the dismissal fair in all the circumstances.

The claimant withdrew his claim for breach of contract in respect of notice pay and that claim is dismissed upon withdrawal.

5. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that I made from which I drew my conclusions.

### **Findings of Fact**

5.1. The claimant was employed by the respondent as an Administrative Officer from 9 January 2012.

5.2. On 12 December 2014, the respondent's Internal Governance and Civil Investigations Team was informed by Northumberland Police that the claimant had been arrested on suspicion of fraud offences relating to the misappropriation of funds from bank accounts of, in the main, elderly people. The respondent was informed that the claimant had been released on bail until 7 May 2015.

5.3. The claimant was suspended on full pay from 15 December 2014.

5.4. On 5 October 2015 the claimant informed the respondent that the charge of conspiracy to defraud was no longer being pursued but that he had been charged with a money laundering offence relating to £230,000.

5.5. On 3 November 2015 the claimant informed the respondent that the amount involved was said to be around £2.5 million and the claimant had entered a plea of not guilty. A trial was listed for hearing on 8 August 2016 and was expected to last four weeks.

5.6. On 12 August 2016 Northumberland Police informed the respondent that the hearing had been postponed and was to commence on 12 June 2017.

5.7. A report was prepared by the respondent's Internal Governance and Civil Investigations Team. The report indicated that the seriousness of the criminal charge was incompatible with the claimant performing any task with the respondent. The claimant had been suspended on full pay for almost 2 years and the criminal trial was not anticipated to be completed for a further 11 months. The report recommended that the case be considered by a decision maker as to whether the claimant's paid suspension should continue.

5.8. Steven Lumsden, Operations Manager was appointed as the decision-maker and on 28 October 2016 the respondent wrote to the claimant inviting him to a decision meeting. It was indicated in the letter that the respondent was considering whether it was appropriate that the claimant be dismissed for some other substantial reason, it was stated that the substantial reasons which were being considered were :

“(1) The reputational risk to HMRC of continuing to employ you given to the nature of the criminal offences with which you are charged and the nature of the work you are employed to do by HMRC, and (2) The cost to the public purse of continuing to employ you whilst suspended on full pay pending the completion of the criminal prosecution against you.”

5.9. On 8 November 2016 the claimant attended a meeting with Steve Lumsden. The claimant admitted that he opened the bank account which was the subject of the criminal proceedings but denied involvement in the fraud.

5.10. Steve Lumsden decided that the claimant’s employment would be terminated on the basis that continuing to support the claimant’s absence was untenable for the business as was the potential risk of the claimant returning to work considering the charges made against him.

5.11. On 28 November 2016 Steve Lumsden wrote to the claimant. In that letter the decision to dismiss the claimant was confirmed and it was indicated that his last day of service would be 28 November 2016.

5.12. On 9 December 2016 the claimant appealed against this dismissal. The grounds of appeal were set out on the claimant’s behalf by solicitors. In that letter it was stated:

“It would appear that during the course of police enquiries our client has been suspended on full pay. He was given the legitimate expectation that he would remain on full pay suspended until the conclusion of the criminal process. However, without notice he was summonsed to attend a meeting for which he was ill-prepared. It seemed the manager made a decision to summarily dismiss our client without notice on the basis of cost to the taxpayer.

It is of great note that an organisation the size of HMRC did not give any consideration to proper redeployment of our client within its office for example under supervision. No evidence of any wrongdoing by him as ever been established and it would appear the employer has acted on a presumption of guilt.”

5.13. Jayne Storey, Head of Direction, Benefits and Credits Customer Processing was appointed as appeals manager. The appeal hearing took place on 1 March 2017.

5.14. On 15 March 2017 Jayne Storey wrote to the claimant indicating that his appeal had not been upheld. She provided copies of the notes of the appeal hearing and a deliberation template setting out the reasons. It is stated:

“I advised Mohammed that HMRC don't see him as being guilty until proven innocent. I reiterated to Mohammed during the hearing that the reason for dismissal was because of the risk to HMRC of continuing to employ him given the serious nature of the criminal offences with which he is charged and the nature of the work that he is employed to do by HMRC. I explained that the charge is money laundering and his work in HMRC involves dealing with customer accounts and administering payments. I advised that this may present a conflict of interest between the work Mohammed does in HMRC and the charges brought against him.”

5.15. The claimant presented a claim to the Employment Tribunal on 11 April 2017. He brought claims of unfair dismissal and breach of contract in respect of notice pay. The claim in respect of notice pay was withdrawn as he was paid five weeks' notice pay in January 2017.

## **The Law**

### **Unfair Dismissal**

#### 6. Unfair Dismissal

Section 98 of the Employment Rights Act 1996 states:

“(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 sub-section (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.

(2) A reason falls within this sub-section 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,

(b) relates to the conduct of the employee....

Section 98(4) states

where the employer has fulfilled the requirements of sub-section (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(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) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

7. Where an employee brings an unfair dismissal claim before an employment tribunal, it is for the employer to demonstrate that his reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) whether the employer acted reasonably in dismissing the employee. Conduct or capability are potentially fair reasons for dismissal under section 98(2) and some other substantial reason is an alternative reason under the legislation.

8. In determining the reasonableness of the dismissal with regard to section 98(4), the Tribunal should have regard to the three part test set out by the Employment Appeals Tribunal in British Home Stores Limited v. Burchell [1978] IRLR 379. That provides that an employer, before dismissing an employee, in that case, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in Iceland Foods Limited v. Jones [1982] IRLR 439. In that case, the EAT said that the Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether the dismissal had been "the band of reasonable responses" available to the employer. In the case of Sainsbury's Supermarkets Limited v. Hitt [2003] IRLR 23, the Court of Appeal confirmed that the band of reasonable responses approach applies to the conduct of investigations as much as to other procedural substantive decisions to dismiss. Providing an employer carries out an appropriate investigation, giving the employee a fair opportunity to

explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. By doing so they are substituting their own standards as to what was an adequate investigation for the standards that could be objectively expected from a reasonable employer.

9 In UCATT v Brain (1981) IRLR225 Sir John Donaldson stated:-

“Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, ‘would a reasonable employer in those circumstances dismiss’, seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question ‘would we dismiss’, because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, ‘well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing’, because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that *all* reasonable employers would dismiss in those circumstances.”

10 The above cases related to conduct dismissals. The statutory test in section 98 (4), as set out above, requires the Tribunal to consider whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason and shall be determined in accordance with equity and the substantial merits of the case. The band of reasonable responses test applies in respect of some other statutory reason and the Tribunal must not substitute its views for that of the respondent.

11. I was also referred the first instance case of *Dr M Rangwani v Birmingham Heartlands and Solihull NHS Trust* 2001 WL 36953658 in which a GP was dismissed by an NHS Trust following being charged with conspiracy to murder. In that case the dismissal was found to be fair as being for some other substantial reason where there was concern for the reputation of the respondent and the use of public funds.

12. It was submitted by Mr Bayne, on behalf of the respondent that the claimant’s position was broadly analogous to that of an employee on long-term sickness absence, who it is known will be unable to return to their substantive post for a lengthy period and who might never be able to return.

13. In those circumstances, the issues for the dismissing officer were whether there was an alternative post of the claimant could return to and, if not should the respondent continue to employ the claimant while suspended and, if so, for how much longer. Mr Bayne referred to the case of **Spencer v Paragon Wallpapers Ltd [1976] IRLR 373** in which Philips J stated

“Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?”

14. The claimant had been on paid suspension from his two years at the date of his dismissal which was almost as long as he had worked for the respondent prior to his suspension. Mr Lumsden was aware that there was no possibility of the claimant returned to work for at least a further eight months and, at worst, there may have been a further delay or a finding of guilt. It was submitted that the respondent could not justify continuing to employ the claimant in those circumstances.

### **Conclusions**

15. I am satisfied that the reason for the claimant's dismissal was the potentially fair reason of some other substantial reason. The reasons given for the dismissal were clear and had been set out clearly to the claimant in the letter inviting him to the hearing at which he was dismissed.

16. I accept the reason given by Steven Lumsden, the dismissing officer, which was that continuing to support the claimant's absence was untenable for the respondent in view of the very serious nature of the criminal offences with which the claimant had been charged and the nature of the work together with the risk to the respondent.

17. The claimant had been absent, suspended on full pay for almost 2 years. His trial had been postponed to 12 June 2017 with a time estimate of four weeks. It was at this stage that the respondents' internal governance section prepared a report and referred the matter to Steven Lumsden as the decision-maker.

18. The procedure was within the band of reasonable responses. The claimant was given the opportunity to be accompanied and to postpone the hearings when he was not able to obtain a companion.

19. There is clear information as to what decision was to be taken and the claimant was provided with the reasons for dismissal.

20. The claimant was subject to criminal charges and felt that he was being treated as a criminal by the respondent. However, I am satisfied that care was taken not to reach a decision on the basis whether he was guilty of the criminal charges against him.

21. The claimant had been off work suspended on full pay for approaching two years. His criminal trial had been adjourned for a further eight or nine months and hearing was listed to last for four weeks. It was not known whether the claimant would be able to return to work after the hearing. It was within the band of reasonable responses for the respondent to conclude that they should wait no longer and that the claimant was to be dismissed.

22. There was consideration given to other employment suggested by the claimant. There were clear reasons why that would not be reasonable or appropriate. Employment within the post room was suggested. The post room is a restricted area with access to confidential information. The cleaning at the premises is outsourced and there are no cleaners employed by the respondent.

23. Both the dismissing officer and the appeals officer considered whether the suspension could have continued on an unpaid basis. It was concluded that the employer could not be expected to keep the job open indefinitely and, if the claimant was suspended with no pay, he would have then been placed in a worse position with regard to the receipt of any benefits. It was reasonable for them to conclude that this was not appropriate. This was not discussed with the claimant. However, it was included within the decision-makers' deliberations which were provided to the claimant at the time of his dismissal and this was not a point raised by the claimant at any time during the appeal or in the claim to the Tribunal.

24. I am satisfied that there was no procedural defect that would take the dismissal outside the band of reasonable responses.

25. I have sympathy with the claimant. He had been charged with extremely serious criminal offences. He felt his employer was no longer supporting him. However, he should appreciate that he had been given a substantial amount of support. He was provided with a considerable amount of time on fully paid suspension and the decision that his employment should be terminated on the grounds that were clearly explained to the claimant was within the band of reasonable responses which was a decision that a reasonable employer acting reasonably could reach.

26. In the circumstances the claim is not well founded and is dismissed.

Employment Judge Shepherd

29 September 2017

REASONS SENT TO THE PARTIES ON

3 October 2017

G Palmer  
FOR THE TRIBUNAL OFFICE