



EMPLOYMENT TRIBUNALS

Claimant: Mr I Grantham

Respondent: Branston Ltd

Heard at: Lincoln

On: 18 and 19 September 2017
3 October 2017 (Judge and Members only)

Before: Employment Judge Blackwell

Members: Mr R Jones
Mr C Tansley

Representation

Claimant: Mr Ellis

Respondent: Miss K Jeram

RESERVED JUDGMENT

The unanimous decision of the tribunal is:

1. The claim of unfair dismissal fails and is dismissed.
2. The claim of direct discrimination pursuant to Section 13 of the Equality Act 2010 (the 2010 Act) in respect of the protected characteristic of disability fails and is dismissed.
3. The claim of discrimination arising from disability pursuant to Section 15 of the 2010 Act fails and is dismissed.
4. The claim of harassment pursuant to Section of the 2010 Act, again related to the protected characteristic of disability, also fails and is dismissed.
5. The claim of indirect discrimination pursuant to Section 19 of the 2010 Act is dismissed on withdrawal by the Claimant.

RESERVED REASONS

1. Mr Ellis represented the Claimant and he called the Claimant to give evidence on his own behalf. Miss K Jeram represented the Respondent and she called Mr S O'Donnell who took the decision to dismiss and Mr I Wait who heard Mr Grantham's appeal against the decision to dismiss. There was an agreed bundle of documents and references are to page numbers in that bundle.

Issues and the law

2. Mr Grantham's first claim is that he was unfairly dismissed. As a matter of law, it is for the Respondent to prove a potentially fair reason for dismissal as set out in Section 98(1) and (2) of the Employment Rights Act 1996. If such fair reason is made out, then it is for the tribunal to determine in accordance with subsection (4) of Section 98 whether the dismissal is unfair. If that potentially fair reason is not made out, then the dismissal becomes unfair at that point.

3. As to case law, it is well established that in conduct cases (which the Respondent says this is), it is for the employer to prove that it had a genuine belief in the misconduct complained of at the time that the decision to dismiss was taken. Such decision must be based upon reasonable grounds following an investigation which is reasonable in all the circumstances. The burden of proof in these two matters is neutral.

4. The decision to dismiss and the reasonableness of the investigation is to be judged on the basis of the well-known test of the band of reasonable responses.

5. Mr Grantham's case in essence is that he does not concede genuine belief, that Branston did not have reasonable grounds to hold the view that he had intended to steal a chair and that further investigation was flawed in a number of ways, principally in that Branston did not make a reasonable investigation into Mr Grantham's claim that his behaviour in moving the chair from one part of his workplace to another was influenced by the drugs he was taking to control the disabling condition which he suffered from, namely Ankylosing Spondylitis (AS).

Disability

6. We adopt Mr Ellis's submissions as follows:-
"The medical evidence provided by C makes clear that C is disabled for the purposes of the Equality Act 2010.

At the start of the hearing, Branston accepted that as of 8 April 2016 it knew that C was disabled for the purposes of the 2010 Act and accepts responsibility for its employees on this basis."

We would add that we also agree with Mr Ellis that in fact the date of knowledge was the date before 7 April, though nothing turns on this point. The condition which rendered the Claimant disabled is of course AS.

Direct discrimination

7. Mr Grantham alleges that his dismissal and the conduct of the Respondent's, and in particular the remarks set out at paras 45 - 47 of the Claim Form, constitute less favourable treatment.

Discrimination arising from disability

8. The unfavourable treatment is once again the dismissal.

Harassment

9. This is brought pursuant to Section 26 and again the discriminatory comments which are alleged to constitute harassment are set out in paragraphs 45 - 47 of the Claim Form.

Findings of fact

10. Mr Grantham was originally employed on 11 October 2005 and continued in his employment until 18 April 2016 when he was summarily dismissed. That is the effective date of termination. At that time, he was employed as a Production Technician. He was well thought of by his employer to the extent that he was attending college one day per week at Branston's cost and it was Branston's intention to enrol Mr Grantham on a BTEC qualification for a further 2 year period. Mr O'Donnell stated that he was an employee he did not wish to lose.

11. Branston are a Company engaged in the production and distribution of potatoes with four sites in the UK and a total of over 500 employees. They have a dedicated Human Resources Department.

12. On 30 March 2016, a Mr Taylor noted that a chair, described in evidence as the best chair in the factory, was missing from the empty office of a Mr Phillips, a Production Manager who had left the employ of Branston. An investigation began and the CCTV footage was observed, which appeared to show Mr Grantham moving the chair. Mr Wallhead, Mr Grantham's line manager, began an investigation, firstly by interviewing Mr Rainbow, Mr Grantham's only colleague on the nightshift when the chair was moved, that is the early hours of 27 March 2016. The notes of that meeting are at pages 112 and 113. Mr Rainbow made the following relevant comments:-

"I remember Ian Grantham saying something about Rob Phillips' chair and his fleece but it was an extra large.

No, just something about Rob Phillips' chair can't say exactly possibly something along the lines of 'that would be good in my computer room' but I can't exactly remember.

It's only because he said something about his computer room that I put 2 and 2 together. I can't confirm because I can't remember exactly what was said."

13. Mr Wallhead immediately moved on to interview Mr Grantham. The notes are at pages 114 and 115. Mr Grantham denied having any knowledge of the chair.

14. However, within 15 minutes of that denial, Mr Grantham retracted the denial and said:-

"I did take the chair, it's on the mezz. I took it because I was going to take it to the workshop to sit on during my break."

15. Mr Wallhead determined to take the matter further and Mr Grantham was by letter of 1 April (page 119) invited to attend a disciplinary hearing. The letter stated:

"The hearing will consider the following:

- Your misconduct relating to the removal of equipment from the production office without consent.*
- Your deliberate false statement.*

Your actions could be found to represent misconduct or gross misconduct and this could result in sanctions up to and including summary dismissal."

16. Notwithstanding that letter, the next matter was a further investigation meeting held by Mr Wallhead with Mr Grantham and an HR representative, Mr Dexter, also attended. That was an investigation meeting held on 7 April. Mr Grantham is asked to explain his actions and he said as follows:

"I was going to take the chair and was looking at the fleece. I knew it was Rob Phillips' and that he was gone. It was extra large so I left it."

He was asked what he was going to do with chair and he said as follows:

"I wanted to use it in the workshop on the nightshift. I was trying to look smart"

17. Mr Dexter then put Mr Rainbow's evidence about Mr Grantham's statement as to that the chair would look good in his computer room. In response, Mr Grantham said:

"I don't know why, I don't have a computer room, I have a 2 bedroom house and 2 children."

18. Then on page 121, Mr Grantham explains that he has a back condition and that as a consequence he takes a combination of drugs and produced a box of prescription medication - Amitriptyline and made the following comments:

"I have never took these before but I did on that night. They make you feel like you have a hangover.

I thought I was invisible.

I was confused.

In my mind I was thinking I could take RP coat'

He was asked why he left the chair on the mezz floor and replies by saying that he was going to take it off the floor the next nightshift and put it under the stairs and cover it up.

19. At the end of the meeting Mr Dexter states as follows:

"Okay Ian we believe from the evidence we have there is intent to steal the company property we have mentioned and you admitted you would have taken the coat but it was an extra-large. We also feel that due to you potentially working alone coupled with the fact that you removed company property there is a distinct lack of trust and confidence, with this in mind we have no option but to recommend this goes to a disciplinary meeting for gross misconduct. ..."

20. Also on the same day (7 April), Ms Hill and Ms Summers, who regularly work on the mezz floor, were asked whether between Monday 28 March/Friday 1 April (they work 9 - 5 Monday to Fridays) they had come across a chair on the mezz floor. Both denied that they had and both stated that they would have noticed it had it been there.

21. Also on 7 April, Mr Grantham supplied to his employer a letter from his GP (page 126) which reads as follows:

"...

I confirm that this man suffers from ankylosing spondylitis. This causes persistent back pain, for which he is on regular pain relieving medication.

..."

22. On 11 April, Mr Grantham gives his employer permission to contact his GP. Also on that day, Mr Grantham is again summoned to a disciplinary meeting and three allegations are made against him. Two are the same as set out in the letter at 119, to which is added:

"Your intent to steal Branston property."

23. In fact the hearing took place on 18 April and the notes begin at page 131, although the heading is incorrect in that it states it was an investigation meeting whereas it was in fact a disciplinary hearing. Initially on page 131 Mr Grantham accepts that the investigation notes with which he has been provided are a true reflection. He accepts that he says that it does not fully reflect what he said about the effects of his medication. He begins his explanation by saying:

"I was confused and felt delusional because I had taken Amitriptyline."

The meeting goes on to go through and read the investigation notes and resumes some 30 minutes later at 09:35. Mr O'Donnell asked why Mr Grantham had taken the chair to the mezz floor and not directly to the workshop. In response, Mr Grantham says:

"I thought at the time I was going to take the chair.

My thoughts were over exaggerated.

It was not my normal thinking."

24. The hearing went on to consider the drugs being taken by Mr Grantham to control the pain in his back.

25. At page 147, at the point where Mr O'Donnell is about the adjourn the meeting, he says as follows:

"OK, I have 1 more question. You are at a crossroads now and the decision of this meeting will be based on the answer you give to this question. Are you going to stick to the medication blurring your thought process and feeling bad story or are you going to be 100% honest and say, you wanted the chair and wanted to take it home and you have lied throughout the whole process? We'll adjourn for you to think about it for 5 minutes."

26. Mr Grantham then returned and said that he was sticking to the medication story. The meeting was then adjourned for 17 minutes during which the conclusions of Mr O'Donnell set out at the bottom of page 147 and the top of 148 were typed up.

27. Mr O'Donnell disbelieved Mr Grantham's explanation as to the effects of the medication and stated that trust and confidence had gone and that he was summarily dismissing Mr Grantham.

28. On 18 April, Mr Grantham appealed the decision as he was entitled to do. The appeal letter repeated the explanation that his conduct had been influenced by the medication that he was taking and that he had acted out of character.

29. He went on:

"I'm extremely embarrassed about the whole situation and I'm extremely sorry for what I have done for taking the chair, but my intension was to use it as a shift chair in the workshop on my night shifts and not to take the chair home, but I must stress that these were my thoughts at the time and my regret is for not taking the chair back to the production office the next night when my head had cleared up, I had thought to myself about taking

the chair back but I was so embarrassed in getting caught I did not take it back.”

30. At page 150 Mr O'Donnell by letter of 25 April confirms the dismissal and sets out the reasoning as follows:

“...

- *I believe you arrived at work and deliberately went into the production office to steal Rob Phillips jacket and chair knowing that he had left the business. You even said that you didn't take the jacket because it was the wrong size.*
- *The medication you took was medication you shouldn't have taken being a responsible adult, you should have followed your GP's advice. You said that this feeling of over exaggeration began at 7:00pm - 8:00pm, an hour after you began your shift, having left home at drive here feeling fine. This feeling carried on until 3:00am in the morning when you were still on shift. Please note the incident took place at 2:38am according to CCTV. You did not tell anyone about this feeling but keep saying you felt embarrassed to tell anyone about your condition. The medication you are blaming for this incident, you confirmed during the disciplinary hearing that you have taken them before, but they have not made you feel like this.*
- *You lied when we first started these investigation meetings and I still believe we have not heard the truth from you.*
- *I firmly believe that the trust and confidence in our relationship had gone and it can no longer continue.*

So we are summarily dismissing you on the grounds of gross misconduct.

...”

31. Pursuant to Mr Grantham's appeal, an appeal meeting was conducted on 3 May 2016 by Mr Wait, who at the time was a General Manager based at Ilminster.

32. The notes of the meeting began at page 153. Early on in the meeting Mr Wait is recorded as saying:

“And you stating that you did not intend to take the chair, I've read these through [ie the investigation and disciplinary notes] to see if I can come to terms with SOD reasonable belief, Here is what I reasonably believe from what I have read. Yes you did go into the office with the intent to steal the chair and fleece, which was too big for you so you left it, yes there are statements to say [from LS and JH] that there was no chair on the mezz floor, was the chair hidden? There is lots of talk around the drugs taken, your bad back issues that no one knows about, they be good drugs you take?”

33. There followed a discussion about the medication Mr Grantham was taking. Mr Wait puts the following question immediately before the hearing adjourned:

“So let me summarise before we adjourn, the drugs they make you feel hungover, but on this occasion they made you spaced out and do something out of character.”

34. Mr Grantham agreed with that summary. Mr Wait adjourned the hearing and promised to send his decision by letter before the end of the week. Before taking the decision Mr Wait asked Mr O'Donnell whether he or any of his colleagues had noticed that Mr Grantham was having trouble with his back. It was clearly Mr Wait's belief at the time (and a belief he still holds) that it would be very surprising if someone with a bad back condition could hide that condition from his colleagues and managers, having regard to the physical nature of the work undertaken by Mr Grantham.

35. By letter of 6 May Mr Wait wrote to Mr Grantham upholding the original decision to dismiss. In summary, he concluded that he had reasonable belief that Mr Grantham had intention to steal the chair and fleece, that he believed that the chair had not been in the place where Mr Grantham had said it was because otherwise it would have been seen by Miss Hill and Miss Summers. He also concluded that Mr Grantham was trying to use the medication as a cover for what occurred that evening and that there were too many coincidences that could suggest otherwise.

Conclusions

Unfair dismissal

Fair reason for dismissal

36. Mr Ellis does not concede either that there was a potentially fair reason for dismissal or that Messrs O'Donnell and Wait had a genuine belief in the alleged misconduct. He does so on two grounds. First as we understand his submissions, that the decision was perverse and unsustainable on the face of the evidence. Secondly, he argues (though he concedes there is no evidence to support the proposition) that once the HR representatives spotted Mr Grantham might well be disabled, they used the conduct allegations against him as an excuse for dismissal.

37. We accept the evidence of both Mr O'Donnell and Mr Wait that the reason for dismissal was that they were of the genuine belief that the three allegations against Mr Grantham had been proven. We therefore find that there was a potentially fair reason for dismissal and that both Messrs O'Donnell and Wait had a genuine belief that Mr Grantham was guilty of the conduct complained of.

Was the dismissal fair?

38. Of course we begin by reminding ourselves of the statutory test of fairness set out in subsection (4) of Section 98 of the 1996 Act. We also need to apply the second two arms of the **Burchell** test, namely whether Branston had reasonable grounds for their genuine belief that the misconduct had been committed and that they had conducted a reasonable investigation so as to enable them to reach that conclusion.

39. It seems to us that the two matters are linked but we will deal first with the criticism of the investigation. The principal criticism is that Branston failed to investigate Mr Grantham's explanation concerning the affect that Tramadol and Amitriptyline had in combination and his assertion that they caused him to behave in an abnormal manner. The only material that was available during the disciplinary process was the leaflet produced with each box of drugs in relation to

Amitriptyline, which is reproduced at page 162. It is also clear that descriptions of the drugs had been obtained from the internet, no doubt by Googling.

40. It seems to us that the reason why Branston did not pursue any investigation into the potential side effects of the drugs was because they simply did not believe Mr Grantham's explanation. This is at the heart of the reasonableness of the decision.

41. We have looked carefully at the investigation notes, the notes of the disciplinary hearing and the notes of the appeal hearing. From these Mr Grantham's account is consistent in that he says that he took on the Saturday afternoon 1 Amitriptyline pill at 3 pm and another at 6 pm. His account also is that he had never before taken that drug prior to work. In the past he had always taken it on going to bed. He also stated consistently that when he had taken it before going to bed, it left him in the morning with symptoms that were akin to a hangover.

42. When asked in those circumstances why he would do such a thing, at page 145 he says:

"I took another Amitriptyline hoping it would stop me feeling rubbish and lazy. I don't know why I took another one before 6 pm."

On the same page he states:

"I took it to counter act how I was feeling. When I haven't had Tramadol I get stomach cramps. I thought taking these would counter act my stomach cramps and make me feel normal."

43. In the appeal hearing in relation to Amitriptyline, he says:

"I take them at night or as and when needed. I was taking them but they made me feel bad so I took another one to make me feel normal. That was a bad mistake."

He repeats that explanation at the bottom of page 153.

44. It is clear that Branston regarded these explanations as a concoction.

45. The next criticism of the investigation is a failure to take a statement from Miss Britton in relation to the position of the chair. Branston says that they had clear evidence that the chair could not have been where Mr Grantham alleged that he had left it. Mr O'Donnell plainly believed that the chair had been stored in a cupboard out of sight on the mezzanine and was later moved by Mr Grantham,

46. The third criticism is that Branston failed to ascertain whether Mr Grantham had a computer room as alleged by Mr Rainbow.

47. In addition to these complaints about a failure to conduct a reasonable investigation, Mr Ellis makes two further well-founded points about the disciplinary hearing conducted by Mr O'Donnell. Firstly he says (and he is right) that Mr O'Donnell failed to take into account the GP's letter of 7 April. He also points out that in cross-examination, Mr O'Donnell accepted that he was mistaken in believing that Mr Grantham had only changed his story because he had seen the CCTV images of him so doing. On the basis of the investigation report, that was plainly not so and it was not a belief that Mr O'Donnell should have had.

48. Again in relation to Mr O'Donnell's disciplinary hearing, Mr Ellis argues

that given the time it took for him to come to a decision (ie some 17 minutes) he must have predetermined the decision. He invites us to consider the whole of the disciplinary minutes to support that contention.

49. Mr Ellis makes two principal criticisms of Mr Wait and the conduct of the appeal hearing. The first is once again of predetermination. We have already set these out above at para 32. Secondly he says that in the letter dismissing the appeal, Mr Wait in his third bullet point paragraph was wrong as to the following statement:

“For example in your disciplinary notes it mentions to took Amitriptyline at 3 pm when you woke up. In your appeal meeting you took it at 3 pm and 6 pm things do not add up”

Mr Wait accepted in cross-examination that he was wrong about that. We found Mr Wait to be a careful and straightforward witness and we accept his evidence that he had not pre-judged the appeal. On the contrary, he had given it careful thought.

50. As we say above, at the root of this issue is whether the explanation put forward by Mr Grantham to explain his conduct in the moving of the chair was sufficient to show that he could not have had intent to steal. In our view, it was a reasonable conclusion to come to that that explanation was a concoction.

51. Thus we conclude that taking the investigation, dismissal hearing and appeal hearing as a whole, a fair process was followed to get to the root of what was a fairly simple issue, namely was Mr Grantham’s explanation credible.

52. Given that we find that that was a reasonable conclusion to come to, finally we need to consider whether the decision to dismiss fell within the band of reasonable responses. Plainly there was Mr Grantham’s record as a valued employee with a clean disciplinary record extending over more than 10 years. However, against that is set the fact that Branston reasonably believed that Mr Grantham had lied throughout the disciplinary process. It seems to us therefore that it must follow that dismissal would fall within the band of reasonable responses.

Disability

53. Before turning to the respective claims, it is in our view relevant to consider whether we accept Mr Grantham’s explanation for his behaviour. In addition to the matters before Branston we have the benefit of Mr Grantham’s evidence and the medical evidence to which he refers.

54. At paragraph 15 of the report of Mr Charlesworth-Jones at page 280 he concludes that if Mr Grantham’s allegations as to what drugs he took were accurate, then

“The combination of Amitriptyline and Tramadol, as stated by Mr Grantham, would be likely to compromise his cognitive performance and consequently this would be likely to adversely affect his behaviour away from his normal performance. The specific removal of the chair is obviously not a specific side effect of the cumulative medication whoever such out of turn behaviour is likely to have been, at very least contributed to, if not caused by the medication as stated it was taken.”

55. We take this to mean that if Mr Grantham had taken the drugs as set out, then his behaviour could be explained by that combination of drugs. Of course this presupposes that Mr Grantham was telling the truth in relation to his consumption of drugs on 26 and 27 March. We regret to say that we do not believe him. We have pointed out above the inconsistencies in Mr Grantham's explanation as to why he would have taken 2 Amitriptyline in a way that he had never done before. In his evidence to us, he added a further different explanation, namely that he took the second Amitriptyline because in relation to Tramadol, if the first one did not work, then he would take another and that would work.

56. We also note that throughout the disciplinary process, he uses three descriptions, namely "confused", "delusional" and "over exaggerated". As Mr Ellis told us, and we observed, Mr Grantham is not a sophisticated individual. Whilst he might well use the word confused, we do not think that he would normally use the word delusional and/or over exaggerated behaviour. We note also that all three of these words are taken from the leaflet describing the side effects of Amitriptyline.

57. We conclude therefore on the evidence available to us that Mr Grantham's explanation was a fabrication and was designed to save his job.

Disability

58. As stated above, we accept Mr Ellis's submissions on the existence of the impairment and the date of knowledge.

Direct disability

59. As we understand it, the claim is brought under Section 13 of the 2010 Act and the unfavourable treatment is said to be the dismissal and the behaviour of the Respondent in the disciplinary process and in particular the language they used. Section 13 begins as follows:

"13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

60. Focussing on the word "because", it is clear that at the time of dismissal, Mr O'Donnell did not believe Mr Grantham was disabled. It was clear from his evidence that he still holds to that view, notwithstanding the medical evidence to the contrary. Equally, Mr Wait at the time of the appeal hearing did not believe that Mr Grantham could be disabled because it was his view oft repeated that Mr Grantham would be unable to disguise such a condition from his managers and work colleagues. It seems to us, put quite simply, that therefore whatever treatment is complained of, it cannot have been "because" of the protected characteristic of disability.

Discrimination arising from disability

61. This claim is brought under Section 15. As we understand it, the causative link goes as follows. Mr Grantham's admitted disability led to him

taking drugs to control the pain caused by that disability, the taking of the drugs led him to behave abnormally thus bringing about the unfavourable treatment of his dismissal. We put to Mr Ellis that if we found that Mr Grantham had not told the truth in relation to the taking of the drugs and their side effects, then that link is broken. We do not think that there is an answer to that proposition. The allegation is built on a false premise. We therefore dismiss it.

Harassment

62. This claim is brought under Section 26 of the 2010 Act and relies upon the same matters set out in paragraphs 45, 46 and 47 of the Claim Form. It appears to us that all of those statements are made in the context of Branston’s representatives doubting “the medication story”. The position would be very different had we believed Mr Grantham’s account. As we have said above, we do not. We note that in deciding whether the statements complained of have the effect required by subsection (1)(a) or (b) of Section 26, we must take into account

- (a) the perception of Mr Grantham;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

63. Given that on our finding Mr Grantham knew that the medication story was false, it does not seem that a claim of harassment can be made out.

Employment Judge Blackwell

Date: 1 November 2017

JUDGMENT SENT TO THE PARTIES ON

25 November 2017

.....
FOR THE TRIBUNAL OFFICE