



EMPLOYMENT TRIBUNALS

Claimant

Mr S Palakkathara Varghese

Respondents

AND

ISS Mediclean Ltd
t/a ISS Facility Services Healthcare

Heard at: London Central

On: 2 August 2018

Before: Employment Grewal

Representation

For the Claimant: In person

For the Respondent: Ms E Grace, of Counsel

REASONS

1 In a claim form presented on 14 December 2017 the Claimant complained of unfair dismissal and unauthorised deductions from wages. The Respondent was uncertain as to whether the Claimant was also complaining of age discrimination. On 19 March 2018 the claimant's representative confirmed that he was not complaining of age discrimination.

The issues

2 It was agreed at the outset of the hearing that the issues I had to determine were as follows.

Unfair Dismissal

2.1 What was the reason for the dismissal? The Respondent contended that it was a reason relating to conduct.

2.2 If it was a reason relating to conduct, whether the dismissal was fair.

Unauthorised deductions from wages

2.3 Whether the Tribunal had jurisdiction to consider a complaint relating to a failure to pay sick pay between December 2016 and January 2016.

2.4 if it did, whether there had been an unauthorised deduction from the Claimant's wages.

The Law

3 The onus is on the Respondent to prove the reason or principal reason for the dismissal. A reason relating to the conduct of the employee is a potentially fair reason (section 98(1) and (2) of the Employment Rights Act 1996 ("ERA 1996").

4 Once the employer establishes a potentially fair reason, the Tribunal then has to consider whether dismissal is fair within the meaning of Section 98(4) ERA 1996, in other words, whether the employer acted reasonably or unreasonably in all the circumstances of the case in treating the reason established as a sufficient reason for dismissing the employee.

5 The well-established authority of **British Home Stores Ltd v Burchell [1978] IRLR 379** provides that in a conduct dismissal case the Tribunal has to ask itself the following three questions:

- (i) Did the employer believe that the employee was guilty of misconduct?
- (ii) Did he have in his mind reasonable grounds upon which to sustain that belief? and
- (iii) at the stage which he formed that belief on those grounds had he carried out as much investigation into the matter as was reasonable in the circumstances of the case?

6 In determining the issue of fairness the Tribunal also has to see whether there were any substantial flaws in the procedures which were such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827**, lays down the approach that the Tribunal should adopt when answering the question posed by Section 98(4). It emphasises that in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; the function of the Tribunal is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

7 Section 13(1)(a) ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant

provision of the worker's contract. Section 23(2) ERA 1996 provides that, subject to subsection 4, an employment tribunal shall not consider a complaint of unauthorised deductions from wages unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Section 23(4) provides that where the employment tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

The Evidence

8 The Claimant gave evidence with the assistance of an interpreter. Joan Carter (Logistics Manager at Chelsea and Westminster Hospital) and Kogo Bamba (General Manager at Chelsea and Westminster Hospital) gave evidence on behalf of the Respondent. Having considered all the oral and documentary evidence I made the following findings of fact.

Findings of Fact

9 The Claimant commenced employment with the Respondent as a Housekeeper working on the Respondent's contract at the Chelsea and Westminster Hospital on 11 April 2005. His job description at the time, which he signed, set out his key responsibilities. These included receiving patient food from the main kitchens, preparing and serving patients beverages and meals. The title of that job was subsequently changed to Healthcare Cleaner and one of the principal duties and responsibilities in the new job description was that he might be required to assist with meal services and be responsible for beverages services to the required standard.

10 In the course of his employment with the Respondent the Claimant received training in food safety. The Claimant's terms and conditions also provided that although his initial place of work was as stated in his statement of particulars, the company reserved the right at any time to require him to work at any location and in any role to which his skills and abilities were suited, within or reasonably adjacent to the area of the NHS Hospital to which he had been appointed.

11 The Respondent's Rules of Conduct set out certain rules, breaches of which could amount to inappropriate or unreasonable behaviour which might result in disciplinary action. Some of the rules were highlighted on the basis that they would be regarded as gross misconduct and could lead to summary dismissal. These included the rules that an employee must follow all reasonable instructions issued by or on behalf of supervision and management and that employees must not engage in any insubordinate, insulting, intimidatory or violent behaviour.

12 On 23 October 2013 the Claimant was invited to a formal investigation meeting following complaints from patients and an inspection of the wards carried out by Joan Carter, who was then Patient Services Manager. On 28 October 2013 the Claimant raised a grievance about Joan Carter. However, for reasons that were not clear, there was no investigation of that grievance and Ms Carter was not aware of it until the Claimant raised it in the course of these proceedings. There was no formal outcome or any finding against Miss Carter in respect of that grievance. Shortly thereafter she moved to the Logistics team.

13 The Claimant was absent sick from work from 10 October 2015 to 5 January 2016.

14 On 29 February 2016 he raised a grievance in which he complained about bullying at work and not having been paid his sick pay during his absence. That grievance was investigated and the Claimant was sent the outcome on 28 April 2016. The investigating officer said that she had found no evidence of the Claimant having been bullied but pointed out to the Claimant that all the supervisors and the managers in her team who had had contact with him had noted that at one time or another he had been rude and/or aggressive in his behaviour to them. She made it clear that she expected the Claimant to treat all his line managers and supervisors with proper respect and care and that shouting was simply not acceptable under any circumstances within the hospital. She also concluded that he had not been paid sick pay because he had not followed the company sickness absence procedures.

15 On 28 June in the same year the Claimant contacted ACAS and started Early Conciliation in respect of the failure to be paid sick pay. However, he did not at that stage, issue any Tribunal proceedings in respect of the sick pay.

16 On 29 March 2017 Tereza Salazar, who was the Claimant's line manager, complained about an incident involving the Claimant on that day. The gist of her complaint was that the ward hostess had asked the Claimant to serve food and he had refused to do so. She had been asked to attend on the ward and before she had even been able to speak to the Claimant or ask him anything, he had sat down and shouted and asked her whether this was an investigation. She then asked him to serve the food and he refused and said that it was not his job because it was not his ward. She asked him several times thereafter again to serve the food but he refused and insisted that if it was an investigation it should be put in writing. She was worried about the aggression of his tone and, therefore, asked him to accompany her down to the office. There had been further aggression and shouting from him down in the office. The account that she gave was supported in a witness statement from Nicole Nunes who had witnessed the incident.

17 On 11 April Mark Leath, Assistant Logistics Manager, invited the Claimant to a formal investigation meeting on 19 April to investigate Miss Salazar's complaint. He set out a summary of the complaint.

18 The meeting had to be rescheduled on a number of occasions because the Claimant was unable to attend it and it eventually took place on 8 May. At that

meeting the Claimant accepted that he had not served the food and said that it was not his job to do so. At that stage he denied that he had ever served food on a ward before. He denied that he had shouted; he said that his voice was loud but he was not shouting. He denied the allegations and said they were a fabricated claim. He also said that the managers had been shouting at him as well and one of the ward sisters had told Tereza Salazar to leave the ward because she was shouting. As a result of the Claimant saying that, Mr Leath interviewed the ward sisters. None of them corroborated the Claimant's account of Miss Salazar shouting at him. Mr Leath produced an investigation report and his conclusion was that there was sufficient evidence for the matter to go forward to a disciplinary hearing.

19 On 22 May there was a further complaint about the Claimant. It was from his supervisor, Hussein Basma. Mr Basma said that on that day he had asked the Claimant to work in a particular ward and the Claimant had refused to do so. He had then asked him to work at another location which the Claimant had also refused. He had told the Claimant that if he was refusing to work where he was told to work he would need to go home.

20 The Claimant was suspended on 22 May for refusing to carry out the reasonable instructions issued by management in respect of the various locations to which they were sending him to work.

21 On 25 May Ewerton Soares, Operations Manager, invited the Claimant to a formal investigation meeting on 30 May 2017 in respect of the second incident. That meeting was also rescheduled on a number of occasions because the Claimant gave a variety of reasons for not being able to attend. The investigation was ultimately concluded without the Claimant having participated in a formal investigation meeting. Mr Soares felt that the Claimant had been given every opportunity to do so but had chosen not to do so. Mr Soares concluded that there was sufficient evidence for the matter to go forward to a disciplinary hearing.

22 On 21 August Miss Carter invited the Claimant to a disciplinary hearing on 30 August 2017 in respect of both the incidents. She set out in her letter the details of the allegations against the Claimant, she advised him of his rights to be accompanied and she warned him that the allegations, if substantiated, could be gross misconduct and could result in his dismissal. She also told him that because it was a disciplinary that could result in a dismissal the Respondent had arranged for a professional interpreter to be present at the hearing.

23 The disciplinary hearing took place on 30 August. It was conducted through an interpreter. The hearing lasted three hours. The Claimant was asked at the outset as to why he was not accompanied by a Trade Union Representative or work colleague and the Claimant responded he was fine on his own as he did not feel it was serious and he had the interpreter. In the course of the hearing the Claimant was asked questions in respect of both the incidents and he had the opportunity to put forward whatever explanations he wished to do so. On this occasion he accepted that he had served food in the past but had not done so on 29 March because he was following a ward-based work schedule which did not

include serving food. He also denied that he had shouted but said that his voice was loud. Although the Claimant answered many questions there were a number of questions that he refused to answer. In respect of 22 May he did not accept that he had been told to go to three different locations and said that he had only been asked to go to one location and had refused to do so because that involved serving food and he did not serve food. He also said that Hussein Basam did not have the authority to send him home because he had been a cleaner before becoming a supervisor and he had not been given proper training as a supervisor and he, therefore, did not see him as a supervisor. He said that there had always been problems with Hussein because procedures were not followed and he believed that Hussein did not have the correct training to be a supervisor.

24 Miss Carter sent the Claimant the outcome of the disciplinary hearing on 31 August. She concluded that the allegations against him in respect of both those incidents had been established and that he had on both the occasions failed to follow reasonable instructions issued by management and had engaged in insubordinate and insulting behaviour. She concluded that that amounted to gross misconduct and decided that the appropriate sanction was summary dismissal. She considered whether a final written warning might be appropriate but considered in light of the Claimant's responses in the course of the disciplinary hearing she was not satisfied that there would not be a repetition of similar misconduct in the future.

25 The Claimant appealed on 7 September 2017. He said that he had followed all reasonable instructions and both the allegations were fabricated and management had created a false story to dismiss and violate all the principles of natural justice.

26 The Appeal hearing took place on 16 November and was conducted by Kogo Bamba. The Claimant said his supervisor, Hussein Basma, and Paulo Diego were both in a conspiracy against him. He later said the conspiracy also included Teresa Salazar and Joan Carter. He was sent the outcome of that Appeal on 29 November and the Appeal was dismissed and the original decision to dismiss was upheld.

Conclusions

Unauthorised deductions from wages

27 The deduction of which the Claimant complained was made at the latest at the end of January 2016. The complaint should have been presented by the end of April 2016. It was presented in December 2017 – about one year and eight months later. The Claimant was clearly contemplating bringing a claim about it in June 2016 because he contacted ACAS and started Early Conciliation. The Claimant also had access to, and the benefit of, Trade Union advice at the time. For reasons that are not clear to me he chose not to pursue that claim in June 2016. The Claimant has not provided any satisfactory explanation to me as to

why it was not pursued at any stage thereafter until December 2017. In those circumstances I am not satisfied that it was not reasonably practicable for the Claimant not to have presented that claim much earlier. I, therefore, concluded that the Tribunal does not have jurisdiction to consider that claim.

Unfair Dismissal

28 The Respondent has satisfied me that the reason for the dismissal was that the Claimant had failed to follow reasonable management instructions and was insubordinate and insulting to managers on 29 March and 22 May 2017. That is a reason related to conduct and, therefore, a potentially fair reason.

29 I then considered whether the Respondent acted reasonably in all the circumstances of the case as treating that as sufficient reason for dismissing the Claimant. I am satisfied that at the time it came to that decision it had carried out as much investigation as was reasonable. The Respondent had witness statements from the managers involved in the incidents on 29 March and 22 May. They interviewed the Claimant in respect of the first incident and as a result of what the Claimant said further witnesses were interviewed. The claimant was given every opportunity to attend an investigatory interview in respect of the second incident. The Claimant was given the opportunity to comment on what all the witnesses had said at the disciplinary hearing. The disciplinary hearing lasted three hours and the Claimant had every opportunity to put forward whatever he wanted. In light of the above, I concluded that the Respondent had carried out as much as investigation as was reasonable in all the circumstances. It had reasonable grounds for reaching the conclusions which it reached.

30 In terms of procedural unfairness, the Claimant's case, as I understood it, was that Miss Carter was not an independent and impartial person to conduct the disciplinary hearing because he had previously raised a grievance against her. However, Miss Carter's evidence was that she had been entirely unaware of the grievance that the Claimant had raised against her. Her evidence was not challenged and I accept her evidence that she did not know anything about the grievance. I am satisfied that she was an impartial and independent person to conduct that hearing. The Claimant has not identified any other procedure flaws in the process.

31 In considering whether dismissal was within the band of reasonable responses open to the Respondent, I took in to account that the Respondent was dealing with not one but two separate incidents of insubordinate behaviour and failure to follow reasonable management instructions and they had occurred within a two month period. The second incident had occurred after a disciplinary investigation in to the first incident had started. I also took in to account, as did Miss Carter, the responses that the Claimant gave in the course of the disciplinary investigation meeting and disciplinary hearing. His view remained that the instructions that he had been given were not reasonable and that he was entitled not to follow them. In light of those facts, Miss Carter had concluded, and I consider she was entitled to conclude, that the Claimant's conduct would not have improved had he been given a warning. I am, therefore, satisfied that

the dismissal was within the band of reasonable responses open to reasonable employer. Having considered all those matters I concluded that the complaint of unfair dismissal was not well founded.

Employment Judge Grewal

Dated: 1 October 2018

Reasons sent to the parties on:

2 October 2018

For the Tribunal Office