



THE EMPLOYMENT TRIBUNALS

Claimant: Ms L Wilson

Respondent: Northern Life Care Limited T/A Ubu

Heard at: North Shields Hearing Centre

On: 11 December 2018

Deliberations: Tuesday 8th January 2019

Before: Employment Judge Arullendran

Members:

Representation:

Claimant: Mr M Winthrope, solicitor

Respondent: Mr Nuttman, solicitor

RESERVED JUDGMENT

The claimant's claim for wrongful dismissal is not well-founded and is dismissed.

REASONS

1. The issues to be determined by the employment tribunal were as follows:
 - 1.1 Did the claimant breach the respondent's alcohol policy?
 - 1.2 Did the claimant breach the respondent's confidentiality instruction?
 - 1.3 Were either or both of the breaches sufficiently serious to amount to a repudiatory breach of contract?
 - 1.4 Was there an unreasonable failure by the respondent or the claimant to comply with the ACAS code?

- 1.5 If the claimant was wrongfully dismissed, has she mitigated her losses?
2. I heard witness evidence from the claimant, Lesley Rattigan (Lead Manager Quality and Compliance) and Linda Bilsborrow (Chief Operating Officer Service Delivery). I was provided with a joint bundle of documents consisting of 204 pages.
3. A preliminary issue was raised by the claimant's representative at the beginning of the hearing to exclude the documents in the tribunal bundle found at pages 159 onwards on the basis that the respondent only disclosed these documents two working days before the hearing. The respondent argues that the documents had been disclosed as a result of the delayed exchange of witness statements, which had been mutually agreed by both representatives, and the fact that the claimant had raised, for the first time, in her witness statement the specific amount of alcohol she had consumed on the date in question. The respondent argues that, as this is a breach of contract claim, the respondent is entitled to refer to documents and witness statements it has in its possession in relation to facts which are now being disputed by the claimant in respect of the claim, i.e. the amount of alcohol consumed by her. It was decided that all of the documents from page 159 onwards would be admitted in evidence as they appear to relate directly to the disputed issues, however the claimant's representative would be afforded the opportunity to make submissions about the admissibility or the specific weight to be given individual documents and these submissions will be taken into account in determining this claim.

The Facts

4. These findings of facts are made on the basis of the balance of probabilities.
5. The claimant began her employment with the respondent on 26th September 2016 and was employed as an area relationship manager. The claimant is a registered nurse (learning disabilities) and the respondent provides personal care and support to people who live independently in shared houses and individual flats, including vulnerable service users, such as those with learning disabilities and complex emotional support needs.
6. It is common ground that the respondent has an alcohol and drugs policy which can be seen at pages 87 to 92 of the bundle. At page 87, the drugs and alcohol policy states "It is Ubu's intention to strictly enforce its no drugs or alcohol policy. A breach of the provisions below is a disciplinary offence and a potential gross misconduct offence under Ubu's disciplinary procedure, for which the penalty is summary dismissal (for that notice or pay in lieu of notice) and possible reporting to the police.". The policy prohibits the drinking of alcohol "on social occasions whether on or off duty when the people we serve are present" and "at any time on social or other events run by or on behalf of Ubu". Further, the policy states "Ubu reserves the right in any of the above circumstances to arrange for the staff member to be escorted from the premises immediately and sent home without pay for the rest of the day or shift."

7. It is common ground that the respondent's policy provides, at page 88 of the bundle, a process for testing for drugs and alcohol. The policy states "staff members may be tested for alcohol and drugs in cases where he or she has had any involvement in a workplace accident or in any incident that has caused or could have caused a danger to health or safety. Testing will also be carried out where management has grounds to believe or suspect that the staff member is or may be under the influence of alcohol or drugs."
8. The respondent's policy goes on to state, at page 89 of the bundle, that "If a test proves positive, the staff member will be invited to attend an interview with a manager.". In terms of the outcome, the policy states that it could include an offer for the employee to undergo a programme of medical treatment, "a written disciplinary warning, where there are no safety issues involved and the circumstances are not serious, [in which case the employee will be tested again after three and/or six months]" or "summary dismissal, where the effects of the employee's alcohol or drugs taking are or could be serious, for example where his or her use of alcohol or drugs affect performance, or where a previous alcohol and drugs test has produced a positive result."
9. A copy of the respondent's disciplinary procedure can be seen at pages 82 to 86 of the bundle and it is common ground that under paragraph 5 of that procedure, which sets out provisions for summary dismissal and gross misconduct, some of the examples of gross misconduct are given as "being under the influence of drink or illegal drugs at work or in the presence of one of the customers we serve or colleagues" and "serious breach of confidentiality". The policy goes on to state, at page 84 of the bundle, that "suspension means that you receive your usual basic pay but you are not permitted to attend work or to contact Ubu's customers, suppliers, the customers we serve or your work colleagues. If you need to defend disciplinary charges or a grievance brought against you then you must first obtain the permission of employment care."
10. On 31st January 2018 the respondent held a three day management training event in Harrogate which the claimant attended along with approximately twenty-nine other employees. The claimant and the other employees were staying at a hotel for the duration of the training event and the claimant's uncontested evidence is that she went to the hotel bar with a number of colleagues on the first evening.
11. At the end of the second day of the training event the claimant went to the bar and had a glass of wine with her colleagues Nikki Cooper, Frank Biggy and a manager called Mark. It is common ground that all of the employees attending the training event went to a bar across the road from the restaurant where an evening meal had been arranged and paid for by the respondent. It is also common ground that all of the respondent's employees, with the exception of two, were drinking alcohol that evening.
12. The respondent provided all of its employees with half a bottle of wine with their meal at the restaurant on the second evening of the training event. The respondent's evidence is that this was the cheapest menu available from the restaurant and that the half a bottle of wine was part of the package. No

evidence was presented as to whether the respondent tried to request that the alcohol be removed by the restaurant from the meal, nor was any evidence adduced that the respondent made any kind of announcement to its staff about any expectations it had of the workers in respect of the consumption of alcohol. The respondent did not provide any alcohol with the meal it provide to its staff on the first evening of the training event.

13. It is common ground that, after the second evening meal, several of the respondent's employees did not return to the hotel immediately, but continued socialising in pubs elsewhere. The claimant spent the evening with her colleague, Nikki Cooper, who had drunk sufficient alcohol to become intoxicated before she and the claimant returned to the hotel. The claimant says she did not continue drinking alcohol after the evening meal and that she drank water and diet coke.
14. Upon returning to the hotel, the claimant and Miss Cooper asked the night porter to open the bar, which he did. The claimant says that she drank either water or diet coke whilst she waited for the porter to allocate a free room to her as she did not wish to continue sharing a room with Miss Cooper. The claimant says that, after she had obtained the key for the new room from the porter, she collected her things from the room she was sharing with Miss Cooper and went to the new room, where she stayed until the morning. The claimant says she went back to Miss Cooper's room at around 7:15am the following morning and found that Miss Cooper's husband had been in an accident and that she needed to return home. Therefore, the claimant offered to give Miss Cooper a lift in her car and she went to find a manager in order to tell someone that she was going to give Miss Cooper a lift home.
15. The claimant went to see the Chief Executive Officer, Dorothy Jarvis-Lee, in the training room and told her that she needed to take Miss Cooper home; she also told Miss Jarvis-Lee that there had been a disagreement between her and some colleagues the previous evening, to which Miss Jarvis-Lee said that Lesley Rattigan would take a statement from her. Ms Rattigan was in the process of obtaining statements from other members of staff in relation to other incidents which had taken place the previous evening. Miss Jarvis-Lee also told the claimant that she was going to suspend her because she smelled of alcohol and that she would make alternative arrangements for another colleague to drive Miss Cooper home.
16. Lesley Rattigan took a statement from the claimant, which the claimant signed, and a copy of this can be seen at pages 101 to 102 of the bundle. The majority of the statement relates to a disagreement between the claimant and other employees the previous evening and near the top of the second page of the statement it states "I understand why I have been suspended, because I smell of alcohol.". Ms Rattigan told the claimant that the suspension did not constitute disciplinary action and that it did not imply guilt. She also told the claimant that she must not attend work or contact any member of staff during the suspension.
17. The claimant left hotel after her suspension and went and sat on a bench, from where she telephoned her husband and told him about her suspension. The

claimant also telephoned Miss Cooper and told her that she had been suspended because she smelled of alcohol. By this point, Miss Cooper was in a car with two other colleagues who provided witness statements to the respondent confirming that Miss Cooper had received a telephone call from the claimant, in which the claimant appeared to do a lot of talking, and that Miss Cooper had told them that the claimant had told her that she had been suspended for smelling of alcohol. Copies of the statements can be seen at pages 108 and 109 of the bundle. The claimant accepted in cross examination that she should not have spoken to Ms Cooper about the reasons for her suspension and she also accepted that Ms Cooper went on to lie in her statement, which the respondent had obtained in relation to an investigation into allegations against Ms Cooper and Mr Biggy.

18. The claimant says that she waited at the training venue for around four hours before driving home and that the reason she did this was because she thought that somebody from the respondent company would come and speak to her, but it became evident that no-one was going to speak to her further that day. The respondent says that the claimant knew she was too drunk to drive and this was the reason she waited 4 hours before driving home.
19. The respondent wrote to the claimant on 5th February 2018 and confirmed that she had been suspended from work, a copy of which can be seen at pages 110 to 111 of the bundle.
20. The claimant attended a disciplinary hearing on 13th February 2018 at which she relied on a written statement she had produced in an advance, a copy of which can be seen at pages 134 to 138 of the bundle. In this statement the claimant denied breaching the alcohol policy and argued that if she was guilty then all of the members of staff, with the exception of two, who had attended the training event were guilty of breaching the policy, particularly as alcohol had been provided for by the company. The claimant did not deny informing Miss Cooper of her suspension, but argued that nothing in the respondent's policy prohibited her from talking to a colleague about her personal circumstances and she claimed that she had not been instructed to keep the matter confidential.
21. The respondent wrote to the claimant on 16th February 2018 and advised her that she was being summarily dismissed for breach of the alcohol policy and for the breach of confidentiality. There were three other allegations which had been investigated as part of the disciplinary process, however none of those had been upheld against the claimant. The respondent stated in the letter that the claimant would have been dismissed for either breach of contract due to the severity of each breach. It is common ground that the claimant did not appeal against the decision to terminate her employment.
22. The respondent carried a separate investigation in respect of other events which took place on the evening of 1 February 2018 and copies of the statements are produced at pages 176 to 196 of the bundle. It is common ground that different people gave differing accounts of the number of drinks the claimant consumed that evening, as well as giving conflicting evidence about what types of drinks the claimant consumed.

Submissions

23. The claimant submits that the question is whether there had been a fundamental breach of contract which entitled it, as the innocent party, to walk away from that contract. With regard to the alcohol policy, the claimant submits that the wording of the policy's unclear in that it does not follow that any form of drinking is a breach of contract, but rather it provides a remedy if an employee habitually attends work under the influence of alcohol. The claimant submits that the events took place at a training event organised by the respondent where alcohol was provided by the respondent itself as part of the meal and, therefore, the respondent waived its own policy and the claimant could not have been acting in breach of contract by drinking alcohol, particularly as the respondent's policy does not say that it takes a zero-tolerance approach to drinking at training events. The claimant submits that the respondent's policy allows the respondent to send people home without pay during the period it carries out an investigation and holds a disciplinary hearing, but that it does not mean that it necessarily results in the immediate termination of an employee's employment.
24. The claimant submits that she has given evidence of drinking four glasses of wine on the evening of 1st February 2018 and that there could be a number of reasons why she smelled of alcohol the following morning, but this does not reach the level of a repudiatory breach of contract on her part. However, the respondent had the opportunity, in accordance with its policy, to categorically establish if claimant's levels of intoxication merited the application of its policy strictly, as set out on page 88 of the bundle, and that the wording of the policy is set out in mandatory terms, in that testing will be carried out by the respondent in those circumstances. Therefore, the claimant submits that there was a duty on the employer to apply the power to test the alcohol levels before taking any action against the claimant.
25. The claimant relies on the case of **T & K Home Improvements Limited v Skilton 2000 IRLR 595**, a copy of which was handed to the employment tribunal, and submits that there is binary approach to the question of whether there has been a breach of contract which entitles the respondent to summarily dismiss.
26. The claimant submits that the mere fact of her telling Miss Cooper that she had been suspended was not a breach of confidentiality because this was not the type of confidentiality which was sought to be protected by the respondent, nor does it reach the level of a fundamental breach.
27. The respondent relies on a skeleton argument, a copy of which was handed to the employment tribunal, and submits that the respondent operates in an industry where no employees are allowed to attend work smelling of alcohol. With regard to the policy on drugs and alcohol, the respondent submits that it does not state that it is compulsory for the respondent to test an employee for alcohol before taking any action. The respondent refers to page 88 of the bundle and submits that it says "staff members may be tested for alcohol" and that the evidence from the respondent's witnesses was that it was not possible to test in this particular case because the testing equipment was not available at the hotel.

28. The respondent submits that the claimant never said, at the time of her suspension, that she did not smell of alcohol or that she had not drunk sufficient alcohol the previous evening to smell of it the following morning. The respondent submits that the claimant signed the statement at the time of her suspension stating that she understood why she had been suspended and that she took approximately four hours to overcome the effects of the alcohol before driving home from the hotel.
29. The respondent submits that the claimant has stated for the first time at this hearing that she only drank four glasses of alcohol and that this was never said by the claimant during the disciplinary hearing or in the claimant's ET1 form and that a number of statements taken by the respondent from other members of staff, in relation to a separate investigation, suggest that the claimant had drunk in excess of four glasses.
30. The respondent submits that there is clear evidence that the claimant breached the requirement for confidentiality when she spoke to Miss Cooper about her suspension and that the tribunal has heard direct evidence from Lesley Rattigan that she did inform the claimant that she was not allowed to contact any member of staff during her suspension. The respondent also submits that the claimant herself was well aware of the requirement not to contact any staff during the suspension as she had suspended people in the workplace before and she was well aware of the standard wording of the suspension in that the employee must not contact colleagues. Further, the respondent submits that the claimant admitted in cross examination that, with hindsight, she should not have spoken to Miss Cooper. However, the ramifications of the breach of confidentiality were that Miss Cooper then lied in her statement and the respondent submits that this must be a fundamental breach of contract by the claimant which entitled the respondent to dismiss her as it interfered with the requirement for the respondent to carry out a fair investigation.

The Law

31. I refer myself to the case of **Laws v London Chronicle (Indicator Newspapers) Limited 1959 1WLR 698** in which it was held that in order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract.
32. I note that the employer must be able to prove that there was a repudiatory breach in order to justify summarily dismissing the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. The tribunal must be satisfied both that the employee committed the misconduct and that it was sufficiently serious to amount to a repudiation: **Shaw v B & W Group Limited EAT0583/11**.
33. I refer myself to the case of **Brisco v Lubrizol Limited 2002 IRLR 607** in which the court of appeal approved the test set out in the case of **Neary and Another v Dean of Westminster 1999 IRLR 288 ECJ (special commissioner)** where the special commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the

[employer] should no longer be required to retain the [employee] in his employment”.

Conclusions

34. Applying the relevant law to the facts I find that, although the respondent has a strict drugs and alcohol policy given the fact that it operates in the care industry, it had waived its requirements in respect of that policy when it served alcohol as part of a meal it provided for its staff on the second evening at the training event of 31st January to 2nd February 2018. Further, it was aware of and allowed its employees to attend the pub prior to the meal organised by the respondent and after the meal had come to an end. The evidence clearly shows that twenty-eight out of the thirty delegates at the training event drank alcohol on the evening of 1st February 2018, of which the claimant was one. There is no evidence that the respondent made any attempt to notify its employees of how the drugs and alcohol policy was to be applied in respect of that particular training event, given that the respondent would be providing half a bottle of wine to each delegate with that meal. Had the respondent required its employees to exercise their consumption of alcohol reasonably, as argued, the respondent could have issued a memo to that effect prior to the commencement of the event, but chose not to do so. As all of the employee, including senior managers, were drinking alcohol at the training event, it is difficult to see how the claimant could be in breach of contract when the others were not, or how it could amount to a repudiatory breach,
35. There is some tension in the wording of the drugs and alcohol policy at page 88 of the bundle in that the respondent has stated that staff members “may” be tested for alcohol and, a further along in the policy, has stated that testing “will” be carried out where management has grounds to believe or suspect that the staff member is or may be under the influence of alcohol. Given that the respondent is only entitled to summarily dismiss an employee where there has been a repudiatory breach of contract by the employee, it is hard to see how the respondent could prove such a breach without carrying out testing. I note that the evidence relied upon by the respondent in respect of how much the claimant had drunk on the evening of 1st February is contradictory and that different employees have stated different amounts and different types of alcohol, such as red wine and white wine and, at best, the evidence is equivocal. Further, this Tribunal has not heard any direct evidence, other than that of the claimant, about exactly how much alcohol was consumed by the claimant on the evening in question. In the circumstances, I find that there is insufficient evidence that the claimant was in breach of the respondent’s alcohol policy.
36. Having taken into account the evidence from both sides, I prefer the evidence of Lesley Rattigan that she did inform the claimant at the time of her suspension that she must not attend work or contact any member of staff throughout her suspension, particularly given that the claimant accepted in cross examination that it was standard procedure for such an instruction to be given to any employee who had been suspended from their employment at the respondent company. I note that the claimant accepted in cross examination that she had telephoned Miss Cooper immediately after her suspension and that in hindsight it

would have been better if she had not told her about it, but that it had “just come out and she had not intended to tell” Miss Cooper about the details relating to her suspension. The claimant also accepted in cross examination that Miss Cooper went on to lie in her witness statement to the respondent. Under the circumstances, I find that the instruction by the respondent to the claimant not to discuss the matter with any other employee related to the fact of the suspension itself and the circumstances surrounding it and that the claimant acted in breach of this confidentiality instruction which had a direct impact on the respondent’s ability to carry out a fair investigation into the allegations against Miss Cooper. In all the circumstances, I find that the breach of confidentiality by the claimant amounted to a fundamental breach of contract on her part as it disclosed a deliberate intention to disregard the essential requirements of the contract, of which the claimant was perfectly well aware, having suspended other employees in the past in her capacity as a manager.

37. As I have found that the claimant did not breach the respondent’s alcohol policy, I find that the respondent was not entitled to summarily dismiss the claimant for that reason. However, as I have found that the claimant breached the respondent’s confidentiality instruction and that such a breach was a repudiatory breach, I find that the respondent was entitled to summarily dismiss the claimant and, therefore, the claimant’s claim for wrongful dismissal is not well-founded and is dismissed. As such, there is no requirement for this tribunal to make any findings on issues number 1.4 and 1.5, as set out above.

EMPLOYMENT JUDGE ARULLENDRAN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

.....11 January 2019.....

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