



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Nightingale

Respondent: Garden City Medical Centre

HELD AT: Manchester

ON: 28 February 2019

BEFORE: Employment Judge B Hodgson

REPRESENTATION

Claimant: In person

Respondent: Ms C Kelly, Practice Manager

JUDGMENT having been sent to the parties on 6 March 2019 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

Background

1. This is a claim of unfair dismissal. In the claimant's ET1 Claim Form (as amended) there is an indication that she may have resigned but it is agreed between the parties that the claimant was in fact dismissed

Issues

2. The issues raised for the Tribunal to determine in summary were agreed at the outset of the hearing as follows:
 - 2.1. What was the reason for dismissal?
 - 2.2. If conduct, was such dismissal fair under the provisions of section 98(4) of the Employment Rights Act 1996 taking account of the following guidelines:
 - 2.2.1. Did the respondent hold a genuine belief in the reason for dismissal at the time it took its decision?
 - 2.2.2. Was there a proper and reasonable investigation into the allegations of gross misconduct?
 - 2.2.3. Was the respondent's decision to dismiss one which was reasonably available to it to reach?
 - 2.3. Was summary dismissal a reasonable sanction in all the circumstances?

Facts

3. The parties had agreed a bundle of documents and references in this judgment to numbered pages are to pages as numbered in such bundle (noting that the bundle was divided into sections and the sections are referenced as well as the actual page numbers)
4. The claimant gave evidence on her own behalf and also put forward written statements from: Ms L Simmons; Mr D Eccleston; Ms V Hamer; and Ms L Aston which were essentially character references. The respondent called Ms C Kelly and Ms M Makin to give oral evidence. They also put forward statements by Dr S Al-Dubbaisi; and Ms B South. The Tribunal explained to the parties at the outset of the hearing the limited weight that is given to evidence produced in writing as opposed to sworn evidence that is able to be challenged in cross-examination
5. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities having considered all of the evidence before it both oral and documentary
6. The respondent is a small GP led Medical Centre on one site employing a total of thirteen staff. Dr S Al-Dubbaisi is the Senior GP Lead
7. The claimant was employed by the respondent in the capacity of Receptionist. Her employment began on 5 May 2009

8. The claimant signed a "Staff Confidentiality Agreement" on 7 February 2014. (section 2, page 17). The Tribunal has also had sight of the claimant's Contract of Employment signed on 22 November 2016 together with documents headed "Confidentiality Policy and Agreement (Staff)" and "Computer Internet and Email Usage policy" (section 2, pages 18 – 28) and also a Job Description for the role of Receptionist (section 2, pages 29 – 31)
9. On 22 August 2018, a member of staff, Ms JC, approached the Practice Manager, Ms Charlotte Kelly to indicate that she had possession at home of a number of work e-mails from Ms Kelly's e-mail record which had been left in her in-tray upon her recent return from holiday and which impacted on her (Ms JC's) position with regard to certain internal matters. Ms Kelly advised Ms Michelle Makin, Practice Nurse, and then Dr Al-Dubbaisi what she had been told, being concerned over the apparent breach of confidentiality and policies, as access to the e-mails would require the use of a confidential password
10. At a staff meeting later that day at which the claimant was present, Dr Al-Dubbaisi told the staff that it had come to his attention that there had been apparent improper conduct with regard to accessing work e-mails and he required anybody who had any knowledge of or involvement in such conduct to speak to him urgently, within the following 48 hours, as he considered the matter sufficiently serious as to potentially warrant referral to the police
11. The claimant did not approach Dr Al-Dubbaisi prior to her finishing work on 24 August and then going on a week's pre-planned holiday
12. On 24 August, Ms JC spoke to both Ms Makin and Dr Al-Dubbaisi apologising for her conduct and indicating that she had left a letter of resignation on Ms Kelly's desk (section 1, page 1), which gave four weeks' notice. She was ultimately put on paid leave until her last day and did not return to work with the respondent during that period
13. Ms Kelly returned to work on Tuesday 28 August (the previous day being a Bank Holiday), had sight of the resignation letter and arranged a meeting with Ms JC for later that day
14. At the outset of the meeting, Ms JC handed a further letter to Ms Kelly (section 1, page 2). In this letter she states that she had been lying when she said that e-mails had been printed off and left in her in-tray, that in fact the claimant had approached her to say that she had had sight of e-mails between Ms Kelly and another member of staff and that she (the claimant) had been able to access them because she knew the member of staff's password – this in fact was how Ms JC had obtained access to them. She had not previously wished to implicate the claimant in view of the seriousness of the matter (the notes of the meeting are at section 1, pages 3 - 6)
15. The claimant returned to work following her leave on 3 September and was immediately called into a meeting with Ms Kelly and Ms Makin. Ms Kelly read out to the claimant a letter she had prepared (section 2, pages 4 - 5) advising

the claimant that she was being suspended on full pay pending an investigation and calling her into what is described as a "Fact Finding interview" on 5 September. The following allegations were set out:

- Obtaining another person's NHS personal password
 - The use or sharing another NHS staff's password
 - Potential use of the password to access another member of staff's NHS email account
 - The knowledge that sharing the password may lead to another colleague using the password to access another staff's account and not raising this to [sic] the Practice Manager
 - Breach of Computer Internet and Email Usage Policy
 - A potential GDPR risk
16. The letter was handed to the claimant and it was confirmed she would attend the meeting scheduled for 5 September (see notes of the meeting at section 2, page 1)
 17. On 5 September, Ms Kelly and Ms Makin met again with the claimant as arranged (see notes at section 2, pages 7 – 13). The claimant said that she had had sight of certain e-mails but implicated a third member of staff (Ms LB) as being responsible for accessing them . She said that she had telephoned Ms JC on the day that matters had come to light and Ms JC had told her that she had said that she found the e-mails in her in-tray simply as the first thing that had come into her mind. She said that Ms JC had winked at her when she (Ms JC) came out of her meeting with Ms Kelly. She had seen the password but could not recall whether or not she used it
 18. The claimant was handed a letter (section 2, page 16) calling her to a disciplinary meeting on 7 September, repeating the allegations and warning her that "the possible consequences arising from this meeting might be: Dismissal". It notified her of her right to be accompanied by another work colleague or a trade union representative
 19. On 5 September also, Ms Kelly and Ms Makin met with Ms LB for her response to being implicated by the claimant. Ms LB denied any involvement.
 20. The disciplinary meeting proceeded on 7 September, conducted by Ms Kelly and Ms Makin – the claimant did not have any representative present with her (see notes of meeting at section 2, pages 34 -35). The claimant was advised that she was being dismissed with immediate effect and she was handed a letter confirming that decision (section 2, pages 32 -33). It gave as the reasons essentially the allegations previously put to the claimant, summarised as breach of confidentiality, and referred to extracts from the respondent's Confidentiality

Policy. It also stated that she had a right of appeal. The claimant then handed to Ms Kelly her own letter of resignation, although dated 8 September (section 2, page 39)

21. On 12 September a letter from the claimant (section 2, pages 41 – 43) was hand delivered to the practice appealing against her dismissal and purporting to retract her own resignation. It expressed her regret at the situation, accepting only that she had seen e-mails but had had nothing to do with them being accessed. The claimant also referred to her job "being advertised the day before [she] had her letter of dismissal given to [her]". The respondent's evidence, which was not challenged by the claimant and accepted by the Tribunal, was that the respondent had been looking to appoint up to two new members of staff over a period of several months due to staff levels and workload and had been advertising accordingly over an extended period of time. Other than the reference to the suggestion that her own job was being advertised, the claimant added nothing to her previously stated position
22. By letter dated 15 September, Dr Al-Dubbaisi rejected the appeal (section 2, page 50)

Law

23. Section 98(1) of the Employment Rights Act 1996 states:

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 subsection 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.

24. The "conduct of the employee" is one of the reasons set out in subsection (2)

25. Section 98(4) of the Employment Rights Act 1996 states:

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.
26. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof.
 27. There is well-established case law setting out the guiding principles for determining an unfair dismissal claim based upon a dismissal by reason of conduct.
 28. The case of *British Home Stores Limited v Burchell (1980) ICR 303* proposes a three-fold test. The Tribunal must decide whether:
 - 28.1. the employer had a genuine belief that the employee was guilty of the misconduct alleged;
 - 28.2. it had in mind reasonable grounds upon which to sustain that belief; and
 - 28.3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances (which include the gravity of the charges and the potential impact upon the employee – *A v B 2003 IRLR 405*).
 29. The Tribunal must then consider whether the sanction of summary dismissal was reasonable in all the circumstances
 30. The Tribunal must not substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (*Iceland Frozen Foods v Jones 1983 ICR 17*). This applies to procedural as well as substantive matters (*Sainsburys v Hitt 2003 ICR 111*).

Submissions

31. Both parties made brief oral submissions
32. Ms Kelly went through the chronology. In her view the respondent had acted in a timely fashion and followed a proper process particularly given its duty of care to its staff
33. The claimant denied misconduct and in her view had not been treated fairly. She had not been offered the opportunity to put her version of events in writing

Conclusions

34. The parties ultimately were in agreement that the claimant had been dismissed, her resignation letter only being handed to the respondent after she had been

notified of the decision to dismiss. It was also not in dispute that the reason for the respondent's decision to dismiss was conduct

35. The claimant further conceded that the allegations were such that if they were properly found to have been proven against her then summary dismissal was an appropriate sanction
36. Her case was that the allegations should not properly have been found proven against her, particularly given what she described as a speedy process
37. It is not for the Tribunal to form or substitute its own view but rather to examine the reasonableness of the respondent's actions and conclusion. In doing so the Tribunal must take into account the size and administrative resources of the respondent. The respondent is a relatively small practice with no in-house HR function
38. There is no challenge being made to the respondent genuinely holding the belief that the claimant was guilty of the conduct alleged
39. In essence the matter comes down to the reasonableness of the respondent not believing the claimant when she said that she was not guilty of the conduct alleged. The respondent had to weigh that denial against the contrary evidence of Ms JC
40. The respondent's position was that the claimant clearly had a vested interest in denying the allegation and indeed seeking to implicate a third party. Ms JC on the other hand accepted her part in the matter and resigned. The claimant acknowledged that there was no personal animosity between her and Ms JC and there was no apparent motivation for the allegation of the claimant's role in the matter to have been fabricated. Further the claimant had not given her version of events when first given the opportunity to do so but on her own evidence, rather, had taken it upon herself to communicate directly with Ms JC. The Tribunal accepts the respondent's conclusion was a reasonable conclusion to draw in the circumstances
41. In terms of process, the claimant was told of the allegations and given the opportunity to respond. She was given the opportunity to be accompanied and ultimately given a right of appeal
42. The Tribunal considered the timing of the process which progressed from suspension to dismissal over five days. The claimant was made aware of the allegations and was given the opportunity to give her response to them. The other individuals potentially implicated were spoken to and there was nothing further to be done by way of reasonable investigation. There was no suggestion, whether by the claimant or otherwise, that other individuals should have been questioned or that there was any other potential evidence that had not been pursued

43. The Tribunal's conclusion is that the respondent acted reasonably both procedurally in terms of the process it followed and substantively in the decision it came to
44. In the circumstances the Tribunal's judgment is that the claim of unfair dismissal is not well-founded and must fail

Employment Judge B Hodgson

Date 8 May 2019

REASONS SENT TO THE PARTIES ON

15 May 2019

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