



EMPLOYMENT TRIBUNALS

Claimant Mr L Holmes

Respondent: SPIE UK Limited

HELD AT: Leeds

ON: 16 and 17 May 2019
22 May 2019
(reserved Judgment in chambers)

BEFORE: Employment Judge Cox

Representation:

Claimant: Mr Sharples, solicitor

Respondent: Miss Smith, counsel

RESERVED JUDGMENT

This claim of unfair dismissal fails and is dismissed.

REASONS

1. Mr Holmes presented a claim to the Tribunal alleging that SPIE UK Limited, his former employer (“the Company”) had unfairly dismissed him from his job as a Facilities Manager. His job involved oversight of three schools, the largest of which was a secondary school with about 1,500 pupils (referred to in these reasons as “the School”). One of his “key responsibilities and accountabilities” was to ensure that health and safety regulations were observed.
2. At the Hearing of the claim, the Tribunal heard oral evidence on behalf of the Company from: Mr Mark Davis, Operations Manager, who was Mr Holmes’s line manager and investigated the allegations that led to his dismissal; Mr Damien

Scott, Operations Manager, who conducted the disciplinary hearing and decided to dismiss Mr Holmes; and Mr Stephen Taylor, Operations Director, who heard and dismissed Mr Holmes's appeal against his dismissal. The Tribunal also heard oral evidence from the Claimant himself.

3. On the basis of that evidence and the documents to which the witnesses referred, the Tribunal made the following findings on the claim.

Reason for dismissal

4. Where an employee alleges unfair dismissal, it is for the employer to show that the reason or, if there is more than one reason, the principal reason for the dismissal was one of the potentially fair reasons for dismissal set out in Section 98(2) and 98(1)(b) of the Employment Rights Act 1996 (the ERA). These include a reason relating to the conduct of the employee (Section 98(2)(b)).
5. From the evidence Mr Scott gave, which the Tribunal found clear and credible, the Tribunal accepts that the principal reason he dismissed Mr Holmes related to his conduct, namely, Mr Scott believed that Mr Holmes had been guilty of serious negligence that could have resulted in unacceptable loss, damage or injury. The specific failures upon which his decision was based were:
 - a. Mr Holmes had failed to ensure that the records of the site of fire alarm points within the School were accurate. (This had come to light when the fire alarm had been activated and the School staff had been unable to locate the point that had been used to activate the alarm.)
 - b. Mr Holmes had failed to ensure that the necessary paperwork was in place to show compliance with the Company's health and safety obligations.
 - c. Mr Holmes had failed to ensure that the risk assessment relating to the use of the School's swimming pool had been updated and had allowed the pool to be used in a way that did not comply with the risk assessment.
 - d. Mr Holmes had failed to log and act upon "near miss" reports made to him by Kerryanne Cross, the cleaning supervisor who reported to him, in breach of the Company's prescribed procedure and a recent instruction from Mr Davis to focus on "near miss" reporting. (A "near miss" is, according to the Company's training materials, "an unplanned event that did not result in injury, illness, damage or product loss – but had the potential to do so.")

Reasonableness of the decision to dismiss

6. If a Tribunal is satisfied that the employer has established that the reason for dismissal fell within the potentially fair reasons for dismissal, it must then go on to decide whether, in all the circumstances of the case, the employer acted reasonably or unreasonably in treating the employee's conduct as a sufficient reason for dismissal. That question must be determined in accordance with equity and the substantial merits of the case, and by reference in particular to the employer's size and administrative resources (Section 98(4) ERA).
7. In the context of a dismissal for misconduct, as this was, the issue for the Tribunal is not whether the employee actually committed the act of misconduct, but rather whether the employer had a genuine belief that the employee committed the act of misconduct, based on reasonable grounds after a reasonable investigation (British Home Stores Ltd v Burchell [1978] IRLR 379). In determining the question of fairness, the Tribunal's role is not to decide whether it would have dismissed the employee had it been in the employer's shoes, but rather whether the employer's actions fell within the range of possible reasonable responses that a reasonable employer might have adopted (Post Office v Foley [2000] IRLR 827).
8. Having heard Mr Scott's evidence on his decision to dismiss Mr Holmes, the Tribunal accepts that he had a genuine belief that Mr Holmes had been seriously negligent because of the failings listed in paragraph 5 above. During submissions, Mr Holmes also accepted that Mr Scott had that genuine belief. The remaining issue for the Tribunal is therefore whether Mr Scott based his belief on reasonable grounds after a reasonable investigation.
9. Mr Scott had before him the notes of the interviews that Mr Davis had carried out during his investigation. Kerryanne Cross, cleaning supervisor, had confirmed to Mr Davis that she had submitted "near miss" forms to the Caretaker, who should have forwarded them to Mr Holmes, and that she had also notified Mr Holmes that she had done so. To her knowledge, Mr Holmes had not acted upon her reports and, if the Caretaker had not forwarded them to Mr Holmes, he had not asked her what had happened to them. Diane Stewart, the Company's Regional Compliance Manager, told Mr Davis that the health and safety records at the School were "atrocious". Tony Redman, Site Manager, told Mr Davis that Mr Holmes had been allowing teachers to use the School swimming pool without this being risk assessed and with no lifeguard present. Dave Cass, Caretaker at the School, told Mr Davis that the School was "a mess", paperwork was "all over the place and nothing in the site master files". Pat Cross, Assistant Caretaker, said that the "near miss" forms had been given to Mr Holmes and had been sitting for some time in the pile of papers on his desk.
10. Mr Scott also had before him a written complaint from the School about the incident when the fire alarm had been set off at the School. Staff had been

unable to locate the site of the alarm point used to activate the alarm because the paperwork confirming which site location corresponded to the number displayed on the alarm panel was not accurate. Further, the Caretakers had not understood how to read the alarm panel or how to reset it.

11. In addition, Mr Scott had an email from Mr Davis to Mr Holmes and others dated 9 April 2018, with the subject line "Cause for Concern/Near Miss – URGENT" and marked as "Importance: High". In it, Mr Scott said: "Please can you all have a push on Case For Concern/Near Miss Reporting – the tools to report are already out there, it's just a case of driving the culture."
12. Mr Scott had the notes of the interview that Mr Davis had carried out with Mr Holmes. This interview had covered the issues set out in paragraph 5 above that eventually led Mr Scott to dismiss and several other matters that indicated Mr Holmes was not meeting his health and safety duties.
13. All these materials were sent to Mr Holmes in advance of the disciplinary hearing, so he knew what evidence Mr Scott was likely to be discussing with him.
14. Many of the matters that Mr Davis had covered with Mr Holmes during the investigatory interview, and all those set out in paragraph 5 above, were discussed again during the disciplinary hearing. Mr Scott's overriding impression from Mr Holmes's responses to the allegations, both at the investigatory interview and at the disciplinary hearing, was that he was failing to acknowledge the seriousness of his failings and refusing to accept responsibility for them. Having read the notes of the disciplinary hearing, the Tribunal accepts that Mr Scott had reasonable grounds for that view. So, for example, although Mr Holmes appeared to accept that he should have chased Ms Cross's "near miss" forms if he had not received them, he said that she was not completing the paperwork correctly. When Mr Davis pointed out that the risk assessment for the swimming pool was out of date, Mr Holmes said that as long as the risk assessment was done it was fine; he did not acknowledge that he had any responsibility to ensure that it was reviewed by the School. When asked about the fact that he was allowing the pool to be used without a lifeguard being present, Mr Holmes's response was that one of the swimmers was a lifeguard; he did not acknowledge that if that swimmer got into difficulty, no one else would be available to assist.
15. When asked about the fire alarm issue, which Mr Scott viewed as the most serious allegation, Mr Holmes's response was to say that the fire alarm incident had happened during his suspension. That did not explain, however, why the paperwork was not accurate. Whilst Mr Holmes accepted that the Caretaker, who had only recently started work at the School, had not known the fire alarm procedure, he tried to shift the blame for that by saying that he had asked somebody else to do the Caretaker's induction.

16. This all led Mr Scott to conclude that Mr Holmes had been seriously negligent. He was aware that Mr Holmes had a clean disciplinary record and over 15 years' service with the Company, and did consider whether to give Mr Holmes a warning. In all the circumstances, however, he did not consider that that was a sufficient response. Mr Holmes had failed to show remorse about his failings, to accept that he was the accountable manager or to show that he would take the necessary steps to rectify urgently what had been uncovered. Mr Scott had lost all trust in him. In all the circumstances, the Tribunal accepts that Mr Scott's decision to dismiss Mr Holmes was reasonable.

Mr Holmes's criticisms of the decision to dismiss

17. In his submissions, Mr Holmes argued that Mr Scott did not have reasonable grounds for concluding that he was at fault in relation to the issues with the fire alarm. He appeared to be saying that any inaccuracies in the documentation were the responsibility of the company that had recently done some work on the alarm system. The Tribunal is satisfied, however, that Mr Scott had reasonable grounds for his conclusion that Mr Holmes was culpable, both for not checking that the documentation was accurate and in not ensuring that the Caretaker knew what to do in the event of a fire alarm.

18. In relation to the risk assessment on the swimming pool, Mr Holmes argued that Mr Scott did not have reasonable grounds for concluding that he was at fault because it was the School's risk assessment and not under Mr Holmes's control. The Tribunal is satisfied that Mr Scott had reasonable grounds for concluding that Mr Holmes had been negligent in not ensuring that the risk assessment was reviewed, by raising and pursuing this matter with the School.

19. In relation to the use of the pool without a lifeguard, Mr Holmes submitted that it was not reasonable for Mr Scott to conclude he was negligent, because a previous Facilities Manager at the School had raised this with Ms Stewart and the Company had had no issue with it. He was unable to identify what evidence there was before the Tribunal that this had in fact happened or that he had told Mr Scott this was the case.

20. In relation to the "near miss" reports, Mr Holmes accepted that he should have chased Ms Cross for the report forms, but said that Mr Scott had no reasonable grounds for concluding that he was wilfully failing to respond to Mr Davis's email to tighten up the practice on "near misses". The Tribunal is satisfied that Mr Scott had reasonable grounds for taking into account that Mr Holmes had been reminded of the importance of the "near miss" procedure when he was assessing the seriousness of Mr Holmes's inaction in relation to Ms Cross's reports and whether he had been negligent in his approach.

21. Mr Holmes argued that Mr Scott had prejudged his guilt before he began the disciplinary hearing. The Tribunal accepts that Mr Scott had been Mr Holmes's

temporary line manager in July 2017 to January 2018 and had formed the view during that time that he was work-shy and tried to avoid responsibility. The Tribunal also notes that at the beginning of the disciplinary hearing Mr Scott described the evidence against Mr Holmes as “damning”. The Tribunal nevertheless accepts Mr Scott’s evidence, which was fully supported by the minutes, that he entered the disciplinary hearing with an open mind and gave Mr Holmes a fair opportunity to make clear his position on the allegations. There were several other alleged health and safety failings on Mr Holmes’s part that were explored by Mr Davis and that Mr Scott could have pursued, but he chose to concentrate on the most significant. In the Tribunal’s view, that also indicated he was taking a reasonable and measured approach to the allegations.

22. Mr Holmes argued that he was never given the reasons for his dismissal. The Tribunal accepts that the letter to Mr Holmes confirming his dismissal, like the letter of invitation to the disciplinary hearing, gave a general description only of the allegations, namely:
- a. Serious breach of health and safety.
 - b. Serious concerns in respect of compliance on your site.
 - c. Failing to carry out reasonable management requests.

The Tribunal accepts, however, that Mr Holmes was fully aware of the concerns that led Mr Scott to terminate his employment. Mr Davis and Mr Scott had discussed these with him at length.

23. Mr Holmes also argued that, because he did not know which specific failings amongst those discussed in the investigation interview and at the disciplinary hearing had led Mr Scott to dismiss him, he did not have a fair opportunity to appeal against the decision.
24. The Tribunal accepts that, ideally, Mr Scott should have confirmed to Mr Holmes what he told the Tribunal in evidence, that is, that the allegations set out in paragraph 5 above were the particular ones that he focused upon in reaching his decision to dismiss. The Tribunal notes, however, that Mr Holmes’s letter of appeal includes an assertion that he had not been guilty of serious negligence or breach of health and safety amounting to gross misconduct. He was therefore asking Mr Taylor to consider whether any or all of the matters discussed at his disciplinary hearing amounted to conduct that justified dismissal. It is clear from Mr Taylor’s evidence to the Tribunal and the minutes of the appeal hearing that Mr Taylor discussed with Mr Holmes the “near miss” forms, the unsatisfactory state of paperwork including that relating to the alarm, and the pool use and risk assessment. Mr Taylor concluded that there were clear breaches of health and safety by the failure to have risk assessments in place and not obtaining completed “near miss” forms. Further, having considered all the allegations and all the evidence, Mr Taylor effectively endorsed Mr Scott’s conclusions that Mr Holmes had not taken responsibility for his actions and that the Company could

no longer trust him, making Mr Holmes's position within the Company was untenable.

Summary and conclusions

25. Taking the evidence as a whole, the Tribunal is satisfied that Mr Scott had reasonable grounds, based on a reasonable investigation conducted by Mr Davis, to conclude that Mr Holmes had been seriously negligent in his approach to his health and safety duties. Given Mr Holmes's failure to acknowledge the existence and/or seriousness of his failings or to accept responsibility for them, the Tribunal is also satisfied that Mr Scott had reasonable grounds for concluding that the Company could no longer trust him and that dismissal was the appropriate sanction, despite Mr Holmes's long service and clean disciplinary record.
26. For these reasons, Mr Holmes's claim of unfair dismissal fails and is dismissed.

Employment Judge Cox
Date: 22 May 2019