



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106026/2019

Held in Aberdeen on 29 August 2019

Employment Judge: M Sutherland

Anthony Shepherd

Claimant
Represented by:
F Lefevre - Solicitor

KW Contractors Limited

Respondent
Represented by:
L Beedie - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that –

- a) the Claimant was unfairly dismissed and the Respondent is ordered to pay the Claimant a basic award of £4,572
- b) the Claimant was not provided with a statement of terms and conditions and the Respondent is ordered to pay the Claimant £2,032
- c) the Respondent is ordered to pay the Claimant notice pay in sum of £1,524 from which tax and national insurance requires to be deducted and remitted to HMRC.

REASONS

Introduction

1. This is a claim of unfair dismissal, notice pay and failure to provide a statement of terms and conditions of employment.

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2. The Claimant is seeking compensation only and does not seek to be reinstated or re-engaged.
3. The Respondent led evidence from Anthony Auld, Director. The Claimant gave evidence on his own behalf.
4. The parties lodged a joint set of documents.
5. The parties made closing oral submissions.
6. The following abbreviations are used in the findings of fact–

Abbreviation	Name	Title
AA, Director	Anthony Auld	Director
JW, SM	James Wilson	Site Manager
SR, CoW	Scott Robertson	Clerk of Works, Aberdeen City Council

Issues

7. The issues to be determined by the Tribunal at this final hearing were as follows –
 - (i) What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?
 - (ii) Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?
 - (iii) Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17

- (iv) If the reason for dismissal relates to the conduct of the Claimant –
1. Did the Respondent have a genuine belief in the Claimant's guilt?
 2. Did the Respondent have reasonable grounds for that belief?
 3. Had the Respondent conducted a reasonable investigation into that conduct?

British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303

- (v) Did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?
- (vi) If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event?
Polkey v AE Dayton Services Ltd 1987 3 All ER 974.
- (vii) To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?
- (viii) What loss has the Claimant suffered in consequence of the dismissal? What compensatory award would be just and equitable? Did the Claimant contribute to his dismissal? Has the Claimant taken reasonable steps to mitigate her losses?

- (ix) Did the Respondent fail to give the Claimant a written statement of particulars of employment under Section 1 of the ERA 1996? Is it just and equitable to increase any award by 4 week's pay?
- (x) What notice period was required to terminate the Claimant's contract under Section 86 of the ERA 1996?

Findings in fact

8. The Tribunal makes the following findings in fact:
9. The Respondent is an Aberdeen based company providing construction and civil engineering works to private and public sector clients. Aberdeen City Council is one of their main clients. The Respondent carries out operations in environments where safety is of significant importance. The Respondent has around 25 employees and does not have any dedicated HR function. The Respondent has a turnover of around £500,000. The Respondent has one owner who is not involved in the management of the business. The business is managed by a Director and three site /contract managers. The Respondent's tradesman and labourers report to these managers.
10. The Claimant was employed by the Respondent as a Plasterer and Tile Fixer from 1 August 2011 until 14 March 2019. As at the termination date his gross weekly pay was £508 and his net weekly pay was £409.03. The Claimant was not provided with a written statement of terms and conditions of employment.
11. The Claimant also undertook some limited work for others during his employment with the Respondent.
12. The Claimant had significant intermittent absences from work because of long standing difficult personal circumstances.
13. On 23 November 2016 the Respondent issued the Claimant with a written warning regarding his continued misuse of company vehicles for personal use.
14. AA, Director became a Director in 2018. He had no prior management experience and limited experience of human resources matters.

15. On 8 January 2018 the Respondent issued the Claimant with a written warning regarding significant interment absences including a repeated failure to call in sick and disappear for days on end. Whilst it was recognized that he was having a difficult time he was warned that should his attendance not improve, and continue to stay improved, then they would have no option but to terminate his employment. The Respondent did not pay sick pay for any absences.
16. On 19 February 2019 the Respondent issued the Claimant with a written warning in respect of his use of a company vehicle for personal use without permission.
17. On 12 March 2019 the Claimant pulled a muscle in his shoulder whilst at work. The Claimant did not advise the Respondent either by putting an entry in the Accident at Work book or otherwise. The Claimant attended work for the remainder of the day.
18. On 13 March 2019 the Claimant attended work. A number of colleagues commented that he looked unwell. SR, CoW was concerned that he may be in a drugged or intoxicated condition. The Claimant was also seen by JW, Site Manager who shared his concerns. SR, CoW asked that he be removed from site as a precaution and for the Respondent to investigate. The Claimant was allowed to conclude his shift that day. AA, Director understood that the Claimant had been "NRB'd" (not required back) by SR, CoW. AA, Director spoke to JW, SM and SR, CoW about the issue.
19. On 14 March 2019 Claimant visited his GP that day who advised that he may be off work for up to 6 weeks because of the pulled muscle. The Claimant was prescribed Naproxen for inflammation and Omeprazole, an antacid. The Claimant texted the Respondent to advise that he was unfit for work and that he may be off for up to 6 weeks.
20. On 14 March 2019 AA, Director took the decision to terminate the Claimant's employment.
21. On 15 March 2019 AA, Director received a text from SR, CoW stating:

“On Wednesday 14 March I was on site at regent crt when the plasterer was working on engaging a chat with him it became very apparent that he was in a drugged or intoxicating condition I asked James to check this out and he confirmed my suspicions later in the day if asked for the gent in question tho be removed from site as a precaution and for k.w to investigate further hope this helps tony [sic]”

22. On 15 March 2019 the Claimant received a letter from AA, Director dated 14 March 2019 stating:

“In light of recent written correspondence regarding your misuse of company vehicles and several verbal conversations regarding your attendance record, we regret to inform you that your employment with [the Respondent] is being terminated with effect as from today, Thursday 19 March, due to a Client’s refusal to have you working on their site, and as we are not in a position to offer you another tiling or plastering works on any of our other ongoing sits.

Due to our Client’s complaint, this has caused an impact on the Company’s reputation and cannot be tolerated”.

23. The Claimant’s employment was terminated with immediate effect on 14 March 2019. The Claimant he received 1 week’s pay in lieu of notice and payment in respect of accrued but unused holidays. The letter of dismissal did not state that he was being dismissed because he was considered intoxicated by drugs at work. It instead stated he was being dismissed because a client was refusing to have him on site.
24. The Respondent did not seek to discuss the issue with the Claimant prior to his dismissal. The Claimant was not invited to attend a disciplinary hearing. The Claimant was not afforded a right of appeal. The Respondent advised that it would have taken around a period of weeks to conclude that process.
25. On 16 March 2019 the Claimant telephoned TA, Director who advised him that it was suspected that he was under the influence of drugs on 13 March 2019. AA, Director believed that the Claimant had a problem with recreational drugs

but had not previously thought that it was a problem at work. The conversation was fraught.

26. The Claimant's GP assessed the Claimant as unfit for work for 42 days from 31 July 2019 because of symptoms of depression. The Claimant was suffering from stress on account of long standing difficult personal circumstances which was then compounded by the termination of his employment with the Respondent.
27. On 27 August 2019 SR, CoW ACC emailed AA, Director confirming a copy of the text sent on 13 March 2019:

“Morning Tony, on wed 13th March I was on site at Regent court when the plasterer was working. On engaging a chat with him, it became apparent that he was in a drugged or intoxicating condition. I asked james to check this out and he confirmed my suspicions later in the day. I asked if the gent in question to be removed from site as a precaution and for k. w to investigate further hope this helps tony”.
28. The Claimant was 45 years old as the date of termination.
29. The Claimant did not apply for any welfare benefits. The Claimant was previously in receipt of welfare benefits before commencing work with the Respondent.
30. The Claimant was unfit for work for three weeks following the termination of his employment on account of his shoulder injury.
31. The Claimant approached six companies for work. The Claimant secured work from 30 March 2019 until 17 April 2019 and received £1980 gross (£1588 net).
32. A week before the final hearing the Claimant was driving a vehicle fitted out with plastering equipment.

Relevant Law

33. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

34. It is for the Respondent to prove the reason for his dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.
35. If the reason for his dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.
36. If the reason for the Claimant's dismissal relates to his conduct, the tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303*).
37. In determining whether the Respondent acted reasonably or unreasonably the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Limited v Jones [1983] ICR 17 (EAT)*).
38. In determining whether the Respondent adopted a reasonable procedure the tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The tribunal then should consider

whether any procedural irregularities identified affected the overall fairness of the process in the circumstances having regard to the reason for dismissal.

39. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –

- (i) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- (ii) Employers and employees should act consistently
- (iii) Employers should carry out any necessary investigations, to establish the facts of the case.
- (iv) Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- (v) Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- (vi) Employers should allow an employee to appeal against any formal decision made

40. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

41. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. Subject to a Claimant's duty to mitigate their losses, this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an

assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the Claimant from the Respondents.

42. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
43. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (*Polkey v AE Dayton Services Ltd* [1987] IRLR 503 (HL)). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.
44. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.
45. The Claimant is entitled to one week's notice of termination of employment for each year of continuous employment up to a maximum of 12 weeks unless the Respondent was entitled to terminate without notice by reason of the conduct of the Claimant.
46. Section 1 of the ERA 1996 provides that an employee is entitled to receive a written statement of terms and conditions of employment within 2 months of

starting work. Section 38 of the Employment Act 2002 provides that an employee may be entitled to an award of 2 or 4 weeks' pay if considered just and equitable in specified circumstances.

Respondent's submissions

47. The Respondent's oral submissions were in summary as follows: -
48. The Claimant was dismissed because he was under the influence of drugs at work and this amounted to gross misconduct. The Respondent had a genuine belief in that misconduct based upon reasonable grounds. There was a reasonable investigation based upon the Director's own knowledge and conversations with the CoW and the SM. The company is small and the Director had no HR experience or assistance. The decision to dismiss was an apt response and fell within the range of reasonable responses. It is not for the tribunal to substitute their own view as to what is reasonable.
49. If the procedure was not reasonable he would have been fairly dismissed in any event (*Polkey*). A more thorough investigation would have established a reasonable basis for concluding that he was under the influence of drugs at work. A more extensive procedure would have still resulted in his dismissal.
50. The Claimant has not taken reasonable steps to mitigate his losses.

Claimant's Submissions

51. The Claimant's oral submissions were in summary as follows: -
52. The Claimant was not summarily dismissed for gross misconduct. The allegations of attendance at work under the influence of drugs were first raised with the Claimant in the further and better particulars of response.
53. The size and administrative resources of the respondent are not small.
54. The Claimant ought to have been afforded the opportunity to challenge the belief that he was under the influence of drugs at work. On the relevant day the Claimant was allowed to work all day and was not sent home. A more thorough investigation and a more extensive procedure would not have resulted in his dismissal.

55. The Claimant has taken reasonable steps to mitigate his losses.

Decision

56. The Claimant was dismissed because a client had refused to have him on site and the Respondent was unwilling to provide alternative work because they believed that he had attended work whilst under the influence of drugs. The reason for the dismissal pertained to the conduct of the Claimant and therefore amounted to a potentially fair reason for dismissal.

57. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides that employers should: carry out any necessary investigations, to establish the facts of the case; inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made; and allow an employee to appeal against any formal decision made.

58. The Respondent did not inform the Claimant of the basis of the problem, did not give him an opportunity to put his case in response before any decisions was made, and did not afford him the opportunity to appeal against the decision to dismiss.

59. Whilst the Director may have held a genuine belief that the Claimant had attended work under the influence of drugs there was not a reasonable basis for that belief based upon a reasonable investigation. Considering the disciplinary process as a whole, having regard to the reason for dismissal and the size and administrative resources of the Respondent's undertaking, the procedure adopted fell without the range of reasonable responses open to an employer acting reasonably in the circumstances.

60. The tribunal therefore determined in accordance with equity and the substantial merits of the case that the Claimant's dismissal was unfair.

61. The Claimant is entitled to a basic award of £4,572.00 (7 years x £508 + 4 years x $\frac{1}{2}$ x £508).

62. It would have taken the Respondent around 3 weeks to follow a fair disciplinary procedure. The Claimant had prior warnings regarding his

conduct and separately regarding his attendance record. The Claimant was at the time of his dismissal signed off work for 6 weeks. The Claimant would have been fairly dismissed within that timescale for either misconduct or his absences. The Claimant would have been off sick throughout that period and would not have been in receipt of wages. In any event the Claimant did not take adequate steps to mitigate his losses having contacted only 6 companies for work since his dismissal. In the circumstances the tribunal does not consider it just and equitable to make a compensatory award.

63. The Respondent was wholly in breach of its duty to the Claimant under Section 1 of the ERA 1996 and considering the size and administrative resources of the Respondent it is considered just and equitable in all the circumstances to award £2,032 (4 weeks x £508).
64. The tribunal consider that there was a 50% chance that the Claimant's dismissal would have been attributable to his attendance, rather than to gross misconduct, and thereby entitling him to 7 week's notice pay (less 1 week already received). Under Section 88 of the ERA 1996 the Claimant would have been entitled to his normal remuneration during this period notwithstanding the likelihood that he would have been absent because of sickness. Accordingly he is entitled to notice pay of £1,524 ($\frac{1}{2}$ x 6 weeks x £508).

Employment Judge:
Date of Judgment:
Date sent to parties:

Michelle Sutherland
06 September 2019
09 September 2019