



EMPLOYMENT TRIBUNALS

JUDGMENT

CLAIMANT

BETWEEN

RESPONDENT

MR T GUY

V

HIGHLAND MEDICAL LIMITED

HELD AT: CARDIFF ON: 19 JULY 2018

EMPLOYMENT JUDGE: MR M EMERY

REPRESENTATION:
FOR THE CLAIMANT
FOR THE RESPONDENT

Mr D Izienz (Counsel)
N Shah (Solicitor)

The Judgment of the Tribunal is that the claim for unfair dismissal succeeds

REASONS

The Issues

1. The claimant was dismissed following a disciplinary process on the ground that he had committed gross misconduct in claiming expenses at a business dinner, at which his manager was present, for his partner and a friend who were also present. The claimant says that the respondent was seeking an excuse to dismiss him and that the respondent did not have a reasonable belief that the claimant had committed gross misconduct; the respondent says that it followed a fair process and had a reasonable belief that the claimant had committed an act of gross misconduct, and his dismissal at the end of the process was fair.

2. At the outset of the case we discussed the Unfair Dismissal legal test applicable to this claim:
 - a. Can the respondent prove the real reason it dismissed the claimant was for the reasons as alleged - gross misconduct and/or some other substantial reason? If not, the claim of unfair dismissal succeeds.
 - b. If the respondent can prove the reason for dismissal was misconduct, was the dismissal fair, considering the following issues?
 - Did the respondent have reasonable grounds for believing that the employee was guilty of that misconduct?
 - At the time it held that belief, had it carried out as much investigation as was reasonable?
 - Did the decision to dismiss fall within the range of reasonable responses available to a reasonable employer in the circumstances?
 - If the respondent can prove the reason for dismissal was for some other substantial reason, can it show that this decision was reasonable in all the circumstances (including the size and administrative resources of its undertaking)?
 - c. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point?
 - d. If the dismissal was unfair, did the claimant contribute to his dismissal by way of his conduct, and if so would it be just and equitable to reduce compensation by any extent?

Witnesses

3. I heard evidence from the claimant and from the respondent. On the first morning of the hearing and prior to hearing evidence I read all witness statements and the majority of the documents within the Tribunal bundle.
4. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case. Also, this judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The Facts

5. The following findings of fact are those which were known to the respondent at the time of the disciplinary process.

6. On 6 April 2017 the respondent's Financial Controller, Wesley Banza, emailed the claimant informing him of a new expenses policy, to take effect from 1 April 2016. Prior to this date the respondent had no written expenses policy. On 24 April 2016, following his return from holiday, the claimant emailed Mr Banza because he had some issues with the policy and he asked to speak to him "*at your earliest convenience*" as "*I will have to personally budget slightly differently...*"
7. The new policy was in the form of PowerPoint slides and stated that allowable expenses were those which the employee is "*obliged to incur and pay ... and the amount is incurred wholly, exclusively and necessarily in the performance*" of their employment. "Every word in these sentences counts." The Policy goes on to say that the cost of entertaining other employees is not an allowable expense, and managers are to use their rewards and recognition budget for any such expenses.
8. The claimant and his new line manager, Craig Stead, who was relatively new to the company, met on the evening of 4 April 2017, the day before attending work-related meetings. Mr Stead had travelled to Cardiff and was staying in a hotel. The claimant invited Mr Stead to his house to have dinner and meet his partner, Loren. Just before meeting, plans changed, and it was agreed that the claimant and Mr Stead would go to a pub local to the claimant, The Ty Nant Inn, for dinner. In his evidence at the subsequent disciplinary Mr Stead said that when discussing the change of plans he agreed that because this was a work-related meeting, the claimant could claim expenses for both of their dinners.
9. The reason why dinner plans changed, according to the uncontested evidence at the subsequent disciplinary, was because Loren was unexpectedly not home and was in fact in The Ty Nant Inn with a friend who was having private life difficulties. As a consequence, the claimant and Mr Stead joined Loren and her friend in the pub. Loren and her friend had already ordered and paid for their drinks.
10. What occurred next was a subject of dispute in the evidence at the disciplinary hearing. Initially, the claimant said, Loren and her friend were not going to eat, then Loren decided she would like a main course and the claimant went to the bar and ordered for her, himself and Mr Stead. Then Loren's friend decided she was going to eat and went and ordered and paid for her own food at the bar. Mr Stead's account was that the claimant ordered at the bar for the four of them. The claimant's account at disciplinary was that, as Loren said she wanted to eat, the claimant asked, and Mr Stead agreed, that "this would be a fair expense" as they were eating "away from home". The claimant said at the disciplinary hearing that he felt this was a justified decision because Loren's presence was 'incidental' to an actual business meeting, and that this was, he understood, a claimable expense.
11. Mr Stead's account in his statement was as follows: "Tommy stood up and left the table. On his return, he commented he paid for all the food and drinks for everyone since their arrival and would simply expense the entire

bill to [the respondent]. I saw the bill and remembered it was a little over £50 and this included the food and drinks for our party of four. I was uncomfortable with his comment and decided to discuss his decision away from Loren at a later date". When interviewed at the disciplinary hearing by the claimant and his rep, he says the following: "...at some point [the claimant] got up and went to pay the bill. He came back and said he'd paid for everything. I said. "Okay".

12. In a further disciplinary interview, Mr Beevers asked Mr Stead whether "... at any stage, did [the claimant] ether ask you whether it was ok to expense Loren's meal...?" Mr Stead stated that if he had been asked, "... I would have said, no, it's not ok."
13. The claimant and Mr Stead worked together the next day and spoke to each other on several occasions. Mr Stead was asked at the disciplinary hearing whether he had raised his concerns over the meal the next day, he confirmed he had not.
14. There was a factual dispute about the itemised receipt. The claimant said he requested a receipt on paying at the bar, but the roll had run out, all he obtained was a credit card receipt, that he then left the pub without him thinking to ask for his itemised receipt. Mr Stead denies that the claimant did not obtain a receipt because, he says, he saw it. The claimant says he cannot have seen the receipt because he went to the bar to pay and he put the receipt in his pocket when he walked away.
15. What occurred next was also a matter of dispute. Mr Stead's initial statement at disciplinary was that the claimant phoned Mr Stead "*a few days*" after the dinner and said he had changed his mind and wasn't going to claim any expenses for the meal "*so there would be nothing to worry about*", which Mr Stead described as a relief to him as he had concerns about this claim. During questioning that the disciplinary hearing, Mr Stead could not he sure when the call was "*...it might have been three or four days, it just probably was within the week*". He also confirmed "*...I don't think I said anything the next day, no.*", and "*I didn't raise the issue with him on the following day*", 5 April, while also accepting that they had spoken on several times on 5 April.
16. The claimant denied any conversation about expenses occurred following the dinner. He provided evidence at the disciplinary hearing, when questioning Mr Stead, that he had gone on leave one working day later – from 6 – 18 April 2017. The claimant also produced phone records to show he did not call Mr Stead when on leave.
17. Mr Stead's response to this questioning was that he could in fact not recall when the call was, that it could have been "*two days or three days or whatever, two weeks...*". On the claimant saying that the conversation never happened, Mr Stead responded "*you're lying to me*".
18. When interviewed again by Mr Beevers, Mr Stead said that the conversation was "*I'm sure it was in person ...would have been at some point when we*

had met at a sales meeting or some case cover in Cardiff.... We cross paths occasionally.”

19. In early July 2017, the claimant was facing a capability process for poor performance, and he had been invited to a capability meeting (letter 4 July 2017) and was interviewed on 11 July in relation to several acts of alleged poor performance. He was suspended from work on 7 July for the expense related allegation and was also interviewed about this on 11 July.
20. On the respondent's case, in early July (two months after the expense claim had been submitted and subsequently paid) Mr Banza queried the expense claim with Mr Stead. Mr Stead summarised his account; that he told Mr Banza that the claimant had said he was going to claim on expenses, but then said he was not, he said he was "*furios*" the claimant had then decided to claim this sum. Because of Mr Stead's evidence, the respondent called in its HR consultants Face2Face HR to investigate, and Mr Beevers was appointed as investigator.
21. By letter dated 17 July 2017 the claimant was required to attend a disciplinary hearing on 28 July. The allegations were in summary: claiming expenses for dinner for his girlfriend and her friend, which was not business related; this claim did not meet HMRC criteria for business expenses; that the expenses claim did not show the names of all attendees; and that he claimed back expense for entertaining Mr Stead which was non-recoverable. At the time of the disciplinary hearing, the allegations were reduced to the following: the claimant had fraudulently claimed business expenses for personal use – a dinner for his girlfriend and her friend; and that this breached the expense guidelines which took effect from 1 April 2017.
22. As well as the issues raised above, the claimant and his representative argued at the hearing that it was reasonable to claim this expense for Loren, that her attendance was 'incidental' to a business meal and that HMRC allowed for such incidental expenses to be claimed.
23. Following the investigation process set out above, Mr Beevers upheld both allegations. In doing so, he referenced the company handbook – that "theft will constitute gross misconduct". He recommended dismissal without notice, a decision upheld by Mr John.
24. The claimant appealed his dismissal, he referenced the issue with the timing of the conversation "a few days later" and stated that Ms Stead's testimony was "unreliable". He produced a copy of The Ty Nant Inn suggesting that £55.34 invoice could not have been for four people's food and drinks. He said that Mr Stead had assisted to the company to "conspire against" him to make it easier to dismiss him.
25. At Tribunal, disciplinary Mr John was asked about the discrepancy in Mr Stead's account, that the claimant had in fact been on leave for two weeks. Mr John's answer was that the claimant had admitted he had omitted the receipt and that he had not put in the identity of all of the diners on the claim.

He said that this was “acknowledgement of fraud occurring”, that the claimant had admitted that someone else had attended the dinner that the decision to dismiss was made on “the claimant’s admission of guilt” and not on Mr Stead’s statement. Mr John stated that the evidence of guilt in this case can be seen based on the fact that he put only his and Mr Stead’s details on the claim, but that Loren had joined the party “this is your admission of guilt”, that we were in a capability hearing “when [the claimant] admitted fraud. We stopped this process.” He said that the evidence of “intent” for fraud was the lack of an itemised invoice and no reference to his girlfriend being at the dinner, “he was not open about it”. On being questioned about the lack of consistency in Mr Stead’s evidence in the disciplinary process, Mr John again stated that his decision to dismiss was “based on [the claimant’s] admission. Nothing else. ... I have gone on the admission. The only thing I looked at. ... He admitted that Lauren at dinner and on bill.”

Submissions

26. Mr Izienc characterised the disciplinary as unreasonable, that it was an excuse to dismiss because they “were after” the claimant on capability. He said that it was not reasonable for the respondent to believe Mr Stead’s statements because there was no consideration to Mr Stead’s timing of the conversation “a few days” post-dinner, whether it was by phone as he had said in his initial statement, or in person as he said when interviewed by Mr Beever. On the failure to name Loren on the expense claim, he had named Mr Stead, another employee who should also, according to the policy, not been in the claim as he was a fellow employee. This was a first offence; the respondent was clearly trawling for evidence. The process was procedurally unfair as the claimant was not allowed to comment on Mr Stead’s additional interview with Mr Beever – at which Mr Stead gave “another story”. Mr Izienc argued that the ACAS guidelines had not been followed, the disciplinary policy not followed. It was clear that there was no intent to deceive by the claimant.
27. For the respondent Mr Shah argued that the claimant had left two attendees off the expenses form, that this along with the other issues lead to a genuine suspicion which led to the investigation. The claimant was allowed an opportunity to comment on all the evidence, that Mr Stead’s account was credible and he was reassured that the claimant was not submitting his claim; that this conversation could have been 2/3 weeks later. The respondent followed a fair process, that the facts proved that the claimant had claimed expenses fraudulently, and so it was reasonable to dismiss.

The Law

28. Employment Right Act 1996

Fairness s.98 General

- (1) 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.
 - (2) A reason falls within this subsection if it—
 - (a) relates to the conduct of the employee
 - ...
 - (4) 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.
29. For the purposes of the unfair dismissal claim we accordingly had regard to the following established case law: that a dismissal will be fair if, at the time of dismissal:
- a. The employer believed the employee to be guilty of misconduct.
 - b. The employer had reasonable grounds for believing that the employee was guilty of that misconduct.
 - c. At the time it held that belief, it had carried out as much investigation as was reasonable.

British Home Stores Ltd v Burchell [1978] IRLR 379.

30. I reminded myself that in determining fairness, it is not for me as the Employment Tribunal to consider whether the claimant is guilty of misconduct, but whether the employer believed, and had reasonable grounds for believing, the claimant was guilty of misconduct. Reasonable belief means the investigation must be within the 'range of reasonable responses' that a reasonable employer in those circumstances might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). The next question is whether the employer acted within the band of reasonable responses in treating this misconduct as a sufficient reason to dismiss.
31. Range of reasonable responses: I reminded myself that it is irrelevant whether I as the Tribunal would have dismissed the employee in these circumstances, that I must not "substitute" our view for that of the employer's reasonably held views (*Midland Bank plc v Madden [2000] IRLR 827*), and I must not 'retry' the evidence to determine whether the respondent had reasonable grounds for believing in the misconduct – this amounts to a substitution mind-set. To put it another way, I accepted it was not my role to

focus on our view of the claimant's guilt or innocence but I should confine itself to reviewing the reasonableness of the employer's actions.

32. What is a fair process? An employer must hold such investigation as is "reasonable in all the circumstances", judged objectively by reference to the "band of reasonable responses" (Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588). "All the circumstances" includes the potential effect of the finding upon the employee (A v B [2003] IRLR 405).

The Tribunal's conclusions on the facts and law

33. Bearing in mind the requirement not to substitute my own views for that of a reasonable employer, I considered whether the respondent's investigation met the standard of a reasonable investigation – whether, given the issues involved, it was within the range of reasonable responses of a similar sized and resourced small-employer, noting in particular that the respondent engaged an HR consultant to conduct the process. I considered that the investigation by Mr Beever was undertaken diligently, in particular that Mr Stead was questioned about discrepancies in his evidence, and that the claimant was given the opportunity to question Mr Stead.
34. I noted that the allegations were serious – as put in the disciplinary decision this was one of fraud by the claimant, a deliberate decision to fraudulently claim expenses and I noted that the requirement to have as reasonable investigation, including consideration of the effect of these charges on the claimant.
35. I considered what the evidence collated at disciplinary showed:
- a. There was early agreement by Mr Stead that the meal could properly be claimed as expenses; however, the Policy stated that this the cost of entertaining other [Respondent] staff is not reimbursable.
 - b. The claimant was initially charged with wrongly claiming for Mr Stead's meal, this charge was dropped.
 - c. The evidence was in dispute as to whether the claimant obtained agreement from Mr Stead to claim for Loren's dinner.
 - d. The evidence was in dispute as to whether the claimant said he would claim for all 4 dinners, and whether in fact he did do so. On Mr Stead's account, when the claimant said he was going to claim for all dinners, his response was "okay".
 - e. The evidence was in dispute about the existence of an itemised receipt, and whether Mr Stead saw this receipt.
 - f. The evidence was in dispute about a conversation which Mr Stead first said took place by phone a few days after the dinner; when he found out about the claimant's holiday he changed his account – this conversation was possibly several weeks later, and in person.
36. I considered whether the evidence reasonably showed, as argued strongly by Mr John, intent to defraud – as evidenced by the lack of receipt and the failure to name Loren on the claim form. I noted also that Mr John did not

consider Mr Stead's evidence because of the "admitted fraud" of the claimant. I did not accept that on any reasonable interpretation of the evidence that the claimant could be said to have "admitted fraud". He strenuously denied fraud. He had an explanation for the lack of receipt (disputed by Mr Stead).

37. What is apparent is that Mr Stead's evidence was ignored by Mr John, and was accepted uncritically on investigation by Mr Beevers.
38. However, Mr Stead's evidence was clearly on its face, full of discrepancies. He was, apparently, deeply unhappy about the claimant claiming this sum, resolved to talk to the claimant about it, but did not take opportunity to do so either on the evening in question or the next day when they were working and in contact together. On his account, he said "okay" to the claimant claiming this sum. On the claimant's account, he had Mr Stead's agreement to claim for Loren. Mr Stead says that the claimant called him a few days later; when being told the claimant was on leave for two weeks, he changed his story to a face to face conversation two-three weeks later. The claimant denies any such conversation, and in fact he submitted his claim for expenses shortly thereafter. Why would he call Mr Stead (who had apparently raised no issue and had in fact said "okay" to the claim) and then a few days later submit the expenses claim?
39. Of course, an employer faced with competing evidence must take a view based on a reasonable belief, on the balance of probabilities. Was it reasonable for Mr Beever to accept Mr Stead's evidence uncritically, and for Mr John to effectively ignore Mr Stead's evidence? I concluded no. Mr Stead's evidence was crucial because if, as the claimant said, his evidence was unreliable, significant factors in the respondent's case on disciplinary fell away. I concluded that on any reasonable analysis of the evidence collected, Mr Stead's evidence was unreliable. He could not satisfactorily account for when the conversation with the claimant occurred post meal, and a reasonable employer would, I found, have critically considered this evidence. Similarly, there was a failure to question how Mr Stead saw an itemised invoice – the claimant's account was he went to the bar to pay and he placed his card receipt in his pocket. Did Mr Stead ask for the invoice? How did he see it as he alleged? If he was so concerned about the issue why did he not raise it the issue the next day?
40. I considered that a reasonable investigation into an act of alleged fraud must consider critically the evidence; it is apparent this did not happen. In fact, Mr John ignored this evidence, focussing on the lack of receipt and the failure to submit Loren's name. On the receipt, the evidence I concluded that the issue of the receipt could not reasonable be regarded as proven misconduct; Mr Stead's evidence was contradicted by the claimant, and Mr Stead's evidence was unreliable in other respects. In short, I did not conclude that a reasonable employer would accept that there was proven misconduct in relation to the receipt.

- 41. Which leaves the claimant’s failure to put all names on the claim form. I accepted that this was the first time the claimant had used this form, and he simply transposed the type of comments he would put on his old excel spreadsheet. However, the new form asked for the identities of those attending. Had the claimant submitted Loren’s name, as this form required, it is likely that he would not have faced a disciplinary allegation at all. For this reason, I consider that the claimant has contributed to his dismissal. I did not seek views on the level of contribution at the liability hearing, and this is an issue for submissions at a Remedy Hearing. A further issue to consider at Remedy is whether or not there should be a deduction under the provisions of *Polkey v AE Dayton Services Ltd*.

Directions for Remedy

- 42. The parties are asked to provide the Employment Tribunal within 14 days of receipt of this Judgment their dates to avoid for a remedy hearing.
- 43. The claimant is Ordered to provide an updated Schedule of Loss to the respondent within 21 days of receipt of this Judgment, along with copies of any documents he is relying on the issue of remedy. The respondent is Ordered to serve any documents upon which it wishes to rely on the issue of remedy the same date.
- 44. The respondent is given leave to serve a Counter-Schedule of Loss 14 days after receipt of the claimant’s updated Schedule of Loss.

Judgment sent to the parties
On

.....4 September 2018.....
For the staff of the Tribunal office

.....

EMPLOYMENT JUDGE M EMERY

Dated: 3rd September 2018