



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Duncan

**Respondent:** Guy's and St Thomas's NHS Foundation Trust

**Heard at:** London South      **On:** 28 November 2019

**Before:** Employment Judge Khalil (sitting alone)

## **Appearances**

For the claimant: Mr Bishop, Counsel

For the respondent: Mr Fitzpatrick, Counsel

## **RESERVED JUDGMENT**

### **Decision**

The complaint of unfair dismissal is not well founded and the claim is dismissed.

### **Claims and issues**

1. By a claim form presented on 25 January 2018 the claimant brought complaints of unfair dismissal, race discrimination and unauthorised deductions from wages. The claimant subsequently withdrew his complaints of discrimination and unauthorised deductions from wages and these claims were dismissed on 7 February 2019. The sole remaining claim was unfair dismissal. ACAS conciliation took place between 14<sup>th</sup> of December 2017 and 14<sup>th</sup> of January 2018.
2. The claimant was represented by Mr Bishop of counsel and the respondent was represented by Mr Fitzpatrick of counsel.

3. The Tribunal heard evidence from the claimant Mr Bennett (Head of Central Services) and Mr Gravells, Director of Facilities Services for the respondent. In addition, there was a witness statement from Mr Paul Buchanan for the claimant, but he did not appear to give evidence. Accordingly, the claimant was informed that the Tribunal would only attach such (limited) weight to this statement as was considered proportionate having regard to the inability of the respondent or the Tribunal to question the statement.
4. There was also an agreed bundle of documents running to 183 pages. At the outset of the hearing the claimant applied to produce some additional documents in relation to some job adverts/job descriptions which the Tribunal allowed. The respondent had not objected.

### **Relevant findings of fact**

5. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
6. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken too in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.
7. The claimant was employed by the respondent as a housekeeping assistant. The claimant commenced employment on 4th of February 2008.
8. The claimant was initially employed as part of the housekeeping team. However, in 2010 he was moved to the rapid response team. The main difference between the two was that the rapid response team staff are required to work in ad hoc areas as and when demand arises whereas staff in housekeeping team would normally clean an area allocated to them. In addition, the clothing worn and the chemicals used may differ and appropriate training would be required.
9. The claimant's contract of employment referred to his position of housekeeping assistant on a band 1 grade (page 72 of the bundle).
10. The claimant's job description was at page 102 -104 of the bundle. This confirmed that the claimant's job title was housekeeping assistant, that this was band 1 and he reported into the housekeeping team leader and was accountable to housekeeping manager. There was a long list of duties and responsibilities under 11 separate bullet points. The last bullet point stated that:

*“to carry out any other duties as reasonably required by your manager/supervisor and to work in any part of the trust as designated by your manager/supervisor, in order to meet the needs of the service”*

11. There was a background of disciplinary issues in relation to the claimant's employment with the respondent which the parties agreed at the outset were not a matter of dispute for the purposes of the unfair dismissal claim. That being the case, it was accepted by the claimant that he was subject to a live final written warning dated 8 August 2016 in relation to the claimant's failure to comply with reasonable instructions of a manager not to send emails and letters of complaint to housekeeping management instead he should raise a formal grievance if he wished to do so. In addition, an allegation that the claimant had used unprofessional language in this communication was also upheld. The claimant appealed against this final written warning received by the respondent on 23<sup>rd</sup> of January 2017 which was ultimately heard on 29 August 2017. The appeal was dismissed and the final written warning sanction was upheld. The final written warning was in the bundle at page 106 to 110.
12. The respondent had been getting increased requests from pharmacy for cleaning as a result of which the respondent considered that the whole housekeeping team should be trained to clean the pharmacy aseptic unit ('PAU').
13. Thus, on 14<sup>th</sup> of October 2016 the claimant's team leader Mr Ray Nwosu had an informal meeting with the claimant. This was because the claimant had refused to attend training for the cleaning of the PAU. The notes following this meeting were in an email at page 111 of the bundle. The claimant's refusal contained therein that he would not participate in any training and would not participate in any deep cleaning in relation to the PAU is not a matter of dispute between the parties.
14. At this meeting the claimant explained that he had previously cleaned the PAU. He said that he later discovered that the claimant was being paid less than Mr Paul Buchanan with whom he used to clean the PAU. The respondent explained that this was because Mr Buchanan was working beyond his contracted shift of 37.5 hours when cleaning the PAU. The Tribunal will return to its findings and conclusions in relation to the respondents belief in this regard later.
15. On 18<sup>th</sup> of October 2016, the respondent's housekeeping manager Mr Negash Aboneh (and the claimant's line manager), wrote to the claimant in reference to the informal meeting with his team leader. This was following a discussion on the same day in which the respondent said that the claimant had reiterated his refusal to clean the PAU explaining that he felt it was not part of his job description, he would never do so and that it was not a reasonable instruction. The respondent reiterated the difference between the claimant and Mr Paul Buchanan. Further, that if the claimant did not attend for the refresher training

on 24<sup>th</sup> of October he would have no alternative but to invoke the respondent's disciplinary policy and procedure. This letter was at page 112- 113 of the bundle.

16. The claimant responded to this letter on 23<sup>rd</sup> of October. The claimant stated that his job description did not expressly include the cleaning of the PAU. The claimant also stated that previously when he had attended training, he had been told by the trainer that cleaning the PAU was a band three (3) job not a band one (1) job. The Tribunal understood band 3 to be a higher grade than band 1. This email was at page 114- 115 of the bundle.
17. A further letter was sent to the claimant by the housekeeping manager Mr Aboneh dated 28<sup>th</sup> of November 2016 which was at page 116-118 of the bundle. The letter cross referred to the previous team leader's report and Mr Aboneh's letter of 18<sup>th</sup> of October. In particular, Mr Aboneh confirmed that cleaning the PAU was and always has been part of the housekeeping assistant duties which the claimant had cleaned in the past for many years. The claimant was being asked to attend refresher training because he had not carried out the task for some time. Further, there was no separate job description for the rapid response team which was part of the housekeeping function. He also stated that all housekeeping assistants in the trust were employed on band 1.
18. The Tribunal finds that from the claimant's receipt of this letter of 28 November 2016 he had been told by the housekeeping manager that his role was a band 1.
19. The Tribunal noted that the claimant had refused to participate in his PDR in 2016 and 2017. This was not disputed by the claimant.
20. The respondent wrote to the claimant on 8 May 2017 explaining the delay in the investigation was because the claimant's appeal against his final written warning was still outstanding.
21. In September 2017, an investigation report was compiled by Andrea Best, Site Hotel Services Manager. The findings of her investigation report were in the bundle at pages 99- 101. The documents included in her investigation report have been referenced in the above chronology except there was an email from Mr Joe Chappell at 118 of the bundle confirming that he had not spoken to anybody about the task of cleaning PAU being band 2. This was in relation to the claimant's reference to him in his email of 23<sup>rd</sup> of October 2016 at page 114 of the bundle.
22. There was a dispute between the parties in relation to who had prepared the investigation report as the name on the report was that of Mr Aboneh. The Tribunal finds that it was reasonable for Mr Gravells to conclude that the investigation report was taken over by Andrea Best. There was no challenge at the time by the claimant in this regard. If the Tribunal is wrong in its finding in

this regard and to the extent that Mr Aboneh had an involvement in the investigation process, he was not the decision-maker at the disciplinary stage or at the appeal stage.

23. The claimant was invited to a disciplinary hearing by Mr Gravells, Head of Central Services. He had not previously been involved with the process and was not known to the claimant. The charges were set out in the invitation letter page 127-128 of the bundle. It was alleged that the claimant had failed to carry out reasonable instructions from a team leader and a manager by his refusal to attend training on cleaning in the PAU. In addition, it was alleged that there had been an inappropriate presentation of housekeeping department by the claimant's statement that its operation was inconsistent and incoherent in his email of 23<sup>rd</sup> of October 2016. The claimant was advised that the investigation officer, his team leader and the housekeeping manager would be in attendance to be questioned if required. All supporting documentation was sent to the claimant. The claimant was advised of his right to be accompanied. The claimant was informed that disciplinary action could be taken against him up to and including dismissal.
24. The claimant wrote an email in response to this invitation to a disciplinary hearing (page 130-131). He stated, amongst other things that the process was a "farce". In his email he also alleged that he told Mr Aboneh that he had been told by three technicians that cleaning the PAU was a band 3 job. In response, he said Mr Aboneh had told him that was only the case if the job was being done by contractors.
25. The disciplinary hearing took place on 24<sup>th</sup> of October 2017. The claimant had indicated in advance that he would not be attending. He did not attend the hearing. The hearing proceeded in the claimant's absence. The Tribunal accepts Mr Gravell's evidence in paragraphs 10-13 of his witness statement in relation to his conduct of the hearing and enquiries in the claimant's absence. The Tribunal finds that it was reasonable for the respondent to decide to proceed in the claimant's absence for the reasons given in paragraphs 9 and 10 of Mr Gravell's witness statement. At the hearing, Mr Aboneh stated that no other member of the team had refused to attend the training. It was observed by Mr Gravells that the live final written warning had some similar fact. It was also observed by him that despite the claimant's background of warnings his behaviour had not improved.
26. Mr Gravell's stated he was confident that the cleaning of the PAU was not an exceptional duty which required skills above band 1. This was explored during the course of the disciplinary hearing. Mr Aboneh confirmed that both the rapid response team and housekeeping assistants were band 1. Mr Aboneh was not specifically asked about the claimant's comment regarding contractors (only cleaning the PAU being on band 3).

27. Further, Mr Gravells noted that the claimant had previously cleaned the PAU and that all 400 housekeeping assistants of the trust were on band 1. There were no band 3 house-keeping assistants. The more senior housekeeping assistants were supervisors or team leaders. The medical technicians and pharmacy technicians were doing different roles.
28. Mr Gravells concluded that a final warning was a fair sanction and having regard to the live final warning, dismissal was a fair sanction. He considered that there was no mitigation from the claimant, on the contrary, he felt the claimant had a very clear understanding of the implications of his position. Mr Gravells also took into consideration the negative impact it was having on the team. Alternative sanctions were considered but ruled out. The decision was sent to the claimant in writing. The minutes of the hearing were at page 142-146 of the bundle and the outcome letter was at page 147-151 of the bundle.
29. In the outcome letter, it was confirmed to the claimant, that his team leader and the housekeeping manager had confirmed the housekeeping assistant role was band 1. The claimant was given a right of appeal.
30. In relation to Paul Buchanan, the Tribunal finds that it was reasonable for the respondent to treat his circumstances as non-comparable to the claimant. The Tribunal finds that the respondent would be in the best position to know the arrangements for his pay and hours and if he was undertaking overtime beyond a 37.5 hour shift rather than being paid at a higher hourly rate than the claimant. In addition, it was not in dispute that Mr Buchanan was not working within the rapid response team which was the team who would be used to undertake ad hoc cleaning of unspecified areas.
31. The claimant appealed against his dismissal. An appeal hearing was arranged for 4 January 2017. The appeals officer was Mr Peter Bennett the respondent's facilities services director. He was supported by a different HR adviser (Rachael Spencer) and the director of engineering Mr Vaughan.
32. The claimant did attend the appeal hearing and was unaccompanied. During the course of the appeal hearing the claimant mentioned for the first time that a pharmacy technician called Miss Penny was a person who had told him he was being asked to perform band 3 tasks by cleaning the PAU.
33. Miss Penny was not called by the claimant to the hearing. The Tribunal accepts Mr Bennetts evidence in relation to the appeal hearing set out in paragraphs 11 to 16 of his witness statement. His evidence in relation to what was said at the appeal hearing was not disputed by the claimant. Mr Bennetts observed that the claimant had not escalated his belief in relation to banding as a grievance. Further, his line manager and a more senior manager had already informed him that he was doing a band 1 job. The claimant had based his refusal to do the training on advice he says he had been given from a pharmacy technician in relation to his cleaning duties in PAU.

34. There was also discussion at the appeal hearing about the difference between a pharmacy technician and the tasks involved in cleaning the PAU.
35. The outcome of the appeal was that the claimant's dismissal was upheld. Mr Bennett explained that they had heard no regret or remorse on part of the claimant and he had persistently refused to accept that his role was a band 1 role from experienced managers. Mr Bennetts was satisfied that it was a band 1 role and that the instruction for him to attend the training was a reasonable management instruction. Mr Bennetts was of the view that his behaviour would not change. It was noted in the appeal hearing that the claimant was asked if he was prepared to attend the training now to which he had responded "yes of course I would you've explained that Negash and the trainers were wrong". The Tribunal will address this point below in its conclusions. The Tribunal also finds that there was no further enquiry of Mr Aboneh regarding the claimant's assertion that he had told him that cleaning the PAU was a band 3 role only if you are a contractor.
36. The appeal against the second allegation was upheld but this did not affect the overall outcome of the appeal. Mr Bennetts was of the view that the issues were predominantly around refusal to attend the required training. The Tribunal finds that it was reasonable for Mr Bennetts to consider this to be the case. The appeal outcome letter was at page 177- 182 of the bundle.
37. The Tribunal finds that the documents at pages 184-189 of the bundle (job adverts in pharmacy) did not assist in the Tribunal's determination of the issues. This was because the job adverts were not comparable to the claimant's role in housekeeping and only one related to the respondent. Further, the claimant agreed this in cross examination.
38. The Tribunal accepted that the NHS cleaning manual and the national specifications for cleanliness in the NHS at pages 190-214 applied to the respondent. The Tribunal also finds that these were not referenced during the investigation or disciplinary and appeals process relating to the claimant because of the respondent's view that the tasks of the claimant were well established custom and practice.

### **Applicable law**

39. It is now well established and settled that the applicable law in relation to an unfair dismissal claim where the claimant has been dismissed is set out in section 98 (2) and 98 (4) Employment Rights Act 1996 and in purported conduct dismissals, the leading case is ***British Home Stores V Burchell 1978 IRLR 379 EAT.***

40. In **Burchell** it was stated that for a Tribunal to be satisfied about the reason and reasonableness of a conduct dismissal, it requires consideration of three matters on a neutral burden:

- Did the respondent have a genuine belief in the claimant's misconduct
- Did the respondent have reasonable grounds to hold that belief
- Did the respondent carry out those most investigation into the matter has was reasonable.

41. By section 98 (4) ERA, having regard to the reason shown by the respondent, the respondent will need to have acted reasonably in treating this as a sufficient reason for the claimant's dismissal. It is also well established that the band of reasonable responses test applies in this regard both to the substantive and procedural fairness of the dismissal.

42. The Tribunal directs itself that it is not for the Tribunal to substitute its view for that of the respondent in determining the question of fairness and reasonableness.

43. This is not a case in which previous warnings and in particular the final written warning was within scope of the Tribunal's determination as to whether any such warning was manifestly inappropriate. This was agreed and clarified at the outset of the hearing.

44. However, the Tribunal is entitled to consider whether weight was attached to the claimant's general disciplinary record by the respondent not just his live final written warning in its consideration of fairness and reasonableness.

### **Conclusions and analysis**

45. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

#### **Genuine belief in claimant's misconduct & reasonable grounds to hold that belief**

46. This is a case in which the claimant has admitted his refusal to comply with the instruction to attend training in relation to cleaning the PAU. What was not admitted by the claimant is that this was a reasonable management instruction essentially for two reasons.

47. First, in so far as the claimant's job description is concerned, the Tribunal concludes that the respondent was entitled to interpret that this had sufficient latitude to enable the respondent to ask the claimant to perform cleaning duties in the PAU. The Tribunal concludes that it does not matter that there was no



express reference to PAU. It would be wholly unrealistic for the respondent to have to list each and every area which the claimant could be asked to clean. The claimant was part of the rapid response team, as a result of which he could be asked to clean ad hoc areas. The main difference with cleaning in the PAU was working with chemicals. The Tribunal also concludes that the respondent's reliance upon the flexibility within his job description was done reasonably. The claimant had previously been trained and worked in the PAU. The respondent was facing an increased demand for cleaning from the PAU. The respondent had tried to address this with the claimant informally. The Tribunal will deal with the 'band' issue below but the claimant's insistence and absolute position in relation to his refusal to undertake the training was in the Tribunal's view striking and one which essentially sealed his fate. As stated by the respondent, the claimant could for example have escalated his point about the band as a grievance. He could also have raised a grading query with HR, or in the alternative/in addition, he could have continued to work under protest, pending a further resolution. The claimant had sought to rely upon a previous instance when he had refused to carry out cleaning of body fluid which did not result in disciplinary proceedings against him because the respondent discovered that the claimant had not undertaken the training. The Tribunal does not see how this helped the claimant's case. In the Tribunal's view, this was an example of the claimant not being asked to undertake some duties within his job description because of the absence of training rather than an example of the respondent trying to get the claimant to undertake tasks which they could not insist on. In addition, the claimant's examples in paragraphs 6 and 7 of his witness statement, illustrated how management prerogative or instruction would prevail in spite of duties being listed in his job description.

48. The Tribunal concludes from this that the claimant was well aware that the tasks and duties he was expected to perform were those listed in his job description but subject to reasonable management instruction. He had benefited from reasonable management instructions in the past. The Tribunal accepts that this has the propensity to create some uncertainty, but in the circumstances of this case the Tribunal does not accept that that happened because the claimant had previously worked in the area he was refusing to receive refresher training in and because he had been told by separate managers that it was reasonable. The Tribunal notes from the job description that the respondent could require the claimant to carry out any other duties as reasonably required by your manager/supervisor and to work in any part of the trust as designated by your manager/supervisor which emphasises the primacy of (reasonable) management discretion. In the Tribunal's view, this negated or at least diluted the claimant's attack on the discretion available to the respondent.
49. Second, in relation to the banding of the claimant's role which appeared to be the claimant's more pressing reason to object rather than an issue related to his job description, the Tribunal concludes that respondent's view of and rejection

of the claimant's position that he was a band 1 employee being asked to perform a role two bands above him was entirely open to it to reach.

50. There was no evidence of any separate banding within housekeeping comprising 400 employees. The claimant's belief was based on a conversation with a pharmacy technician (outside of housekeeping), from whom no statement was ever provided. He also placed reliance on a conversation with Mr Aboneh about cleaning in PAU being band 3 for a contractor only. Whilst, the respondent did not investigate if that was expressly said but Mr Aboneh did maintain the duties of the claimant were band 1, as set out in his letter of 28 November 2016, which was also the view of the claimant's team leader (both confirmed this at the disciplinary hearing too) and which was compounded by the Site Hotel Services Manager, the Head of Central services and ultimately the Director of Facilities Services. In addition, the Tribunal concludes it would not have provided an appropriate comparison as the claimant was not a contractor.

51. There was no other or competing reason before the Tribunal in relation to why the respondent would initiate the disciplinary procedure. The Tribunal concludes that the respondent had a genuine belief in the claimant's misconduct based on his persistent and unreasonable refusal to undertake the training to enable him to clean the PAU which was based on reasonable grounds.

#### Reasonable investigation

52. The respondent's investigation report was comprehensive and thorough. The claimant's position was consistent and he did not waver. The claimant did not attend his disciplinary hearing which proceeded in his absence. There was however an independent appeal hearing.

53. The Tribunal has already observed that Mr Aboneh was not asked specifically about the alleged comment concerning band 3 only applying to contractors but for reasons already set out above, the Tribunal does not consider this rendered the investigation defective or defective enough to render the respondent's investigation unreasonable. The respondent's position through housekeeping personnel more senior to the claimant was that there were no cleaning employees in housekeeping other than band 1 and/or that cleaning the PAU was within a band 1 employee's role.

54. The respondent focused its attention on the views of management within housekeeping as opposed to pharmacy. The Tribunal concludes it was entitled to do so. Thus, the Tribunal does not attach significance to the respondent not seeking the views of a pharmacy technician.

#### The decision to dismiss & the range of reasonable responses

55. The Tribunal concludes that the respondent was entitled to dismiss the claimant for his unwavering refusal to undertake refresher training to clean the PAU. The claimant was issued with a final written warning and was already subject to a live final written warning. It was within the range of reasonable responses. The claimant was the only employee to have refused. He had previously undertaken the training and the cleaning. He had been told, reasonably, by his team leader, his manager (within housekeeping) a Head of department and a Director that it was within scope of his duties and band.
56. The Tribunal considered the claimant's arguments about the non-referral to the NHS cleaning manual and national specifications for cleanliness but concludes that it was open to the respondent to proceed on the basis of widely known custom and practice of the housekeeping and rapid response teams and (reasonable) managerial instruction. In addition, these documents do not assist with the banding issue which the respondent had considered to be the more pressing concern.
57. The Tribunal did reflect on the claimant's position at his appeal hearing that he would at that stage accept that the duties he was being asked to perform were a band 1. The Tribunal concludes that the respondent did take this into account but was entitled to conclude, essentially, that it was either too late or that, having regard to his final warning and previous disciplinary record, a lesser sanction to dismissal would not have been corrective. It is not for the Tribunal to substitute its own view. By analogy with the question of remorse, it is for the respondent to decide to what extent and degree, if any, this is accepted and in this case the respondent did not conclude that a sanction less than dismissal was appropriate. The Tribunal concludes that this was within the range of reasonable responses.

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Employment Judge Khalil  
08 January 2020