



THE EMPLOYMENT TRIBUNAL

SITTING AT:
BEFORE:

LONDON SOUTH
EMPLOYMENT JUDGE BALOGUN

BETWEEN:

Mr Rouhman Choudhury

Claimant

And

London Borough of Southwark

Respondent

ON: 2, 3, 4 & 9 December 2019

Appearances:

For the Claimant: Mr W Brown, Solicitor

For the Respondent: Mr A Line, Counsel

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim form presented on 21.12.17, the Claimant claimed automatic unfair dismissal (whistleblowing) and ordinary unfair dismissal. Claims of whistleblowing detriment were withdrawn. The Respondent admitted dismissal but contended that it was by reason of the Claimant's conduct and was in all the circumstances fair.
2. I heard evidence from the Claimant and his witness, Sheikh Rahman, a friend. On behalf of the Respondent, I heard from Neil Kirby (NK), Head of Regeneration; Simon Bevan, (SB) Director of Planning; Dominic Cain (DC) Director of the Exchequer; Maurice Duncan (MD) Project Manager; and Bruce Glockling (BG) Head of Regeneration.
3. The parties presented a joint bundle of documents, to which pages were added at the start of the hearing. Numbers in square brackets are references to pages in the bundle.

The Issues

4. The issues I had to determine were as follows:
 - a. Did the Claimant's email of 4 April 2017 to Colin B Davies amount to a qualifying disclosure for the purposes of section 43B(1) of the Employment Rights Act 1996 (ERA) and if so;
 - b. was this the principal reason for the Claimant's dismissal? If not;
 - c. was there a potentially fair reason for dismissal?
 - d. was dismissal in all the circumstances fair, taking into account equity and the substantial merits of the case?
 - e. did the Respondent wrongfully dismiss the Claimant by failing to give him contractual notice?

The Law

5. Section 103A ERA provides that an employee shall be regarded as unfairly dismissed if the reason, or if more than one, the principal reason for the dismissal is that the employee made a protected disclosure.
6. Section 43B provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters listed in sub-paragraph (a)-(f). The claimant relies on sub-paragraph (b) – breach of a legal obligation.
7. Section 94 provides the right not to be unfairly dismissed.
8. Section 98(2) sets out the potentially fair reasons for dismissal. One of those reasons is conduct 98(2)(b)

9. Section 98(4) provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.
10. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Findings of Fact

11. The Claimant was employed by the Respondent from 6 June 2005 to 13 July 2017, latterly in the position of Project Coordinator (Chief Executive department), where his role involved managing construction projects.
12. On 10 April 2017, the Claimant was informed by BG that concerns had been raised by the Fraud Department relating to an application he had made for council housing and also a Right to Buy application. The Claimant was sent home for a 3-day cooling off period. This is a process under the Respondent's Disciplinary Procedure, during which it determines whether further action is necessary.
13. On his return to work on 13 April, the Claimant was suspended on full pay pending investigation. The investigation was carried out by NK, who interviewed the Claimant on 12 April 2017 [322-326]. As part of that investigation, NK was afforded access to the Claimant's email account and H drive. On accessing the account, NK discovered that a number of emails and a folder on the H drive headed RTB had been deleted from the account on the 10 April 2017 (the day the Claimant was notified of the allegations and sent home). This was a matter that would be taken into account in the Claimant's eventual dismissal. [286]
14. On 10 May 2017, NK produced his investigation report. Of the 5 allegations being investigated, NK concluded that 4 of them were supported and should proceed to a disciplinary hearing on gross misconduct grounds. [290]
15. On 14 June 2017, the Claimant was invited to a disciplinary hearing to respond to the following allegations:
 1. Failure to disclose information on his Housing application form that could materially influence the outcome of the housing application, and subsequently accepting a council property without declaring ownership of another property;
 2. Knowingly misleading the Council by not revealing his true circumstances during a Council Housing application;
 3. Fraudulently completing a Medical Rehousing form;
 4. Providing false information to a senior manager within the council about his relationship with Shibbir Choudhury. [823-824]

16. By way of background to the allegations, on 22 April 2005, the Claimant completed and submitted an application form for council housing. The following provisions on the form are relevant for our purposes:
17. Under the heading: "Changes in your circumstances" the application form states:

"If your details change – for example, you move house or have a child – you should let us know as soon as possible, if you do not, we may offer you an unsuitable property. We can only decide what property to offer you based on the information you have given us.

It is also important that you let us know of any change that would affect your priority for housing. If you accept a tenancy that we have offered, based on false information provided by you, we may take you to court." [293]
18. This requirement continues while the application remains live and only ceases once the tenancy has been granted.
19. Section 2, Question 6 of the form asks: *"If you or someone moving with you owns or rents any other home, please give their details here"*. The boxes have been left blank and against this is written the letter "N", indicating that there are no details to be given. [298]
20. The Claimant signed the form with a declaration that he would tell the council immediately about any changes in his circumstances. [308]
21. From 15 November 2005, until November 2016, the Claimant was the joint registered owner with 3 relatives of a property at 32 Elm Avenue, Chatham, Kent (the BTL property). [309] The Claimant says that this was an investment property which he never resided at. The Claimant did not declare this change of circumstance to those dealing with his Housing application, which remained live until 23 January 2009, when he was granted the tenancy.
22. In early 2017, the Claimant made an application to purchase his council property under the Right to Buy scheme. As part of that process, the council arranged for the property to be valued. The Claimant was unhappy with the valuation and raised a complaint. There then followed an exchange of correspondence by email and as part of that chain was an email dated 4 April 2017, sent by the Claimant to Colin Davis, at the Valuation office appealing for a redetermination of the valuation. The Claimant relies on this email as a qualifying disclosure. [215C-215D]
23. The Claimant's brother, Shibbir Choudhury, (SC), one of the co-owners of the BTW property, was applying to purchase his own council property and was also challenging the council over its valuation. On 26 September 2016, as part of an email chain with Matthew Jackson (MJ), Head of Property about this, SC copied in the Claimant to the correspondence [312]
24. On 27 September 2016 at 1:27pm, MJ emailed the Claimant: *"Noting the inclusion of your LBS email address on the "cc" list, copied in also to all strategic directors, can you let me know your involvement in relation to this Right to Buy matter please?"*. [312]

25. The Claimant replied on the same day at 2:18pm: “*I have no involvement with this person. From the follow-on email's, I called the individual's mobile number this morning and he apologised for sending this in error*”. [312] The Claimant did not at any point prior to the disciplinary investigation reveal to the Respondent that SC was his brother.
26. The disciplinary hearing took place over 2 days, on 7th and 13th July 2017. The hearing was chaired by SB. The Claimant was accompanied by a Trade Union representative. [552-565]. Following an adjournment on the last day of the hearing, the Claimant was notified that charges 1 and 4 had been upheld and that charges 2 and 3 were not. After hearing the Claimant's mitigation, SB announced that the Claimant was dismissed with immediate effect. [565]. The dismissal was confirmed in writing the same day [568-569]
27. On 4 August 2017, the Claimant appealed against his dismissal on a number of grounds. [575]. His appeal was heard on 25 September 2017 by DC. The Claimant was not accompanied on this occasion [422-435]
28. On 29 September 2017, DC wrote to the Claimant informing him that his appeal had been unsuccessful and that the decision to dismiss was upheld.

Submissions

29. Both parties gave oral submissions. These have been taken into account.

Conclusions

30. Having considered my findings of fact, the parties' submissions and the relevant law, I have reached the following conclusions on the issues.

Is the Claimant's email of 4.4.17 a qualifying disclosure?

31. The first point to make about this email is that it is virtually identical to an email within the same chain, dated 29.3.17. The only difference is that the recipients to the April email are different and there is an added paragraph in which the Claimant complains about the unacceptable delay in dealing with the issue. [215C-215E]. This is relevant because at a preliminary hearing on 8 January 2019, the Claimant's Solicitor, Mr Brown, accepted on his behalf that the email of 29 March could not amount to a qualifying disclosure [49B]. I note from the record of the preliminary hearing that neither party had a copy of the email of the 4 April. I suspect if they had, the concession would have extended to both emails as it is difficult to see why the 4 April email would amount to a qualifying disclosure when the almost identical one of the 29 March did not. Nevertheless, I have considered the 4 April on its own merit.
32. On a proper reading of the 4 April email, it is a complaint about a personal matter i.e. the council's valuation of the Claimant's council property at £230,000, which he considered too high, and the fact that because of the council's delay in dealing with the matter, he has had to spend more in rent. In my view, the Claimant did not hold a belief that the disclosure was in the public interest, neither was it reasonable for him to do so. In re-examination, the Claimant contended that by referring in his email to the spreadsheet highlighting properties being sold for under £100,000 in the area, this showed that he was worried that the disparity meant that properties were being sold cheaply and there was a public interest in disclosing this. I consider that evidence disingenuous. The only

concern that the Claimant had was his belief that the price he was being asked to pay for his flat was too high. In his email, he refers to having discussed the matter with his MP. However, it is clear from the email that the matter discussed was not the public interest concern that he now says he had, but the issue of the Council's poor service in responding to his enquiry.

33. I find that the Claimant did not hold a reasonable belief that the email was in the public interest when he sent the email. Even if I am wrong on that, the Claimant has failed to provide any details of the legal obligation he believed the council had broken. It is telling that it was not until part way through the hearing that sub-paragraph (b) of section 43B(1) was identified as being relied upon. This is despite this issue having been sign-posted in the Preliminary Hearing judgment of Employment Judge Truscott QC of 8 January 2019 [49C]. There is also no reference to any breach of legal obligation in the Claimant's witness statement. I have therefore concluded that the Claimant did not hold a reasonable belief that his email showed a breach of a legal obligation by the Respondent and that this was a construct after the fact.
34. In all the circumstances, I find that the Claimant email is not a qualifying disclosure.
35. It follows that the Claimant could not have been dismissed for making a protected disclosure and so his automatic unfair dismissal claim must fail. Even if I am wrong about that, I would still have found that the protected disclosure was not the reason for dismissal. That is because I accept the evidence of NK, SB and DC that they did not know about the email of 4 .4.17 until it was disclosed in these proceedings. It could therefore not have contributed in any way to the dismissal.

What was the reason for dismissal?

36. I find that the Claimant was dismissed for the reasons summarised in his dismissal letter and set out at paragraphs 15(1) & (4) above. [568-569]. These were reasons related to his conduct, leading to a fundamental breakdown of the relationship of trust and confidence.

Did the Respondent have a reasonable belief in the Claimant's guilt based on a reasonable investigation?

37. In relation to the first allegation, there was no dispute that between applying for council accommodation in 2005 and being granted it in 2009, the Claimant's circumstances changed in that he became part owner of another property. The Claimant's case before the disciplinary panel was that there was no duty to disclose his property purchase as it was not a "home" but an investment. He claimed that he had discussed his proposal to purchase property as an investment with a Housing Officer when completing the application and that was the advice she had given. [558]. The Claimant did not provide any details of the person he spoke to and the Respondent did not consider his explanation credible. That evidence was repeated in the Tribunal and I too found it lacking in credibility, not least because he told the Tribunal that the person he spoke to was a gentleman but the disciplinary interview notes record that the Claimant referred to the person as "she". The Claimant said that the notes were wrong and that he had referred to "he" in the hearing. The Claimant repeated asserted during the hearing that the Respondent's notes were inaccurate. On those occasions, the notes either did not

not support his evidence or directly contradicted it. The Claimant was not a credible witness. His evidence was evasive, contradictory with itself and with contemporaneous documents, and he was unnecessarily argumentative. His approach to cross examination was not to concede anything until forced to, even when it was obvious that such a concession should have been made. For example, when it was put to him that in his email of 4 April 2017 he was complaining about delays by the Respondent in dealing with his "right to buy" application and the additional rent he had had to pay as a result, he immediately said "No" even though this was obvious from reading the email. It was only when I pointed out that this apparent contradiction that he changed his response to "Yes".

38. I am satisfied that, based on its investigation, the Respondent was entitled to reject the Claimant's explanation and to find that there had been a deliberate failure to disclose his changed circumstances.
39. Turning to allegation 4, the Respondent relies on the Claimant's reply to MJ's email of 27 September 2016, (para 25 refers) as the basis for its belief that he provided false information. The Claimant accepted during the disciplinary process that he had provided incorrect information to a senior manager but contended that it was not misconduct and put forward mitigating circumstances to do with his difficult relationship with his brother. However, the Claimant's evidence before the Tribunal was significantly different. At paragraph 23 of his witness statement, he claims that on receipt of the email from MJ, he rang his line manager, MD, and declared his relationship with his brother. Further, in his oral evidence, he told the Tribunal that MD had told him what to say in his email response to MJ and had approved it before it was sent. When it was put to the Claimant that none of this was said at the disciplinary hearing, he claimed that it was and that this was another example of the hearing notes being inaccurate. SB denied that this was said at the disciplinary hearing and I prefer his evidence. It is highly implausible that such an important factor would have been omitted from the notes, particularly as the Claimant's trade union representative put forward other mitigation, which was noted. MD gave evidence and denied that any such conversation took place with the Claimant. I prefer MD's evidence on this, not least because no reference is made to this in the Claimant's letter of appeal or in the appeal notes, which I also find to be an accurate account of what took place. I am satisfied that the Respondent had reasonable grounds for its belief in allegation 4.
40. I am satisfied, based on the Respondent's investigation that it was entitled to reach the conclusions it did on the evidence before it. The investigation was in accordance with its disciplinary policy and within ACAS guidelines. It was thorough and involved interviews with relevant individuals, including the Claimant, who was given every opportunity to defend himself against the allegations and did so at length. I heard evidence from the decision makers who gave reasoned explanations for their conclusions, which, I am satisfied, were reached in good faith.
41. The Claimant raised one procedural issue in relation to the dismissal and that was that the dismissal letter did not adequately set out the reasons. The Claimant does have a point as the letter simply informs the Claimant that 2 of the charges are upheld without saying why. However, this was corrected at the appeal stage where SB attended the hearing and presented a report setting out his reasons for his findings in relation to both charges [591-595]. The appeal outcome letter also set out the reasons in detail. I am therefore satisfied that the absence of detail in the dismissal letter did not affect the overall fairness of the investigation.

42. I find that the reason for dismissal is made out.

Was dismissal in all the circumstances fair?

43. The Claimant contended that dismissal was too harsh a sanction and that neither of the charges amounted to gross misconduct. Gross Misconduct is defined in the disciplinary procedure as: “*misconduct of such a serious nature that it fundamentally breaches and destroys the contractual relationship between an employer and an employee. It is an act (or an omission) which makes any further working relationship and mutual trust impossible*”. [1116]
44. In relation to allegation 1, although housing applications are not means-tested and property ownership does not preclude one from applying for council accommodation, the ownership of property is relevant to the assessment of housing priority and need. Part of that assessment will be a person’s ability to pay rent privately. This offence occurred against the background of an acute housing crisis in London and a waiting list of 10,000 applicants for social housing within the borough. The Respondent has a duty to allocate housing with the highest standards of transparency and probity and the Claimant as an employee would have been aware of this. The Respondent was therefore entitled to view his non disclosure of his part-ownership of another property while in the process of applying for council accommodation as a serious matter.
45. Whilst allegation 1 involved an act of non disclosure, allegation 2 involved a positive act of deliberate falsehood. SB said in evidence that this offence, in particular, coupled with the Claimant’s deletion of documents from his computer relevant to the investigation caused it to conclude that there had been a breakdown of the relationship of trust. I am satisfied from the evidence that the Respondent was entitled to form that view.
46. In all the circumstances I find that dismissal was fair. The unfair dismissal claim therefore fails.

Wrongful Dismissal

47. I am satisfied from the evidence that the Claimant was guilty of the 2 allegations leading to his dismissal. I am also satisfied that the Claimant’s deletion of emails and a folder headed “RTB” from his computer on the very day that he was informed of concerns raised by the fraud department about his right to buy application was done in order to destroy/conceal relevant evidence. His assertion to the tribunal that the initials “RTB” did not stand for Right to Buy and that the deletions were done in order to clear his computer inbox of excessive emails was not credible and is rejected.
48. I am satisfied that the Claimant’s conduct amounted to a fundamental breach of the employment contract, entitling the Respondent to terminate without notice. The wrongful dismissal claim is therefore dismissed.

Judgment

49. All claims fail and are dismissed.

Employment Judge Balogun
Date: 10 December 2019