



EMPLOYMENT TRIBUNALS

Claimant: Mrs R Green

Respondent: Consensus Community Support Ltd

Before: Employment Judge Hargrove.

JUDGMENT ON RECONSIDERATION

Pursuant to rule 70 the tribunal confirms the judgement of the tribunal that the claimants complaint of wrongful dismissal was not well founded.

Reasons

1. By a judgement sent out on the 5th of September 2019 the employment tribunal rejected the claimants complaint of unfair dismissal and wrongful dismissal. The claimant made an application for reconsideration of the judgement by emails of the sixth eighth and ninth of September not copied to the respondent. The claimant had been allegedly dismissed for being asleep while on duty with a fellow carer who reported it. They were in charge of a number of residents with very challenging behavioural characteristics at a residential home, two of whom required 2-to-1 care.
2. The essence of the claimants case was that she was not in fact asleep but her appearance was a consequence of PTSD which she claimed caused her to have absence episodes, and that she Had a previous unblemished record.
3. The tribunal rejected the claimants application for a reconsideration of the unfair dismissal on the basis that it had no reasonable prospect of success in particular on the basis that the medical evidence then available did not confirm any diagnosis of PTSD. The investigation, the belief of the dismissal and at the subsequent appeal, and the decision to dismiss all fell within a band of reasonable responses. The claimants application in relation to that head of head of claim was essentially an attempt to reopen arguments which had been rejected by the tribunal.

4. However the employment judge, in an order sent out on the 16th of October 2019, set out a proposal to reconsider the rejection of the wrongful dismissal claim of his own Initiative. In accordance with the rules the tribunal proposed to deal with the matter on the basis of the parties' written submissions without a hearing. There were considerable delays in the claimant responding specifically to this proposal, but the employment judge has considered the submissions made by the claimant, and the respondent's response dated 22nd of January 2020. The tribunal is satisfied that the parties have consented to this process, at least in relation to the issue whether or not the respondent had proved On the balance of probabilities at the hearing that the claimant was in fact guilty of gross misconduct, a different test from that of unfair dismissal. If the tribunal were to revoke its decision and find that there was a wrongful dismissal, there would have had to have been a hearing requiring evidence to decide a dispute as to the claimant's length of service.
5. The matter which caused me concern on reviewing the evidence after the judgement had been sent out was whether the medical evidence produced by the claimant at the hearing and only obtained sometime after the dismissal, and accordingly not considered by the respondent at the time, cast doubt on whether the claimant's apparent sleeping on duty was in fact a manifestation of an underlying illness and thus not an act of gross misconduct.
6. It is to be noted that the respondent has the burden of proving the act relied upon on the balance of probabilities, which is a lower burden than that required in the criminal courts. In that connection, evidence arising after the dismissal and up to the Tribunal hearing is admissible, whereas in an unfair dismissal case the focus is on the belief of the dismitter following a reasonable investigation of the facts at the time. In a wrongful dismissal case, the employer may be able to provide later evidence to confirm that the claimant was in fact guilty of gross misconduct, or, as is alleged in this case, the claimant may provide evidence to show that she was not. The evidence which the claimant relied upon in this connection is summarised at paragraphs eight and nine of the tribunal's reasons.
7. On the basis of that evidence I considered it a possibility that the claimant sleeping was a manifestation of an underlying illness, but I am satisfied on the balance of probabilities that it was not, or did not mitigate the fact that she was asleep. These are the further reasons, some of which carry more weight than others:-
 - 7.1. At the time and since the claimant has claimed that it was causatively linked to a diagnosis of PTSD, but there was never any diagnosis of PTSD in the hospital notes at the time, contrary to what the claimant says she was told. In addition, while the claimant's GP letter of the 29th of March 2019 diagnoses a number of illnesses, they do not include PTSD. There is an even later letter of July 2019 from a psychotherapist which points to a diagnosis of PTSD and a "zoning in and out of consciousness," which could be "mistaken for being asleep on the job", but this report must have been based upon information provided much later by the claimant, who clearly had a motive to seek assistance in her tribunal case, and there is no evidence that the psychotherapist had access to the claimant's medical records.
 - 7.2. Furthermore, the claimant's evidence was that the episodes had ceased and that she was fit to return to work, supported by a GPs fit note, by 20 August 2018; and that she was fit to drive. This does not suggest that the claimant was

considered vulnerable to sudden and unpredictable episodes of lack of consciousness.

7.3. There was some evidence at the time of the dismissal that the claimant was in such a position in the chair as to suggest that she had settled herself down to sleep. There was also evidence that when she was awoken or roused she said that she had had a rough night and could not sleep. This was not the only that she admitted to being asleep – see paragraph 7.16 of the chronology.

8. In summary, on the basis of that finding, having regard to the other matters set out in the original reasons, I consider that the respondent was entitled to treat this as gross misconduct, and to dismiss summarily.

Employment Judge Hargrove

Dated: 20 February 2020.

Sent to the parties on: 27 February 2020

For the Tribunal

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