

10



EMPLOYMENT TRIBUNALS

Claimant: Mr S Sargeant

Respondent: Basildon & Thurrock University Hospitals NHS Foundation Trust

Heard at: East London Hearing Centre

On: Tuesday 18 February 2020

Before: Employment Judge Speker OBE DL

Representation

Claimant: In person

Respondent: Mr S B Sudra (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that the Claimant was not unfairly dismissed and accordingly, this claim is dismissed.

REASONS

1 This claim of unfair dismissal was brought by Steven Sargeant against Basildon & Thurrock University Hospitals NHS Foundation Trust.

2 During the hearing, evidence was given by two witnesses, the Claimant himself and Elizabeth Summers, Professional and Commissioned Educational Lead for the Trust. I also had the opportunity of reading documents from a bundle running to 292 pages. There had originally been claims of discrimination on the basis of race and age but these were dismissed on withdrawal. Therefore, the only matter before me was Mr Sargeant's claim that he was unfairly dismissed. The essential facts were as follows.

The Facts

3 Mr Sargeant was employed by the Trust as a health care assistant from 5 August 2013. It is clear, from the material I have seen, that he was an enthusiastic employee. Letters from colleagues, from whom I did not hear, but which were included in the bundle, describe him as having been a good time keeper and very committed to the job. It is said that he would “go a long way” for his patients and all those comments are very much to his credit. However, this claim arises out of concerns which the Respondent had regarding aspects of the Claimant’s conduct which led to certain steps being taken with regard to him. These concerns dated back to 2015 when there were complaints regarding his behaviour and about him swearing. Steps were taken, for a period of time, to limit his duties and to subject him to supervision, but there were further concerns which culminated in disciplinary action being taken against him and these led to a disciplinary hearing on 13 June 2018. This resulted in the Claimant being made subject to a final written warning within the Trust’s disciplinary procedure. This was for a period of 24 months, which was the maximum that the policy allowed. The Claimant did not appeal against that final written warning.

4 Just over a month after the imposition of that warning, there was a further complaint with regard to the Claimant swearing and being verbally offensive in the presence of a patient. There were other concerns at around the same time suggesting that he was not adopting the proper process in relation to his being present on the ward and as to his absences from the ward. The Claimant was suspended and a disciplinary investigation was commenced in accordance with the Trust’s policies. That investigatory process appeared to include interviewing all of the relevant personnel, who knew anything of the matters raised and included interviewing the Claimant himself.

5 An investigatory report recommended that the matter proceed to a disciplinary hearing. This was eventually held on 21 February 2019. The Claimant was notified of the process and was invited to attend but he declined to do so, notwithstanding efforts which were made on behalf of the Trust to facilitate his attendance. He had the opportunity to ask to change the date but he persisted in his refusal to attend. The hearing therefore went ahead in his absence and was conducted by Elizabeth Summers. Having reviewed the evidence available and the investigation report and, in the absence of the presence of the Claimant or any submissions made by him or on his behalf, the decision was reached that in the light of the continuing final written warning and similar misconduct having occurred, it was appropriate to summarily dismiss the Claimant and he was so dismissed. He was notified of the outcome and of his right to appeal within 10 working days. He did not appeal but ultimately contacted ACAS and commenced the employment proceedings.

6 There was evidence to the effect that the Claimant entertained a grievance with regard to certain aspects of the organisation of shifts within the work place and the fact that he felt that his wishes and requests were not being properly considered. He had filed a grievance about this. It may be that his concentration on his considered grievance had priority in his mind rather than the matters that were being raised with him by the Trust.

The Law

7 The law which applies in this case is set out in the Employment Rights Act 1996 in particular section 98(1)(B), which requires the Tribunal to decide whether the reason for dismissal shown by the employer, was a potentially fair reason. The reason put forward by the Respondent in this case is a reason under section 98(2)(B) namely, the conduct of the employee. The test for unfair dismissal is set out in section 98(4) as follows:

Where the employer has fulfilled the requirements of section 1, the determination of the question whether the dismissal is fair or unfair, having regard for the reason shown by the employer, 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 shall be determined in accordance with equity and the substantial merits of the case.

8 Mr Sudra appropriately refers me to the well-known case of *British Home Stores Ltd v Burchell [1978] IRLR 379* which sets out the appropriate test in cases of dismissal for conduct. This is a threefold test. The employer must show that: -

- (1) it believed the employer is guilty of misconduct,
- (2) it had in mind reasonable grounds upon which to sustain that belief and,
- (3) at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that the employer does not need to have conclusive direct proof of the employee's misconduct but must have a genuine and reasonable belief which has been reasonably tested.

9 Applying those three tests to this case, I find that the Trust did believe that Mr Sargeant was guilty of the misconduct alleged against him. I find that it had reasonable grounds for that belief taking into account the previous history, the presence of the final written warning for similar misconduct and the evidence which existed of the final allegation against him, which the Claimant himself did not specifically deny.

10 Finally, I find that the belief was based upon as much investigation as was reasonable. I note the investigation which was carried out and the interviews, the notes taken and the compilation of a detailed investigation report leading to the disciplinary hearing which would have been an opportunity for the Claimant to put forward any arguments which he had in relation to the allegation. For his own reasons, he chose not to do so.

11 Having reached this stage of the process, it is then necessary to apply the test of unfair dismissal as mentioned in section 98(4) of the Act. In relation to this guidance

is provided by various well-known legal cases, one of which is *Iceland Frozen Foods Limited v Jones [1982] IRL 439CA* which refers to the objective test of “the band of reasonable responses.” That case emphasises that in judging the reasonableness of the employer’s conduct, the Tribunal must not substitute its own reason, as to what was the right course to adopt for that of the employer. In many cases, there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and one, quite reasonably, take another. The function of the Tribunal is to determine in the particular circumstances of each case, whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then the dismissal is fair. If it falls outside the band, it is unfair.

12 In the present case, I find that to dismiss the Claimant in these circumstances, bearing in mind the evidence which was available and against the background of a final written warning still current at the time, was within the band of reasonable responses open to this employer acting as a reasonable employer. For those reasons, I therefore find that the dismissal cannot be categorised as unfair and therefore, the claim for unfair dismissal is unsuccessful.

.....
Employment Judge Speker OBE DL

27 February 2020