



EMPLOYMENT TRIBUNALS

Claimant: Mr G Singh

Respondent: Stockton Specsavers Hearcare Ltd

Heard at: Teesside Justice Centre

On: 07 February 2020

Before: Employment Judge Sweeney

Appearances

For the Claimant, Mr G Singh, in person

For the Respondent, Mr O Holloway, counsel

JUDGMENT having been given to the parties on 07 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

The Claimant's claim

1. By a Claim Form presented on 12 October 2019, the Claimant, Mr Singh, brought a claim of unfair dismissal arising out of the summary termination of his employment on 10 June 2019. The Respondent contends that Mr Singh was fairly dismissed for a reason related to conduct, namely that he had deliberately and improperly accessed a colleague's email account without authorisation.

The Hearing

2. At the hearing, Mr Singh represented himself. The Respondent was represented by counsel, Mr Orlando Holloway. The parties had prepared an agreed bundle of documents.
3. The Respondent called two witnesses:
 - (1) Ms Beaumont, (dismissing officer),
 - (2) Mr McLachlan (appeal officer).
4. Mr Singh gave evidence on his own behalf.

The issues

5. The issues to be determined were as follows:
 - 5.1. What was the reason or principal reason for dismissal?
 - 5.2. Was the reason a reason which related to conduct?
 - 5.3. If the Respondent has satisfied the Tribunal that the reason for dismissal related to conduct, did it act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant? This involves considering the following:
 - 5.3.1. Whether the Respondent genuinely believed that the Claimant had done the thing for which he was dismissed;
 - 5.3.2. Whether, in forming that belief, the Respondent carried out a reasonable investigation;
 - 5.3.3. Whether the employer had reasonable grounds for its belief;
 - 5.3.4. Whether the sanction of dismissal was reasonable;
 - 5.3.5. Whether the Respondent followed a fair procedure;

Findings of fact

6. Having considered all the evidence (written and oral) and the submissions made by the parties, I find the following primary facts.
7. Mr Singh was employed by the Respondent as an audiologist from December 2016 to 10 June 2019 when he was dismissed for gross misconduct. He was based at the Respondent's store in Stockton.
8. On 07 May 2019 Mr Singh was invited to attend an investigation meeting on 10 May 2019 in connection with some customer complaints which had been made by different customers in April and May 2019. That meeting was to be conducted by Debbie Ramshaw, Head of Business Performance and Anne Watson, Operations Manager.
9. On 09 May 2019 a colleague of the Claimant, Chloe Brown, complained to Ms Ramshaw that Mr Singh had accessed her personal gmail account and, in particular, an email which had been in her sent box. This was an email which she had sent to her line manager, Mr Gary Tyzak, in response to criticisms made against her by the Claimant. Ms Brown was upset that the Claimant had accessed her account and concerned that he had sought to access information which was private between her and Mr Tyzak.
10. Ms Brown subsequently emailed Ms Ramshaw a written account of what happened (**page 52-53**). In that written account she describes how she had a

conversation with Mr Singh during which she expressed that she was unhappy with him because he had complained about her competence to her manager, Mr Tyzak. She described how the Claimant explained his actions in saying:

'well you wrote something about me to Gary';

11. Ms Brown asked how he could know that. She explained that the Claimant told her that he had seen a reference to his name on her emails when she had left her gmail account logged in.
12. The account provided by Ms Brown, therefore, was that the Claimant told her that he looked at what she had written about him because he saw his name in her email, or on a document, and that is why he read it. Ms Brown said that the Claimant then told her to remember to log out next time.
13. The statement by Ms Brown does not record the Claimant as saying to her that he stumbled across her email account by accident or mistake. Rather she says that the Claimant explained that he saw a reference to his name and that is why he looked at her account. Mr Singh's explanation is found at **page 89 to 95** of the bundle. There is some consistency between the two but where they differ significantly is that in Ms Brown's account she says that Mr Singh read the email because he saw his name; whereas Mr Singh, in his account, says he simply stumbled across the document and did not, in fact, read anything.
14. No further letter was sent to the Claimant regarding the complaint by Ms Brown. Mr Singh was made aware of this complaint at the meeting which had already been arranged for 10 May 2019 in connection with the patient complaints.
15. At the end of that meeting, Ms Ramshaw suspended the Claimant because of the seriousness of the allegation made by Ms Brown. Between then and the appeal hearing the Claimant did not have access to his computer. However, he was able to make whatever representations he wished with regards to the allegations, which he understood and which he was able to respond to prior to any decision being taken.
16. There was no further investigative interview with the Claimant after 10 May 2019. Ms Ramshaw prepared a report (**page 66-67**) in which she recommended no action to be taken in relation to the customer complaints but that there was a case to answer in relation to the allegation of unauthorised access to a colleague's personal emails.

Disciplinary hearing, 22 May 2019

17. The Claimant was invited to attend a disciplinary hearing on 16 May but then rearranged for 22 May 2019 to be chaired by Ms Beaumont, Director for the Respondent's Ashington and Cramlington stores. In advance of that meeting, she reviewed Mr Singh's statement (**pages 89 – 94**) and in order to understand more about how access could be gained to a colleague's email account, Ms Beaumont spoke to the I.T department by telephone. She was provided with history logs which are in the bundle at pages **44-45, 47, 51**.

18. She provided these to Mr Singh at the disciplinary hearing at which he was represented by a trade union representative. According to the Respondent, the history logs showed that the Claimant had accessed Ms Brown's account and also that he had accessed another account belonging to one Zoe Lancaster. The hearing was adjourned to give Mr Singh time to review the logs and to prepare a response to them, which he did.

Disciplinary hearing, 05 June 2019

19. The hearing was reconvened on 05 June 2019. Mr Singh attended with his trade union representative. By this time, he had considered and gone through the documents given to him at the hearing on 22 May and had prepared a document in response to the history logs, a copy of which he gave to Ms Beaumont at the reconvened hearing (**page 96-99**).

20. Mr Singh's case was that he had not deliberately accessed Ms Brown's account. Rather he had stumbled across it accidentally. He focused on technical matters such as the lack of 'sign in' and that Ms Brown had been in the habit of not logging out.

21. Following the hearing, Ms Beaumont returned to I.T. to further inform herself and in particular to check if the access could have been accidental as maintained by Mr Singh. She relied on I.T.'s expertise to the extent necessary to inform her on the likelihood or otherwise of access to Ms Brown's systems being accidental. Considering all the information before her which included the statement from Ms Brown, the Claimant's own account the log history and I.T.'s explanations, she rejected Mr Singh's account that he accidentally accessed Ms Brown's emails.

22. She did not rely only on the explanations from I.T. She accepted Ms Brown's account that the Claimant told her that the reason he accessed her account was that he saw a reference to his name. That is inconsistent with the Claimant's explanation given to Ms Beaumont that he accidentally accessed the account. In concluding that Mr Singh had deliberately accessed the account one of the key points for Ms Beaumont was that the history log showed that the Claimant had accessed Ms Brown's 'sent box' after he said he first accidentally stumbled across Ms Brown's account.

23. Having determined that Mr Singh had deliberately accessed a colleague's email account without permission she went on to consider what sanction to impose. Ms Beaumont concluded that Mr Singh's actions amounted to gross misconduct and that trust in the Claimant was seriously undermined not only because of her conclusion that he had deliberately and knowingly accessed his colleague's account but additionally because she concluded that he had not been truthful about it during the disciplinary process. Although the Claimant was at that stage subject to a written warning in relation to a previous, unrelated matter, she did not take that warning into account. She decided to dismiss the claimant, confirming this in a letter dated 10 June 2019.

Appeal, 26 June 2019

24. The Claimant appealed. The appeal was heard on 26 June by Mr McLachlan. In advance of this appeal hearing, Mr Singh prepared and sent the documents at pages **83-85**, which Mr McLachlan considered. Mr Singh also provided a further statement at the appeal hearing (**pages 86-87**).
25. Mr McLachlan carefully considered the points raised by the Claimant. He was more familiar with the email system and was more confident than Ms Beaumont when it came to technical issues. He concluded that Ms Ramshaw's decision to dismiss was a reasonable one and he dismissed the appeal.
26. A key feature for Mr McLachlan was the number of times Ms Brown's account had been accessed. The Claimant had contended to him that the access was accidental – that he stumbled across Ms Brown's email account when looking to log into his own. Mr McLachlan rejected this. He believed the Claimant acted deliberately. He accepted that the first time the Claimant accessed it could well have been a mistake but not thereafter. He looked to see if the Claimant had accessed Ms Brown's account and then gone on to access his own. He likened the accidental stumbling on to someone else's account to the concept of stepping accidentally into someone else's shoes. In such a situation, upon realising the mistake, one might say 'whoops, not my shoes' and then step into the correct shoes. Therefore, Mr McLachlan looked to see if the Claimant then logged into his own account (or shoes, adopting his metaphor), having stumbled onto Ms Brown's by accident. He did not find this. In fact, he saw that Mr Singh had subsequently accessed her inbox and sent box. Mr McLachlan believed that this demonstrated deliberate access. He did not accept the Claimant's account of accidentally stumbling across her account and rejected what Mr Singh said, as Ms Beaumont had.
27. The Claimant at no stage accepted that he had done anything wrong. Mr McLachlan considered the sanction of dismissal imposed by Ms Beaumont and considered it to be a reasonable sanction in the circumstances.

Relevant law

Unfair dismissal

28. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
29. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

30. In a 'misconduct' dismissal, the employer must also show that the principal reason for dismissal relates to the conduct of the employee. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard. The Tribunal must not put itself in the position of the employer. The Tribunal must confine its consideration of the facts to those found by the employer at the time of dismissal and not its own findings of fact regarding the employee's conduct.
31. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.
32. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:
- (i) Did the employer carry out a reasonable investigation?
 - (ii) Did the employer believe that the employee was guilty of the conduct complained of?
 - (iii) Did the employer have reasonable grounds for that belief?
33. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. However, where an employer dismisses an employee for gross misconduct, it is relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** (UKEAT/0032/09/LA) [2009] and **Eastland Homes Partnership Ltd v Cunningham** (EAT/0272/13). This means asking two questions:
- (1) is the conduct for which the employee was dismissed conduct which, looked at objectively, capable of amounting to gross misconduct, and
 - (2) Did the employer act reasonably in characterising the conduct as gross misconduct?

Fair procedures

34. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

Conclusions

Reason for dismissal

35. I must first of all determine what the actual reason for dismissal was. In this case, it is not in dispute. I find that the genuine and causative reason the Claimant was dismissed was that he accessed, without authorisation, the email account of a colleague Chloe Brown and that he had given a dishonest account of the reason for doing so. That was a reason which related to conduct and therefore potentially fair. The next issue was whether the Respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal. Having considered all the evidence and applying the legal principles summarized above, I conclude that it acted reasonably for the reasons set out below.

36. I have considered carefully the five key points raised by Mr Singh, which are set out in bold (and numbered (1) to (5) below) in assessing the fairness of the decision to dismiss.

(1) There was no need to suspend the Claimant

37. Mr Singh contended that it was not necessary to suspend him. He has a point that it may not have been necessary to suspend him as he could have worked in a different location from Ms Brown during the investigation. However, the decision to suspend him on an allegation of gross misconduct for unauthorised access to a colleague's account was one which was within a band of reasonable responses to that allegation owing to the potential of any employee in those circumstances interfering with digital data. That is not to suggest that Mr Singh personally would have interfered with any investigation. Even if I were wrong about that, the suspension did not operate so as to render the procedure unfair, or more importantly it did not render unfair the decision to dismiss. The suspension did not impede the Claimant's ability to understand the complaint against him or to respond adequately to it.

(2) The failure to interview Mr Singh prior to the completion of the report;

38. Mr Singh was not notified of the complaint by Ms Brown until 10 May 2019. That meeting had been set up to consider only the patient complaints. Ideally he should have been made aware of Ms Brown's complaint prior to that meeting. He had been asked to attend the meeting on 07 May and the document in which Ms Brown sets out her account was not provided by her until 09 May 2019. Although the meeting of 10 May could have been rearranged, the fact that it was not postponed and rearranged did not adversely affect the fairness of the overall process or decision to dismiss. It was not

unreasonable to raise the complaint at that pre-arranged meeting. Ms Beaumont was conscious that Mr Singh would require time to respond to the information given to him. Mr Singh had the opportunity to respond to the complaint thereafter and he did so. He was provided with sufficient information to enable him to understand the complaint and put forward his response to Ms Beaumont in due course and before any decision was made by Ms Beaumont.

39. Mr Singh complains that he should have been sent a letter similar to that at **page 50**. However, the fact that he was not sent such a letter did not impact on the fairness of the hearing which was eventually undertaken by Ms Beaumont. There are no obligatory rules which an employer must follow in any given case. ACAS provides guidance as a supplement to the Code of Practice on disciplinary and grievance procedures. The essential point in this respect is that prior to dismissing any employee, the employee must know and understand what allegation is being made against him and must have a fair opportunity to respond to it before an impartial decision maker and the employer must follow fair procedures. Mr Singh did understand the allegation against him and had sufficient time to prepare.
40. The failure to interview Mr Singh prior to 10 May 2019 did not render unreasonable the decision to dismiss. He was not put to any disadvantage by this. He understood what was said against him and had every opportunity to make his own representations (which he very ably did) to Ms Beaumont, who was an impartial decision maker.

(3) Bias against Mr Singh

41. Mr Singh contended that there was bias against him. However, he did not identify what this was based on, why there might be any bias and (other than in the outcome of dismissal) how this bias was demonstrated. I could find no evidence of any bias against Mr Singh either by Ms Ramshaw or Ms Beaumont. In fact, Ms Beaumont was brought in to the proceedings precisely because Mr Singh objected to certain others conducting the hearing. He did not complain about her hearing the matter at any time.

(4) Ms Beaumont did not understand the points which Mr Singh was raising.

42. Mr Singh has a point that Ms Beaumont did not fully understand some of the points that he was raising and in particular when he raised a technical I.T. issue in relation to 'sign in'. She accepted as much and admitted to being dependent on I.T. explanation and support in relation to this. That is why she went to ask I.T. in advance of the disciplinary hearing to understand how access to Ms Brown's account could have been gained and when. I.T. provided her with the relevant logs which she then ensured were given to Mr Singh, something she did at the disciplinary hearing. She ensured that he had time to take them away and digest them and come back to her with his responses. She then asked IT the essential question which was whether access was likely to be accidental, as Mr Singh had suggested. Ms Beaumont admitted to being a bit bamboozled by some of the points which Mr Singh was raising which is why she was

dependent on I.T. expertise. There is no shame in that of course. She is entitled to rely on the expertise of the IT department and to take account of it along with the other material (which included Ms Brown's account and that of Mr Singh) when considering whether access to the account was likely to be deliberate or accidental.

(5) Mr Singh did not have access to a computer

43. I do not see how having access to a computer would have assisted with the fundamental question of whether access was deliberate or intentional. It was not made clear how this was relevant to the issues before the Tribunal, or for that matter, to the issue to be determined by Ms Beaumont. In any event, the Respondent did not act unreasonably in proceeding to make a decision on the disciplinary matters by taking account of the material which it had access to and which it provided to Mr Singh. He clearly understood the allegation and he was not precluded from making his points by not having access to a computer.

The reasonableness of the Respondent's belief

44. Were there reasonable grounds to support Ms Beaumont's genuine belief that Mr Singh had accessed Ms Brown's account without authorisation? The answer to that is 'yes'. The investigation which was undertaken (consisting of the investigation by Ms Ramshaw and the additional material obtained by Ms Beaumont from the I.T. department) was reasonable in the circumstances. Ms Beaumont considered all the material before her: Ms Brown's account of events (paragraphs 10-13 above), the Claimant's account of events, the log history and the I.T. department's explanations. Ms Beaumont formed her belief from the totality of the evidence. The decision she reached was one which was open to her to make on the material before her and it was a reasonable conclusion. It is not for me to substitute my view of the facts for hers.

45. The Respondent followed a fair and reasonable procedure overall. Any defect in the process, such as failing to provide the logs to Mr Singh prior to the first disciplinary hearing or failing to send a letter similar to that at **page 50** or to interview him prior to 10 May 2019 did not render the procedure unfair. He was provided with the logs and the hearing was adjourned to give him time to consider them and to respond to them. The hearing was reconvened and Mr Singh made his case. Further consideration was given to his points but a decision was made that the access was deliberate.

46. Much was made by Mr Singh of the lack of a 'sign in' on the page showing Ms Brown's log history. However, even if Ms Brown had not logged out of her account, the fact remains that the log history shows unequivocally that the Claimant accessed her account. The precise amount of time he spent reading what he saw is probably impossible to determine; but that was not the point.

47. Ms Beaumont accepted Ms Brown's statement which gave an account of a particular email in her sent box which had been accessed by the Claimant, where she had made reference to him in relation to a particular patient. That is what sparked the complaint from Ms Brown in the first place. The log history was consistent with what she said in her written account and there was

evidence of multiple access, not just one. She rejected Mr Singh's account that he accidentally accessed the account, which was contrary to the explanation Ms Brown said he had given her at the time, which was that he had seen a reference to his name, which is why he looked a bit closer.

48. It is perfectly possible that what Mr Singh says is right – that he accidentally stumbled on to Ms Brown's account and that her statement as to why he accessed the email is wrong. However, in considering whether he was unfairly dismissed, it is not for me to determine whether, in fact, he deliberately accessed Ms Brown's account. Ms Beaumont did not act unreasonably in concluding that he did. She did not act unreasonably in rejecting his account that he had stumbled accidentally on to Ms Brown's email account. Her conclusion was not outside a range of reasonable responses open to a reasonable employer acting fairly and reasonably and it is not for me to substitute my view on the facts for her.
49. Mr McLachlan, who heard the appeal, came to the same conclusion that the access was deliberate. He too was reasonably entitled to arrive at that conclusion and again, it is not my role to substitute my view for his. There was no unfairness in the arrangements for the disciplinary hearing or the appeal. Mr Singh had a further opportunity to state his case at the appeal stage. Mr McLachlan knew enough about how the email systems worked to arrive at a reasonable (and reasoned) view on the evidence before him. He did not feel confused or in any way unsure of what points Mr Singh was making on appeal.
50. In terms of sanction, again it is not for me to say whether a lesser sanction might have been more appropriate. I must ask whether the sanction of dismissal was within the band of reasonable responses. In light of the conclusions reached by Ms Beaumont regarding the deliberate accessing of his colleague's account and given her rejection of the Claimant's denials, it was not unreasonable for her to categorise the conduct as gross misconduct and to terminate the Claimant's employment. Looked at objectively, the Claimant's conduct, as she and Mr McLachlan found it to be, was capable of amounting to gross misconduct in all the circumstances, including the context of Ms Brown having sent a private communication to her line manager in response to criticisms made of her by the Claimant.

Summary of conclusions

51. The Respondent had a genuine belief that the Claimant improperly accessed his colleague's email account. That belief was a reasonable belief and was formed having undertaken a reasonable investigation in all the circumstances. The procedure undertaken by the Respondent was fair and reasonable. The Claimant understood the case against him, was provided with the relevant material and was able to present his response to impartial decision makers. Given the damage to trust and confidence occasioned by the Claimant's actions as the Respondent found them, and the failure of the Claimant to recognise any wrong-doing on his part, the sanction of summary dismissal was one which was within a band of reasonable responses open to a reasonable

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employer. Accordingly, the claim of unfair dismissal is not well founded and the proceedings are dismissed.

Employment Judge **Sweeney**

1 April 2020