



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MS D CLARKE

AND

Respondent
THE SECRETARY OF STATE
FOR JUSTICE

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 29TH / 30TH JUNE 2020

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- MR J DUFFY (COUNSEL)

FOR THE RESPONDENT:- MR J ALLSOP (COUNSEL)

JUDGMENT

The Judgment of the Tribunal is that:-

- i) The Claimant's claim for unfair dismissal is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings a claim of unfair dismissal. The claimant was employed as a Prison Officer at HMP Guys Marsh from 6th July 2017 until her dismissal on 7th August 2019 for gross misconduct.

Medical Evidence/Background

2. On 26th December 2018 the claimant sustained a head injury outside work. She was hospitalised until 29th December 2018, and off sick from 27th December 2018 until 6th February 2019 with post head injury concussion syndrome. She returned to work on 6th February 2019 with a phased return, altered hours and amended duties, which were repeated on 14th February in a fit note valid for three weeks. A further fit note of 6th March 2019 recommended a phased return, reduced hours, reduced computer screen time and was valid for one month to 5th April 2019 in accordance with which the claimant was placed on restricted duties.
3. At a meeting with CM Every on 11th March 2019 the claimant described “.. that she had concussion and was suffering with continued dizziness and migraines...” and related symptoms. She attended the doctors the same day and signed off from work until 30th March 2019, and a further fit note of 29th March 2019 signed her off until 12th April 2019.
4. An OH report from Ms Elizabeth Latham of 1st April 2019 stated that she was awaiting a neurology review and that her ongoing symptoms included “..intermittent episode of dizziness, headaches/migraine, appetite loss/weight loss, concentration impairment and low mood.” She recommended that if the claimant returned to work on the expiry of the current fit note she be placed on non-operational duties.
5. On 8th April 2019 she attended a consultation with Dr Christopher Murphy (Consultant Neurologist). He concluded that her symptoms were consistent with concussion and post-concussion syndrome, from which 75% of people recover within three months although in some cases symptoms persist for up to 12 months.
6. At a meeting with CM Every on 12th April it was agreed that she would return full time but on restricted duties; and a fit note of 15th April recommended a phased return.
7. A further OH report of 1st May 2019 confirmed that she was fit for full duties and was not suffering any ongoing symptoms.

Standards of Behaviour

8. The respondent submits that in determining whether the respondent was justified in concluding that the claimant’s behaviour constituted gross misconduct and/or fundamentally breached the bond of mutual trust and confidence that the tribunal should bear in mind that as a Prison Officer the highest standards of integrity and honesty are expected as reflected in clause 12 of her contract of employment:-

12. STANDARDS AND BEHAVIOUR

As a civil servant, you are expected to conduct yourself with integrity, impartiality and honesty.

NOMS staff members are expected to meet high standards of professional and personal conduct and behaviour. All staff members are personally responsible for their conduct. Misconduct will not be tolerated and failure to comply with these standards can lead to action which may result in action being taken. Clear guidance and a framework for expected standards and behaviour are set in the NOMS Staff Handbook, Chapter 2.

Facts

9. In the early part of 2019 the claimant's line manager was Custodial Manager (CM) Martyn Peel and there were a number of meetings during her sickness absence. CM Peel's account is that during these meetings she informed him that she had had been advised not to drive, and that she had pre-booked a ski holiday from 19th – 28th February 2019. He advised her that taking holiday whilst off sick was permitted but should be discussed with Detail and did not himself give her permission to go. It is not in dispute that the claimant did not do as he suggested and discuss her proposed holiday with Detail. However, in a meeting with CM Every on 26th April 2019, and again in the investigatory interview with Mr Heggarty the claimant stated that she had been given permission to go by CM Peel. By the time of the disciplinary hearing the claimant accepted however that CM Peel had not given her express permission to go.
10. She returned to work on 6th February 2019 on a phased return and with restricted duties and between 19th and 28th February she took the annual leave and went on the skiing holiday. She returned to work on 6th March and was placed on restricted duties in accordance with the recommendations of the fit note of the same date. On 1st March CM Matthew Every had become her Line manager.
11. On 10th March 2018 whilst working on restricted duties on the gate she asked CM Markey if she could leave as she was unwell, but use TOIL and not record her absence as sick leave. She was informed that she could not do so but could take sick leave if she was not well enough to continue. She did not do so but went home at approximately 4.00pm before her shift had ended and without permission. At about 7.25 that evening she telephoned CM Markey and explained that she had left the Prison to go to Tesco during a break but had felt dizzy and asked her boyfriend to collect her. In a memo written the same evening CM Markey expressed the view that this conduct was unacceptable, and considerable scepticism as to the veracity of the claimant's account in any event.
12. CM Every held a meeting with her the following day. She said she still had dizzy spells and was not fit to work even on restricted duties. On the same day she obtained the fit note signing her off for three weeks, which was subsequently extended to 12th April when she returned. On 1st of April she attended Occupational Health as set out above, and Dr Murphy's report was received at some point after 9th April. She returned to work on 12th April 2019 on restricted duties on the gate and on

- 15th April the claimant suggested to Governor Hooley that she was not able to continue on full hours.
13. The events which led to her dismissal began on 26th April 2019. CM Every informed Governor Hooley that he had been told that the claimant had been skiing whilst on restricted duties and on that same day he had a meeting with the claimant. The claimant stated that she had been on holiday but had not skied, but accepted that she had been driving contrary to medical advice. There was a discussion of cosmetic surgery and CM Every informed the claimant that she was expected to return to full duties from 30th April 2019.
 14. Mr James Heggarty was subsequently appointed to investigate three allegations; that the claimant may have abused the restricted duties policy, acted disingenuously and made false statements regarding her health.
 15. On 30th April the claimant returned to full duties. On that afternoon she attended a Stage 2 Formal Attendance review meeting and was given a stage 2 unsatisfactory attendance warning. On 1st May an OH assessment concluded that she was fit to fulfil full time duties.
 16. Mr Heggarty produced a report on 18th June concluding that the allegations of abuse of sick leave and unprofessional conduct should proceed to a disciplinary hearing. This conclusion was accepted and disciplinary proceedings were commenced.
 17. On 16th July 2019 the claimant was suspended.
 18. On 6th and 7th August 2019 a disciplinary hearing was conducted by Governor Lucas. The claimant was represented by her POA representative and Mr Heggarty, CM Peel, CM Every, and the claimant gave evidence. Central to the allegation of abuse of sick leave was the question of whether the claimant had gone on the ski holiday with her friends but had not skied, which would certainly be consistent with being unfit for full duties, or whether she had both gone on the holiday and skied. The claimant contended that the former was the case. However, Governor Lucas concluded that she had in fact been skiing. The central piece of evidence to support this conclusion was a photograph of the claimant and her friends. They are all wearing skiing or snowboarding clothing and it is not in dispute that all of her friends were skiing or snowboarding. The claimant does not accept that it is possible from the photograph to conclude that she was participating in skiing, as opposed simply to being present with her friends. Governor Lucas accepted that as the claimant's feet are not shown in the photograph it is not possible to conclude definitely whether she is wearing ski boots or snowboarding boots. However, the photograph shows her dressed in full ski gear including a helmet and goggles, neither of which would be necessary if the claimant were not in fact skiing. The claimant's case was that her friends had hired her a helmet as she was clumsy, but Governor Lucas concluded on the balance of probabilities that she had actively participated and had been skiing. He concluded from this that if she was well enough to participate in an active ski holiday

- that she was well enough to be on full duties and that she had been abusing the sickness absence policy.
19. In respect of allegation 1 (the abuse of sick leave) Governor Lucas concluded that in February 2019 the claimant had “been well enough to go on a skiing holiday..and therefore I could only conclude that she was well enough to undertake full operational duties at work at that time and after “ (witness statement para 41). He further found that on 10th March 2019 she had left duty and failed to follow the sickness reporting procedures; and that she had ignored medical advice and continued to drive after she had been advised not to. She had breached annual leave policy in failing to obtain permission to go on annual leave and had not obtained permission from CM Peel. He was satisfied that she had skied whilst on the holiday which “directly contradicted the need for restricted duties at work”. She had knowingly abused the Respondent’s Attendance Management Policy which called into question her honesty and integrity.
 20. In respect of allegation 2 (unprofessional conduct) Governor Lucas concluded that the abuse of the Sick Leave/Attendance Management Policy was itself a serious example of unprofessional conduct. He also concluded that she had been disingenuous towards her line managers, the investigating officer and the disciplinary hearing in maintaining her denial of having breached the respondent’s policies; that she had failed to seek authorisation for her annual leave; and had left duty on 10th March 2019 and failed to follow the sickness reporting procedures. Looked at overall she had failed to adhere to the Civil Service code in respect of integrity and honesty.
 21. Having concluded that both the disciplinary allegations were proven he concluded that the seriousness of the charges and the lack of remorse or acknowledgment of wrongdoing mean that he could not trust her not to repeat similar behaviours and that the relationship of trust and confidence had irretrievably broken down; and that a lesser sanction than dismissal would not be appropriate.
 22. The claimant appealed, and the appeal was heard by Jeannine Hendrick, Prison Group Director of the Devon and North Dorset Prison Group on 15th October 2019. The appeal was not a rehearing, the task for the appeal officer being to consider whether the decision to dismiss was fair and reasonable. During the hearing the claimant re-iterated that whilst it might appear from the photograph that she had been skiing that she had not. She accepted that she had continued to drive contrary to the advice of her neurologist. The claimant accepted that she had not consulted her GP before going on holiday which contradicted what she had said at the investigation/disciplinary stage.
 23. Ms Hendrick’s conclusions were that the further photographic evidence shown to her supported rather than contradicted the proposition that she had skied, and no additional evidence which showed that she had not had been provided. She had suggested that she had informed members of the management team of her intention to go skiing but that was not corroborated, and that she had described CM Every’s evidence as being tainted by historic relationship difficulties between the two which

Ms Hendrick rejected. Ms Hendrick concluded the decision to dismiss was fair and reasonable and confirmed the disciplinary outcome.

Conclusions.

24. As misconduct is a potentially fair reason for dismissal, the first question is whether the claimant was genuinely dismissed for that reason. It is not suggested by the claimant that there was any other reason and I accept the evidence of both Governor Lucas and Ms Hendrick that their conclusions were that the claimant had committed the misconduct alleged against her.
25. The next questions, in relation to the fairness of that dismissal are the well known Burchell questions. Did the respondent conduct a reasonable investigation, draw reasonable conclusions from that investigation, and was dismissal a reasonable sanction. In respect of each of those questions the range of reasonable responses test applies.
26. Mr Duffy makes the following central points on the claimant's behalf which essentially concern the reasonableness of the conclusions drawn, but also touch on the investigation to some extent. Firstly, as is agreed, going on a pre-booked holiday during a period of sickness absence is not itself a breach of any of the Respondent's policies, nor is it evidence that the claimant was in fact fit for any duties beyond those sanctioned by the medical evidence. Secondly it is not reasonably or rationally possible to conclude that the claimant had been skiing, and had therefore lied about not doing so, on the basis simply of the photograph. Thirdly, even if she had skied it did not follow without further enquiry or medical evidence that she had in fact been fit to be at work or for full duties; and fourthly and linked to the last point that the claimant's absences and reduced duties were specifically supported by medical evidence. The conclusion that the claimant was fit for full duties necessarily involves rejecting that medical evidence, but Governor Lucas had not sought any further medical evidence. In the absence of any such evidence Governor Lucas was obliged to accept the medical evidence and the conclusion that the claimant was fit for full duties was simply not rationally open to him. Neither he nor Ms Hendrick are medically qualified and it was simply not open to either of them to go behind the medical evidence simply on the basis of their own conclusion that the claimant had in fact been skiing.
27. In terms of the investigation there is, as is set out above only one criticism, that conclusions as to the claimant being fit for duties were made without obtaining further medical evidence. In my judgement that is more usefully considered in the context of the conclusions. In all other respects the investigation was extremely thorough and I can see no reason to criticise it. The claimant was given the

- opportunity at every stage to state her case, and it certainly fell well within the range reasonably open to the respondent.
28. In terms of the conclusions, in my judgement it was reasonably and rationally open to both Governor Lucas and Ms Hendrick to conclude that the claimant had been skiing. The photograph shows her in full ski gear including in particular helmet and goggles and her explanation for the fact of her having and wearing a helmet stretches credulity. It follows in my view that that conclusion fell within the range reasonably open to both of them.
29. However, in my judgment Mr Duffy makes a good point that it is not possible to conclude from that, certainly in the absence of medical evidence, that she was in fact fit for full duties. That conclusion necessarily presupposes that the medical evidence is wrong. However, given that the medical evidence included the opinions of the claimant's GP, the Occupational Health practitioner and in particular the Dr Murphy, a consultant neurologist, it would require significant evidence to displace it. There is in fact no medical evidence to contradict it.
30. In addition, on the face of it there is an explanation which is consistent with the medical evidence; which is simply that the medical opinions were correct but that the claimant was prepared to ignore medical advice and take risks with her health in her private life in driving and skiing that she was not prepared to take in order to work. However, that is not a conclusion anyone advances or urges on me; and the question for me, is not whether there is another explanation that is logically consistent with the medical evidence, but whether their conclusions were reasonably and rationally open to them. This is in my view a more difficult question. If the evidence was simply that the claimant was off work with self-reported symptoms that were contradicted by her other activities they might be. However, in my judgement Mr Duffy is correct that the medical evidence makes that conclusion impossible. It follows that in my judgement that whilst it was open to the respondent to conclude that the claimant had been skiing that it did not follow from that fact that she had abused the sickness absence policy. It follows from that, in my view, that the finding that allegation 1 (abuse of sick leave) was made out equally falls outside the range reasonably open to the respondent.
31. However, allegation 2 (unprofessional conduct) is based on the fact of the claimant having skied. If it can reasonably be concluded that the claimant had skied, which for the reasons given above in my view it can, then the claimant has persistently failed to tell the truth throughout the whole process. Equally the conclusion that the claimant had been less than frank in respect of other aspects, such as being given permission to go on the holiday by CM Peel was equally rationally open. In those circumstances the finding of disingenuousness was unquestionably rationally open to Governor Lucas and, given the standards of honesty and integrity expected of a Prison Officer, as was the conclusion that the claimant was guilty of Unprofessional Conduct.

32. It equally follows that there was a rational basis for the conclusion that the claimant could not be trusted not to behave in the same way again, given her persistent denials, and that the relationship of trust and confidence had broken down, again in particular given the standards required of Prison Officers as set out above. In those circumstances in relation to allegation 2 alone in my view dismissal fell within the range of sanctions reasonably open to the respondent.
33. As a consequence I have concluded (not without some reluctance given that I have held that one of the primary findings of fact was not rationally open to the respondent) that the investigation was reasonable, the conclusions at least in respect of one of the allegations was reasonable and that the sanction of dismissal was reasonable for that conduct alone.
34. It follows that the claimant's claim must be dismissed.

EMPLOYMENT JUDGE CADNEY
Dated: 21 September 2020

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