EMPLOYMENT TRIBUNALS

claimant: Mrs C Yemidale

Respondent: University Hospitals Birmingham NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal

On: 8 & 9 February 2021

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: Dr Onipede of counsel
For the respondent: Ms Stanley of counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unlawful deduction from pay is dismissed on withdrawal.

2. The claimant's claim for unfair dismissal is dismissed.

REASONS

1. This was a remote hearing. The parties did not object to a remote hearing format. The form of remote hearing was by CVP - V. A face to face hearing was not held because it was not practicable and no-one requested it. The hearing was listed for two days and no party had asked the tribunal to allow additional time for the hearing.
2. By a claim presented on 29 December 2019, after a period of early conciliation, the claimant claimed unfair dismissal. The claim related to the claimant's dismissal for gross misconduct with effect from 2 September 2019.

3. We were referred to a bundle of documents of 283 pages, a separate claimant's bundle, the claimant's remedy bundle, a skeleton argument for the claimant, and a chronology.

4. We heard evidence from the following witnesses who were cross examined. For the claimant, herself. For the respondent, Mr Kevin Bolger (KB) (Chief workforce officer and international office, and Mr Simon Jarvis (SJ) (Director of Facilities).

5. At the start of the hearing, the claimant explained the grounds of her unfair dismissal complaint as follows:

   5.1. The investigation was unreasonably long (8 months).

      5.1.1. The claimant did not say that the length of the investigation was prejudicial to the outcome of the disciplinary process, but relied on the ACAS Code of Practice on Disciplinary Hearings as requiring an investigation to be carried out without unreasonable delay.

      5.1.2. We stated that we did not consider that the claimant could rely on the length of the investigation to show an unfair dismissal in the absence of relying on any prejudice caused by it in terms of the outcome to the disciplinary process. We pointed to the tribunal hearing timetable, to which neither party had objected, which allowed for only 3 hours witness evidence for both parties. We considered in the context of this timetabling, and that the claimant was not relying on prejudice to the disciplinary outcome caused by the length of investigation, that it would be disproportionate to deal with the length of investigation as an issue in the hearing.

      5.1.3. The claimant relied on 2 cases cited in her skeleton argument at paragraph 24 to argue that she should be allowed to pursue the issue as follows:
      The Tribunal is reminded that the test of band of reasonable responses must bear upon all aspects of procedure process including whether the pre-Dismissal Investigation was fair and appropriate.

      In J. SAINSBURY PLC -V- HITT (2003) ICR 111, the Court of Appeal held that the Range of Reasonable Responses Test applied as much to whether a reasonable Investigation had been carried out as it does to the reasonableness of the decision to dismiss for the conduct reason.

      In CRAWFORD AND ANOTHER -V- SUFFOLD MENTAL HEALTH NHS TRUST (2012) IRLR 402, the Tribunal was critical of the delays in this case which was six Months from Suspension to Dismissal. The Tribunal stated that any period of suspension should be for the minimum period, and that six Months puts a lot of unnecessary pressure on the Appellant.

      5.1.4. We read these comments and found neither related to the length of the investigation per se. The *Crawford* case as described above by the claimant was relating to the length of suspension, and the claimant was not suspended.

      5.1.5. Therefore, we informed the claimant that this issue would not be considered by the tribunal in this case and we did not take it into account.

5.2. The respondent failed to suspend. The claimant's case was that this gave the expectation she would not be dismissed. The claimant accepted that, in correspondence, she was informed by the respondent that the allegations were a gross misconduct offence and she may be dismissed. It was agreed there would not be cross examination of this issue and it would be dealt with in submissions only.

5.3. The dismissing officer, SJ, was not a director, as stipulated by the respondent's disciplinary procedure; and so he had no authority to dismiss.

5.3.1. The respondent accepted that SJ did not have a job title as a director at the time of the dismissal decision, but submitted that, although his job title had changed from that of 'director', his role remained the same; and that his changed job title was included in an updated disciplinary procedure applicable from 30 Sep 2019.

5.4. The claimant was not sent a copy of the new disciplinary procedure coming into force on 30 Sep 2019, after the disciplinary hearing and prior to the appeal hearing. The claimant could not say that receiving a copy of this procedure would have made any difference to the outcome of the disciplinary process.

5.5. The decision to dismiss was not within the band of reasonable responses given mitigating factors of:

5.5.1. 15 years service.

5.5.2. The claimant had no disciplinary record.

5.5.3. There were no clear guidelines over the giving of references and no training on it.

5.6. The appeal panel did not include sufficient non-executive directors to meet the requirement of the disciplinary procedure. The 2017 disciplinary procedure relied on by the claimant said that the appeal panel should have had 2 non-executive directors and it only had one. The respondent's case was that it relied on the 2019 procedure which came into force in Sep 2019 and under which the composition of the panel in the appeal hearing was correct. The claimant did not rely on any prejudice caused by the make-up of the panel.

5.7. The claimant said the appeal did not cure defects at the dismissal stage because there was no proper review of the decision.

5.8. The claimant relied on arguments about the scope of the Human Rights Act 1998 in relation to the unfair dismissal decision, with which the respondent disagreed.

What happened

6. We find the following as the primary facts in this case relevant to the issues.

7. The claimant was employed by the respondent from 1 Nov 2004 and dismissed for gross misconduct on 2 Sep 2019. She was latterly a band 5 nurse and her professional body was the Nursing & Midwifery Council (NMC).

8. Both parties agreed that claimant committed a gross misconduct as follows:

   8.1. The claimant gave almost identical employment references for a bank nurse in Jan and May 2016. These references provided misleading employment history information.

   8.2. The claimant provided to the same bank nurse in March 2017 a reference which provided misleading employment history information. She either failed to look at the reference at all but confirmed it was her reference to the agency requesting it; or she did look at the reference, and knew it provided misleading employment history information. She confirmed the reliability of the reference to the agency. The claimant's actions were unprofessional conduct.

9. We make the following further findings about the nature of the misconduct. In January and May 2016, the claimant gave employment references which stated that the bank nurse did not have current warnings, was not under investigation for conduct or performance issues, and did not have any safeguarding allegations against him, when she was not in a position to know this information. In fact, she had only worked with the bank nurse once and this was prior to 2014. The reference which the claimant gave in March 2017 also provided negative information relating to current warnings, investigations under policies and safeguarding allegations, when she was not in a position to know this information.

10. The claimant's misconduct was a breach of the respondent's code's values of honesty and accountability. It was also a breach of the NMC code of conduct.

11. The claimant was invited to a disciplinary hearing on 2 Sep 2019 regarding these acts and was dismissed. The claimant was provided with a copy of the disciplinary procedure then in force. The claimant admitted the misconduct and the disciplinary panel, chaired by SJ, believed in her guilt.

12. The respondent's disciplinary procedure version 003, issued in Feb 2017 and in force until 30 Sep 2019, gave a list of managers authorised to dismiss, including 'Associate Director of Facilities'. The list did not include 'Head of Facilities', SJ's job title at that time.

13. SJ's evidence, which we accept, was that his job title was 'Associate Director of Facilities' at the time when disciplinary procedure version 003 was issued and it was subsequently changed to 'Head of Facilities' prior to Sep 2019. The new version of the disciplinary procedure issued in force from 30 Sep 2019 included in the list authorised dismissing officers 'Head of Facilities'. The 2019 new procedure was therefore updated to reflect SJ's job title.

14. We do not consider that an internal structure chart from 2016 relied on by the claimant showing SJ as 'Head of Facilities' negates SJ's oral evidence on this. SJ was an experienced dismissing officer with authority to dismiss and as such an appropriate person to chair the panel. We accept SJ's evidence that he had authority to dismiss on 2 Sep 2019. We find that the disparity in job titles in the procedures with the on the ground job titles was merely an administrative oversight in the policy and not material.

15. It was SJ's evidence, which we accept, that, when making the decision to dismiss, the disciplinary panel considered whether a lesser penalty would be appropriate with regard to the claimant's mitigating circumstances. The panel felt that, although her work record was worthy of merit, her conduct fell substantially below the standards expected by the NMC and the respondent and was fundamentally incompatible with the respondent's values of honesty and accountability. Therefore, it took the view that dismissal was appropriate notwithstanding her employment record.

16. The claimant appealed and her appeal was considered by a panel chaired by KB on 29 Nov 2019. We find that the claimant was sent a copy of the new disciplinary procedure in force from 30 Sep 2019 because the invitation to appeal meeting letter stated that it was enclosed. The claimant's appeal statement ran to 6 pages and the points were all considered at the appeal meeting. The claimant's points of appeal included mitigation but did not include the failure to suspend or complaints over the constitution of the panel, despite the claimant being represented at all times by an experienced trade union representative. The appeal panel was properly constituted under the parameters of the Sep 2019 appeal procedure. We consider that there was a proper review of the dismissal decision; the meeting notes showing that all the claimant's appeal points were discussed. The appeal was unsuccessful.

17. The only differences between the 2017 and 2019 disciplinary procedures on which we heard evidence or submissions was the change to SJ's job title being reflected in the list of dismissing officers and a change to the composition of the appeal panel.

18. There was nothing in the disciplinary procedure requiring the respondent to suspend the claimant under any circumstances. It said that a suspension may be considered and may be appropriate in certain circumstances. Suspension was a neutral act not implying misconduct or guilt.

19. We were not referred to any guidance on the giving of references, but accept that the dishonesty and lack of accountability demonstrated by the claimant in the misconduct she committed are not matters which should have to be covered in guidance on giving references (or training), particularly when they were covered by the respondent's values.

Relevant law

20. Under section 94(1) Employment Rights Act 1996 (ERA) an employee has the right not to be unfairly dismissed by his employer.

21. Under section 98(1) ERA, in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

22. Under section 98(4) ERA, where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) 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 (b) shall be determined in accordance with equity and the substantial merits of the case.

23. It was confirmed by the Court of Appeal in *Foley v Post Office; HSBA Bank plc v Madden 2000 ICR 1283*, that the tribunal must not substitute its decision as to what the right course of action was for the employer to have followed and, 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 another employer quite reasonably take another. It is the function of the tribunal to determine whether in the circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

24. The respondent also referred to *J Sainsbury Plc -v- Hitt [2003] ICR 111*; which confirmed that the tribunal must not substitute its own standards and decision for that of the employer. The issue is whether the investigation fell within the range of reasonable responses.

25. The respondent referred us to the classic test in misconduct dismissal cases in *British Home Stores Ltd -v- Burchell [1980] ICR 303*, in which the tribunal has to ask itself: (i) did the employer genuinely believe that the employee was guilty of the misconduct alleged? (ii) did the employer have reasonable grounds for that belief? (iii) at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

26. The claimant provided copies of the following cases: *Whitbread PLC v John Hall; Salford Royal NHS Foundation Trust v Roldan; Graham v The Secretary of State for Work and Pensions (Job Centre Plus); Crawford* as above; *Iceland Frozen Foods Ltd v Jones; Hitt* as above; *Taylor v OCS Group Limited.*

<u>Remedy</u>

27. Under s123 (1) ERA, subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss

sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

28. In *Polkey v AE Dayton Services Ltd 1988 ICR 142 HL*, the House of Lords held that where there was a proven procedural irregularity, but it could be shown that carrying out the proper procedure would have made no difference to the dismissal decision, this should be taken into account when assessing compensation.

30. Under s123(6) ERA, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

31. Under s122(2) ERA, where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce the amount accordingly.

29. In *Hollyer v Plysu 1983 IRLR 260*, the EAT suggested that contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100%); largely to blame (75%), employer and employee equally to blame (50%); slightly to blame (25%).

<u>Law and arguments relating to the claimant's case under the Human Rights Act 1998 (HRA)</u>

30. Article 6 HRA says that: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

31. Article 8 HRA says that: Everyone has the right to respect for his private and family life, his home and his correspondence.

The approach

32. The Supreme Court in *R (on the application of G) v Governors of X School 2011 IRLR 766* did not consider that there was a sufficient connection between the disciplinary proceedings and the regulatory proceedings for Article 6 to apply at the disciplinary hearing.

33. The legal position is that the right to a fair hearing provided for in Article 6 will not be engaged in respect of most internal disciplinary hearings as an employee has the right to complain to an employment tribunal about the lawfulness of his or her dismissal. Article 6 can be invoked where a public sector employer's internal disciplinary proceedings have the potential to seriously affect the employee's future employment, such as in the case of allegations of serious misconduct against a medical professional, where the employee in effect faces the end of his or her civil right to practise his or her profession.

Parties' arguments

31. The claimant argued that she did not have a fair trial under Art 6 HRA because the claimant did not receive a copy of the September 2019 disciplinary procedure prior to the appeal hearing; and the respondent did not assess alternatives to dismissal.

32. The claimant did not suggest there was any connection between the disciplinary proceedings and any regulatory proceedings against the claimant. We did not hear evidence that there were any regulatory proceedings against the claimant.

33. The claimant argued that the claimant's Art 8 right to a private life meant that the dismissal was unfair because the tribunal should proportionately balance the dismissal decision against the impact on the claimant.

34. The respondent argued that Art 6 rights do not apply to internal processes.

35. In respect of Art 8, the respondent relied on case of *TURNER (appellant) v. EAST MIDLANDS TRAINS LTD* which states that 'so far as procedures are concerned, the domestic test of fairness does not fall short of the procedural safeguards required by Article 8.' IE the tribunal need only look at s98 ERA and need not add any more safeguards to its decision.

Conclusions

36. We will consider the claimant's grounds for arguing that the dismissal was unfair.

37. The respondent failed to suspend:

    37.1. There was no requirement on the respondent to suspend in cases which may result in dismissal. The claimant was well aware that the outcome of the disciplinary hearing may be her dismissal. We find that the respondent's failure to suspend did not result in an unfair dismissal.

    37.2. Even if this did not conclude the issue, her failure to raise the issue on appeal would do so because the respondent was not aware that it was an issue which needed consideration.

38. The dismissing officer, SJ, was not a director, as per the procedure, and had no authority to dismiss:

    38.1. We find that SJ did have the authority to dismiss and that the absence of his job title in the list of those with authority to dismiss in the disciplinary procedure did not mean that his role was not in fact included in those with authority to dismiss; his job title had changed and the disciplinary policy had not been updated to reflect this. We do not consider the respondent was in breach of its policy.

    38.2. If we are wrong on this and there was a breach, it was merely a technical breach which did not go to the fairness of the dismissal. SJ was an appropriate and experienced dismissing officer. His appointment was within the range of reasonable processes for the respondent to follow.

39. The claimant was not sent a copy of the new disciplinary procedure coming into force on 30 Sep 2019 after the disciplinary hearing and prior to the appeal hearing:

    39.1. We have found that the claimant was sent a copy of the new disciplinary procedure.

    39.2. Even if she were not sent one, this would not make the dismissal unfair. The claimant had a copy of the 2017 disciplinary procedure. The amendments to it in the September 2019 version we have noted as set out above made no material impact on the fairness of the process for the claimant. The respondent complied with the 2019 procedure in terms of the make up of the appeal panel and so the claimant would not have had information of a non-compliance withheld from her.

40. The decision to dismiss was not within band of reasonable responses given mitigating factors as set out above:

    40.1. The dismissing officer did take into account the mitigating factors and this was also reviewed on appeal. Given that the claimant committed a gross misconduct involving dishonesty and breach of the respondent's values and her professional body's code, it cannot be said that the decision to dismiss was not within the range of reasonable outcomes. It is not the role of the tribunal to substitute its view for that of the employer and start trying to weigh up mitigating factors against the severity of the offence to see if a different conclusion would have been more appropriate.

41. The appeal panel did not include sufficient non-executive directors:

    41.1. We have found that the appeal panel was properly constituted.

    41.2. Even had this not been the case, the claimant did not rely on any prejudice caused by the make-up of the panel. Therefore, it would have been a technical matter which did not make the dismissal unfair.

42. Human Rights Act:

    42.1. The claimant did not cite any connection between the disciplinary proceedings and any regulatory proceedings against the claimant (if there were any). Following *R (on the application of G) v Governors of X School,* we find that Art 6 was not engaged in the internal proceeding.

    42.2. As per *TURNER (appellant) v. EAST MIDLANDS TRAINS LTD*, Art 8 does not place on the tribunal any higher a standard than s98 ERA. Therefore, it does not place any higher bar for the respondent to cross so as to change our decision on the above points.

43. Appeal not cure defects:

    43.1. We have found that there were no defects at the dismissal stage to be cured on appeal. If there had been, we have concluded that the appeal was a proper review. Therefore, it would have been effective to cure the defects.

44. We now turn to the *Burchell* test:

    44.1. Did the employer genuinely believe that the employee was guilty of the misconduct alleged? We consider that SJ had that belief based on the claimant's admission.

    44.2. Did the employer have reasonable grounds for that belief? Yes – the claimant's admission

    44.3. At the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case? Yes – the claimant admitted her guilt

45. Therefore, we dismiss the claimant's unfair dismissal claim.

46. If were wrong on the question of procedural unfairness, we would in any event have found that all compensation should be reduced both on basis of contributory fault and on *Polkey* principles by 100% given the gross misconduct committed by the claimant which resulted in her dismissal for which she was wholly to blame.

Employment Judge Kelly

25 February 2021