



EMPLOYMENT TRIBUNALS

Claimant: Mr C Kane

Respondent: Debmat Surfacing Ltd

Heard at: Newcastle via CVP

On: 11th February 2021

Before: Employment Judge AE Pitt

Representation

Claimant: Mr Kane, Son

Respondent: Mr Jackson, Consultant

JUDGMENT having been sent to the parties on 16 February 2021 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

1. This is a claim by Colin Kane, date of birth 8 June 1955, in relation to his employment with Debmat Surfacing Ltd. He was employed as a driver for the respondent from 1st September 2012 until 30th July 2020; at the date of his dismissal, he was 65 years of age. The claimant claims unfair dismissal pursuant to Section 98 Employment Rights Act 1996.
2. The claimant was represented by his son, Mr Jake Kane. The respondent was represented by Mr Jackson, Consultant. I had before me a bundle of documents which included the contract of employment, dismissal letters and appeal letters.
3. I read witness statements and heard evidence from Shaun Johnson, Contracts Manager; David Buggy, Managing Director; John Turner, Managing Director; James Davidson, Director; the claimant.

The Facts

4. In making my findings of fact, I have taken account of the witness statements, the oral evidence of the witnesses, and the contemporaneous documents I

have been provided with. Where there was a conflict of evidence, I determined it on the balance of probabilities.

5. The respondent is a small business that employs less than 160 people. It undertakes surfacing work of roads, car parks and drives. Three people carry out administrative work for the respondent from its offices in Ryton-on-Tyne. It does not have a dedicated HR department.
6. The contract of employment has within it a brief disciplinary policy (page 27 of the bundle). It sets out under Breach of General Discipline examples of 'a breach of general or domestic rules or regulations' such as persistent lateness, irregular attendance, unauthorised absence, substandard work, or any conduct that may be detrimental to the harmonious running or reputation of the company. Such a breach may lead to disciplinary action.
7. The document also sets out examples of serious misconduct, including theft and refusal to follow reasonable instructions or regulations. The list is not exhaustive.
8. The claimant was employed by the respondent as a driver. He has suffered from chronic obstructive pulmonary disease (COPD) for several years. He is a smoker, but his evidence was that he was attempting to quit the habit. The claimant had periods of absence due to ill-health. One such period was from 9th March 2020 until 30th March 2020.
9. On 9th March 2020, the first day of his illness at approximately 3:20 pm, the claimant was seen at a Social Club close to his workplace by Shaun Johnson. Mr Johnson was travelling back to the respondent's premises and coincidentally, was driving behind a Debmatt wagon. He alleges that when he saw the claimant, the claimant was stepping back into the premises as if to hide from the wagon. Upon his return to the office, Mr Johnson informed Mr Turner of the events. Mr Turner telephoned the claimant, who did not answer but returned the call shortly thereafter. Mr Turner's account of the conversation includes the comment from the claimant 'he had been bad in bed all day with his chest.' The claimant denies being in the Club on the Monday; although he accepts, he was there the following day.
10. The NHS notified the claimant by letter dated 21 March 2020 he should shield because of the COVID-19 pandemic.
11. On 23rd March, Mr Buggy notified the claimant he was investigating the claimant for 'dishonesty and breach of company regulations.' On 26th March, Mr Buggy held an investigation meeting. Mr Johnson was also present. He appears to have conducted most of the questioning.

12. It was put to the claimant “You have been seen several times at the Club drinking alcohol and smoking,” and on “One occasion John Turner rang you, and you said you had been ill in bed all day.” Mr Johnson put to the claimant, “Surely if you had been unfit for work and on antibiotics, you shouldn’t be in the pub,” the claimant responded, he had only been there for a bit, and he saw nothing wrong with that. Mr Buggy commented that as a director of the company, “I am not comfortable that you think it is ok to go to the pub when not fit for work.”
13. Following the meeting, Mr Buggy sent a letter to the claimant stating he had concerns that the claimant had been attending the pub on numerous occasions whilst being signed off sick with severe chest pains. It goes on, “we would have to assume that your GP advised you to stay in the house as much as possible, especially due to the current Coronavirus outbreak which puts you at greater risk due to your specific diagnosis, as has been confirmed by the recent letter you have received about self-isolating for a period of 12 weeks.” The letter concludes, “we consider your actions inappropriate, especially for someone with your diagnosis. We also view your actions as a breach of the company’s disciplinary rules, which we shall deal with at the end of your 12 weeks isolation”.
14. On 24th June, the claimant was sent a letter informing him that there was to be a disciplinary meeting on 6th July. The allegation was “this action is being considered with regards to your dishonesty and breach of company regulations.” No witness statements or photographs accompanied the letter.
15. Mr Turner was the decision maker at the disciplinary hearing. He put to the claimant the allegation he had been seen during the first week of his sickness on numerous occasions at the Club. The claimant accepted he had been there for 15 minutes on one occasion and for 30 minutes on a second occasion.
16. Mr Turner went on to say he had a photograph of the claimant drinking outside of the Club, but this was not shown to the claimant, nor was Mr Turner able to give a date of when it was taken or by whom. Mr Turner went on, “I wouldn’t expect a member of staff who is too ill to be at work out on the drink. Do you think it’s reasonable?” To which the claimant replied I see your point of view.” Mr Turner went on, “I phoned you on Tuesday to see how you were, you didn’t answer. When you called me back later on. I asked how you were. You informed me you’d been in bed all day and had just gotten up, yet this is one of the days that you were seen in the Club, is that correct?” The claimant responded he could not remember. Mr Turner had a short break to consider his decision. Upon his return he informed the claimant he was dismissed for a breach of trust and dishonesty.
17. The outcome was confirmed in a letter sent to the claimant on 7th July 2020. In it, Mr Turner set out the allegation, ‘that he was attending the pub on numerous occasions, consuming alcohol and smoking whilst being signed off on the sick

with chronic lung disease/chest infection and claiming to be at home in bed.’ He concluded the claimant was guilty of a serious and willful breach of the company’s rules, which he considered gross misconduct, and therefore the claimant was dismissed.

18. The claimant appealed against his dismissal on two grounds; first, he had been told that the telephone call was on the Tuesday when in fact it was Monday. Secondly, he raised the issue of consistency, as he was aware of two other people who had been to the Club whilst they were ill. The claimant stated Mr Buggy was aware this was happening. Mr Davidson agreed to investigate.
19. The hearing was held on 21st July and chaired by Mr Davidson. In response to the day of the call, Mr Davidson said he would check Mr Turner’s phone. As to the second, Mr Davidson asked for names so that he could investigate further.
20. The claimant was informed of the outcome by letter of 22nd July. Having checked phone records, Mr Davidson confirmed the telephone call was in fact made on Monday 9th March; however, he pointed out the claimant had not disagreed about lying to Mr Turner in the calls. In relation to the second ground of consistency, Mr Davidson stated Mr Ward had left the company, and could not be subject to disciplinary action. Mr Davidson went on to say that he was not aware of any other driver who had acted in the same way. He dismissed the appeal.

The Issues

21. What was the reason or principal reason for dismissal?
The respondent relies on the claimant’s conduct. If the dismissal was because of conduct the Tribunal will need to decide whether,
 - a. there were reasonable grounds for believing the claimant had committed an act of gross misconduct,
 - b. at the time the belief was formed, the respondent had carried out a reasonable investigation,
 - c. the respondent otherwise acted in a procedurally fair manner,
 - d. was dismissal within the range of reasonable responses.

The Law

22. Section 98 Employment Rights Act 1996, The Act, sets out the law concerning Unfair Dismissal. It is for the respondent to show the reason or principal reason for the dismissal and that it is a reason falling within section 98 (2) of the Act or is some other substantial reason for dismissal. Misconduct may found a fair dismissal. The Tribunal must then apply section 98(4) of The Act and consider whether the dismissal was fair or unfair, which depends on.

‘Whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the

employee and it shall be determined in accordance with equity and the substantial merits of the case.'

23. The approach to misconduct cases was formulated by Arnold J in **British Home Stores Ltd v Burchell [1980] ICR 303**. If the reason for the dismissal was misconduct of an employee and potentially fair, the Tribunal must ask itself the following questions;
- i) Did the respondent act reasonably in treating the employee's conduct as sufficient reason for dismissal in accordance with equity and the substantial merits of the case?
 - ii) Did the respondent have an honest belief in the misconduct of the claimant?
 - iii) Did the respondent have reasonable grounds to sustain that belief?
 - iv) Did the respondent undertake as much of an investigation into the misconduct as was reasonable in all the circumstances?
 - v) Did the respondent follow a fair disciplinary procedure?

24. **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**. In determining the fairness of a dismissal, the Tribunal must consider if dismissal fell within the range of reasonable responses. The Tribunal must not impose its view on the dismissal, but consider whether a reasonable employer could have dismissed on the facts of the case.

Discussion and conclusions

25. This case highlights the need to make a proper record in relation to allegations of misconduct. In particular, taking an account from any potential witness, i.e., Mr Johnson, Mr Turner, and the person driving the wagon. Further, there is reference to a photograph. Although Mr Turner said he did not take it into account when making his decision, I do not accept his assertion as the photograph was shown to the claimant at the hearing. Enquiries could have been made into where the photograph came from. It appears it was obtained from a person who was not an employee but was a family member of an employee, the photograph may even be date stamped. The respondent could have enquired as to how the evidence came into the possession of the employer. It was not produced before me today, despite it being of relevance.
26. I concluded that the investigation was not one which a reasonable employer would have undertaken. Indeed there was no investigation other than to speak to the claimant before disciplinary proceedings were commenced. In addition to the matters above, the respondent made allegations of 'numerous occasions' when the claimant was seen at the social club, although the evidence they had before me was one occasion. Further, there was an obvious error in relation to the date it is alleged that Mr Turner telephoned the claimant. It was not until the claimant raised this as an issue that the respondent realised it had made a mistake in the date upon which the call was made.

27. It was also put to the claimant, he should not be in a public house because he was absent through ill health. There is nothing in the disciplinary procedure prohibiting an employee from acting in this way. The respondent also alleged that the claimant was acting contrary not only to his GP orders, but also the general rules that were in force at the time in relation to shielding due to Covid-19. These are assumptions which were not adequately investigated or tested by the respondent. I am particularly perturbed by the date of the telephone call. The claimant was informed that the telephone call had taken place on a Tuesday, the second day of absence, when he admitted he had been in the Social Club, when in fact the telephone call took place on a Monday. This is a serious error.
28. Finally, it is not clear the exact nature of misconduct of which the claimant was found guilty. Questioning revolved around his attendance at the Social Club, and indeed the letter from Mr Turner stated he was dismissed because he was attending the premises on numerous occasions, consuming alcohol and smoking whilst being signed off on the sick with chronic lung disease/chest infection and claiming to be at home in bed. There seem to be two aspects to this; first, the claimant being present at the Social Club; secondly, he claimed to be at home in bed, which I take to be an assertion he had lied to Mr Turner.
29. There is no rule the respondent can point to, which says that an employee cannot socialise in whatever way they deem appropriate whilst absent from work through illness. The respondent made a gross assumption, without evidence, the claimant should not be at the Social Club because of the nature of his condition and because he should be shielding. In relation to the latter, the claimant did not have to shield, the notification to shield coming after the date of the allegation. Regarding the former, there is no evidence from which the respondents could conclude that the claimant had been advised not to leave his home.

Conclusions

30. Did the respondent have an honest belief in misconduct?
It would be surprising if Mr Turner did not have such a belief as he was the person who had the conversation with the claimant. The claimant also admitted that he had been to the Social Club on two separate occasions and explained why. He did not admit to lying or misleading Mr Turner.
31. Did the respondent have reasonable grounds to sustain that belief?
As noted above, the belief in the misconduct was based upon Mr Turner's own observations.
32. Did the respondent undertake as much investigation into the misconduct as was reasonable in all the circumstances?
33. I have identified flaws concerning the investigation as follows;

- i. No written accounts were taken, which led to confusion over dates and times.
- ii. Mr Johnson, who was a key witness to the sighting and the phone call, was present and asked questions at the investigation hearing.
- iii. There was no investigation.
- iv. On the evidence before me, no one else was asked about the claimant going to the Club, although on the basis that a photograph was produced it seems to have been common knowledge. There was a suggestion it was produced by a family member of an employee. Further there was a Debat vehicle in front of Mr Johnson.
- v. The respondent relied on the claimant's ill health and made assumptions about his health, including the nature of his underlying health condition, the reason he was absent from work and the need to shield without making further enquiry.
- vi. In evidence, before me, the respondent's witnesses placed great reliance on the fact that any action by an employee while they are at through ill health, which delays a return to work, is misconduct. I note the disciplinary procedure does not contain any clause regarding ill health, nor was there any evidence upon which they could rely, which suggested the claimant's illness was harmed by this behaviour or his return to work delayed. In any event, as of 23 March, the claimant was not able to attend work because he was shielding as directed by the NHS.

34. Was a fair disciplinary procedure followed?

In addition to the flaws identified above concerning the investigation, I concluded the respondent's procedure fell below the standard expected from a reasonable employer in the following ways;

- i. Mr Johnson took an active part in the investigation meeting and was also a witness to the telephone call.
- ii. the lack of a statement from the driver, who the respondent concedes was readily identifiable.
- iii. in addition to the failure to make a proper enquiry into the photograph, I am not satisfied that Mr Turner did not rely upon it. He clearly showed it to the claimant at the disciplinary hearing.
- iv. Mr Turner handling the disciplinary hearing. He was the person who took the initial complaint. One of the allegations against the claimant was that he had lied to Mr Turner. It was inappropriate for Mr Turner to deal with the disciplinary hearing. I accept that this is a small business, but I note there are two managing directors, one of whom heard the appeal. A reasonable employer would have found an independent person to conduct the disciplinary hearing. It would be extremely difficult for any employee to challenge a Director of the

company. This is especially the case where the allegation relates to a conversation he, Mr Turner, had with the claimant and is alleging the claimant lied. A reasonable employer would have appointed an independent person who would have been able to assess the evidence of both the claimant and Mr Turner before making his decision. Mr Turner was biased because he was the person to whom the comment was alleged to have been made.

- v. Mr Turner never put to the claimant directly at the hearing that he had lied or misled Mr Turner. The issue of note-taking is highlighted by the incorrect date being stated during the disciplinary hearing, clearly misleading the claimant.
- vi. The allegation against the claimant was that he had been in the Social Club on several occasions. However, there is only evidence of two, one when he was seen by Mr Johnson and a second occasion about which the claimant made an admission.
- vii. Although the claimant was offered an appeal, this process fell short of what might be expected from a reasonable employer. Whilst it was conceded by Mr Davidson that the day was wrong in relation to the telephone call, he did not consider whether there was any reason to doubt Mr Turner's recollection of the call or the impact generally upon the evidence.
- viii. The claimant also alleged inconsistent treatment, specifically referring to one former employee, Tony Wood. The respondent's response to that was "The does not work for us anymore." I concluded Mr Davidson was aware of Mr Woods behaviour and that no action had been taken at the time of the events.

Polkey

35. The ACAS Code of Practice sets out a simple procedure which it is suggested be adopted by an employer as follows; state precisely what the complaint is and outline the case briefly by going through the evidence gathered. Ensure the employee is allowed to see any witnesses' statements and to question them.

36. A fair procedure, in this case, would be to gather evidence from all people, including Mr Johnson and Mr Turner and the person who sent photograph or check with Mr Johnson when he received the photograph.

37. Have someone else conduct the investigation, perhaps Mr Davidson. Leaving Mr Buggy to conduct the disciplinary hearing, and an independent person outside of the organization to conduct the appeal, such as the respondent's representative.

38. If the respondent is going to rely on the fact that the claimant should not be leaving his home, it ought to have obtained medical evidence to check the position.

39. I am satisfied that if a fair procedure had been carried out, the claimant may have been dismissed I assess the likelihood of dismissal as 25%.

Contribution

40. There are two aspects to contribution; first the claimant was in the Social Club on sick leave. The respondent has already acknowledged that of itself is not gross misconduct therefore I have concluded there is no contribution regarding this aspect of misconduct.

41. The second would be the allegation of lying to Mr Turner. I am not satisfied on the balance of probabilities the claimant did lie to Mr. Turner. There is no contribution in relation to this aspect of misconduct.

Conclusions

42. The claimant was unfairly dismissed. There was a 25% chance of the claimant being dismissed if the respondent had conducted a fair procedure. The claimant did not contribute to his dismissal.

Employment Judge AE Pitt

Date 20th May 2021