



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100098/2021

Held in via Cloud Video Platform on 8 and 9 June 2021

Employment Judge Brewer

Ms E Horrocks

**Claimant
In person**

Lloyds Pharmacy Limited

**Respondent
Represented by
Ms G Rezaie, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:

1. The claimant's claim for unfair dismissal fails and is dismissed

REASONS

Introduction

1. This case was listed for a reading day on 7 June and for the evidence to be heard over 3 subsequent days. In the event the evidence was completed on 8 June. I deliberated on 8 and 9 June and delivered my judgment in the afternoon of 9 June. The claimant indicated that she would like written reasons, and these are set out below.

2. The solicitors acting for the respondent had initially been Fieldfisher. They are noted in the ET3 as representing the respondent. On receiving the CVP login details I noted that the respondent had engaged new solicitors, Mills & Reeve LLP. At the outset of the hearing I informed the parties that until I retired from private practise I was a partner at Mills & Reeve based in their Birmingham Office. I noted that the respondent was not a client of the firm at that time I retired and that they do not appear to have advised the respondent on the claimant's dismissal. I said that in all the circumstances I did not feel the need to recuse myself but wished to hear the views of the parties before making a decision. Both parties were content for me to hear the case.
3. I had an agreed bundle of documents which I had read in advance of the hearing. I heard oral evidence from the claimant and from Ms Nicola Cairns, Regional Manager, and Mr Tony O'Reilly, Head of Division for the respondent. All of the witnesses swore an oath before giving their evidence.
4. Before taking the evidence I explained, principally for the claimant, the procedure we would follow, and I explained to the claimant the nature and purpose of cross-examination. Finally I set out and we agreed the issues in the case.

Issues

5. This is a case where the respondent admits dismissing the claimant for gross misconduct. The reason for dismissal is not in issue.
6. Given the above, the issues in the unfair dismissal claim which potentially fall to be considered are:
 - a. Was the reason or principal reason for dismissal a potentially fair reason under the Employment Rights Act 1996 (ERA) and if so, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

- b. Was the dismissal fair in all the circumstances taking into account the size and administrative resources of the respondent and equity and the merits of the case?
- c. If the claimant was unfairly dismissed, then she may be entitled to a compensatory award. If there is a compensatory award, how much should it be?
 - i. What financial losses has the dismissal caused the claimant?
 - ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the claimant be compensated?
 - iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - v. If so, should the claimant's compensation be reduced? By how much?
 - vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - vii. Did the respondent or the claimant unreasonably fail to comply with it by?
 - viii. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - ix. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
 - x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- d. What basic award is payable to the claimant, if any?

- e. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Relevant law

7. The relevant statute law is set out in sections 94, 98, 119, 120, 122, 123, 124 and 124A Employment Rights Act 1996 (ERA). I need not set out the text of those sections here.

8. In terms of case law, the relevant test I have applied is as follows:

- a. Did the respondent act reasonably in all the circumstances in treating the claimant's actions as a sufficient reason to dismiss the claimant and in particular:

- i. Did the respondent genuinely believe in the claimant's guilt;
- ii. Were there reasonable grounds for the respondent's belief in the claimant's guilt;
- iii. At the time the belief was formed the respondent had carried out a reasonable investigation;
- iv. Did the respondent otherwise act in a procedurally fair manner;
- v. Was dismissal within the range of reasonable responses?

(see **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA Civ 1588).

9. I remind myself that I should not step into the shoes of the employer and the test of unfairness is an objective one.

10. In relation to gross misconduct, this is a contractual concept dependent on a finding of fact about what happened — **West v Percy Community Centre** EAT 0101/15.

11. Exactly what type of behaviour amounts to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — **Wilson v Racher** 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/09.
12. Even if an employee has admitted to committing the acts of which he or she is accused, it may not always be the case that he or she acted willfully or in a way that was grossly negligent (see for example **Burdett v Aviva Employment Services Ltd** EAT 0439/13).
13. I refer to a number of other cases in the discussion below.

Findings in fact

14. I make the following findings in fact (numbers in brackets refer to page numbers in the bundle).
15. The respondent is a provider of retail and regulated pharmacy services operating around 1,500 pharmacies in the UK employing around 1,500 staff.
16. The claimant was employed by the respondent as a Pharmacy Manager from 4 January 2005 until her summary dismissal for gross misconduct on 17 September 2020. The claimant managed the respondent's branch at Kinghorn, Burntisland.
17. The claimant's line manager was Gemma Higgins, Regional Manager. In turn, Ms Higgins reported to the Head of Service, Mr O'Reilly.

18. The claimant is a registered pharmacist, and the respondent provides regulated services. Both the registration and the provision of the regulated services are regulated by the General Pharmaceutical Council (GPhC).

19. The claimant was responsible for everything that went on in her branch. Among her responsibilities were:

- a. Ensuring that GPhC standards were met;
- b. Applying the respondent's internal standards (known as ICARE);
- c. Ensuring patient safety;
- d. Applying the respondent's policies;
- e. Ensuring compliance by the branch staff with the respondent's policies;
- f. Keeping up to date with the respondent's operating standards set out in various policies known as Standard Operating Procedures (SOPs);
- g. Ensuring staff kept up to date with the respondent's SOPs.

20. The claimant's branch held a contract for the fulfilling of prescriptions for a local care home. The claimant had overall responsibility for that contract. She was the 'Responsible Pharmacist'. There had been a number of complaints about the service provided to the care home, including delay, dispensing errors and poor service. In August 2020 the care home raised their concerns with Ms Higgins who moved the contract to another branch and carried out an investigation into the complaints.

21. Having spoken to a number of staff, Ms Higgins became concerned that the claimant may not have been following the respondent's procedures. Ms Higgins spoke to the claimant on 3 September 2020.

22. During the discussion between the claimant and Ms Higgins the claimant accepted that she had:

- a. not carried out date checking in the first quarter of 2020 but had completed the respondent's Date Checking Matrix as if she had;
- b. not followed clinical SOPs; and

c. falsified SOP documents.

23. The respondent's Disciplinary Policy is at [49 – 55]. The SOP it was alleged that the claimant had failed to follow is at [47 – 48]. The respondent's disciplinary policy includes that:

“Any investigatory meeting should be regarded as purely fact finding, it is not a disciplinary sanction and will not necessarily result in disciplinary action being taken” [50].

24. The policy also sets out examples of matters considered to amount to gross misconduct [53 – 54]. These include falsification of documents; deliberate, wilful and/or negligent non-compliance with clinical SOPs; and serious breach of trust and confidence.

25. Ms Higgins considered the concerns she had to be significant and that they amounted to a disciplinary issue. She suspended the claimant and referred her investigation to Ms Cairns to act as the disciplinary manager.

26. The claimant was invited to a disciplinary hearing on 11 September by email dated 9 September 2020 [98]. The allegations were set out in the invitation as follows:

- a. falsifying pharmacy documentation, namely date checking matrix, which is in breach of trust and ICARE values;
- b. disposal of dispensing error in breach of SOP CC01: Customer Complaints and Dispensing Incidents;
- c. admitting to falsely completing declaration of staff completion of July 2020 SOP update ROC despite it not being completed;
- d. admitting of regularly signing SOP's without reviewing, reading or understanding them.

27. The claimant was advised that the allegations may amount to gross misconduct and that one outcome could be her dismissal. She was not told that she could

be summarily dismissed. The claimant was advised of her right to be accompanied to the hearing. The claimant was provided with her interview notes although one page, page 6, was missing.

28. The claimant asked for the hearing to be re-scheduled and the respondent agreed. A further invitation was sent out (which included the missing page 6) and the hearing eventually took place on 17 September 2020. At no point before the disciplinary hearing was the claimant sent copies of the notes Ms Higgins took of her investigation meetings with the claimant's colleagues.
29. At the hearing the claimant admitted all of the allegations save that she said what she had done she had done in error. She had, she said, made mistakes.
30. The outcome of the hearing was the claimant's immediate and summary dismissal, and she was advised of this after the conclusion of the hearing on 17 September 2020 which is therefore the effective date of termination. The disciplinary hearing notes start at [112].
31. The dismissal letter was sent out on 22 September 2020 [130]. This confirms the reason for dismissal. The allegations for which the claimant was dismissed are consistent across the disciplinary invitation email, the hearing notes and the dismissal letter. The claimant was advised of her right to appeal the outcome of the disciplinary hearing.
32. On 30 September 2020 the claimant emailed the respondent to confirm that she wished to appeal [134]. In her email, the claimant says that her grounds of appeal are that:
 - a. *"the outcome was too severe"*; and
 - b. *"the correct process was not followed"*.
33. Mr O'Reilly was tasked with hearing the appeal. He received and read the disciplinary papers in advance of the appeal hearing which took place on 22 October 2020. Those notes excluded the statements Ms Higgins had taken

from the claimant's colleagues. The appeal hearing notes start at [151]. I note that at no point did the claimant row back from her acceptance that the respondent's allegations were made out. Her appeal was rooted in her conviction that she should not have been summarily dismissed. The issue of the respondent not following its procedure was the claimant's assertion that she should have been sent, and was not sent, the notes of Ms Higgins' investigation meetings with the claimant's colleagues. Mr O'Reilly was not, of course, aware of this procedural issue until the claimant explained it to him and so determined to adjourn rather than end the appeal on 22 October, and investigate further, which he did. The appeal reconvened on 17 November 2020.

34. Mr O'Reilly's appeal outcome letter is at [174]. The claimant's appeal was unsuccessful.

35. The claimant commenced early conciliation on 17 November 2020, and she was issued with her EC Certificate on 17 December 2020. The claimant presented her claim form on 8 January 2021.

Observations on the evidence

36. The first point to make is that in her oral evidence, as in her disciplinary and appeal hearings, the claimant accepts that she was guilty of the allegations, but she sought to categorise the failings as mistakes or errors. She was very clear that she had not acted wilfully or deliberately.

37. In terms of procedure, the claimant was highly critical of the fact that she did not see copies of Ms Higgins investigation notes (other than her own). The claimant complained that, in considering its sanction, the respondent failed to give proper weight to the claimant's length of service, her historic performance and clean record.

38. The claimant also said that she was never sent the appeal outcome and only became aware of it in preparing for this hearing.

39. I found the respondent's witnesses to be generally credible. Their evidence was consistent with the contemporaneous documentation. They seemed to me to answer all of the questions put to them clearly and consistently and were able to explain the bases of their decisions and their decision making process. Generally, save in one respect, I also found the claimant to be credible. She was, in essence, honest throughout in not seeking to suggest that she was not guilty of the matters she was accused of. Where the claimant differed from the respondent was in her refusal to accept she had acted wilfully or deliberately. At the hearing she sought to explain that her 'errors' or 'mistakes' were to do with staff being furloughed, misunderstanding and in one respect hoping to 'catch up' to the documentation she had submitted, a matter I will return to below.

Respondent's submissions

40. Ms Rezaie's submissions were essentially that the **Burchell** test was made out. Most of the test was not in dispute. There was no suggestion that the respondent did not have a genuine belief. Given the claimant's admissions the investigation was reasonable and given the allegations and the claimant's seniority and responsibilities, dismissal was within the band of reasonable responses.

Claimant's submissions

41. The claimant's submissions were short. She said she bitterly regretted her actions but maintained that the sanction of summary dismissal was too severe.

Decision

42. The respondent provides medication to the public and as such patient safety is its primary concern. It follows that patient safety is the primary concern of those of its staff involved in selling and dispensing medication. One way the respondent meets this concern is the requirement to have and use standardised procedures for, for example, dealing with use by dates on medicines, dealing with dispensing errors and ensuring that staff are up to date with the respondent's procedures.

43. Turning to the allegations for which the claimant was dismissed, the first was that the claimant had not carried out date checking in accordance with the correct procedure but had completed the respondent's Date Checking Matrix as if she had.
44. The respondent has a system of all stock being checked quarterly and some short dated stock being checked weekly. The object is to ensure there is no out of date stock which could be sold or dispensed. Once the check is complete a document is signed confirming the check has been done. This document is the Date Check Matrix. The reasons for doing this are self-evident. Out of date medicine may be less effective or even ineffective, patients may not therefore be getting the best care. Providing out of date medication could have a negative impact on patients, on the reputation of the respondent and ultimately on the respondent's business. It is the job of the Pharmacy Manager to ensure that date checking is done and done correctly. The Pharmacy Manager must sign the quarterly return to confirm the checks have been done.
45. In effect the claimant completed documentation representing to the respondent that all relevant stock had been checked on 6 and 7 August 2020. In fact it had not been done, and out of date medication was discovered on a spot check by Ms Higgins. As set out above, the claimant has always accepted that she did not complete the date checks but signed the return as if she had. That amounted to the creation and provision to the respondent of a false record. The claimant's assertion that this was somehow an error or mistake, in the sense that it was inadvertent, cannot be accepted. It is plain that having not completed the checks, the signing of a document to say the exact opposite is a quite deliberate act which the claimant knew had the effect of misrepresenting the position to the respondent.
46. The second allegation was that the claimant had disposed of evidence of a dispensing error in breach of SOP CC01: Customer Complaints and Dispensing Incidents. In short, the claimant disposed of a blister pack involved in a dispensing error which, as a matter of policy, should have been retained. The respondent's SOP CC01 [47 *et seq*] says at point 9:

“The packaging of the medication involved in a dispensing incident must be retained at the pharmacy for 2 years...” (my emphasis).

47. The claimant accepted that she ought to have recalled this requirement but did not, nor did she check the SOP before disposing of the blister pack. I accept that this may not have been a deliberate flouting of the respondent’s SOP by the claimant, but it was reasonable of the respondent to conclude that at best the claimant had been negligent in this regard.

48. The third allegation was that the claimant falsely completed a declaration of staff completion of the July 2020 SOP update despite that not in fact being the case. Again the claimant accepted that she had done this. In cross-examination the claimant accepted that it was part of her job to ensure that staff were up to date with training and that ultimate compliance assurance rested with her. She agreed with Ms Rezaie that it was for the claimant to ensure that risks to patients did not materialise which explains why branch staff being up to date with changes to SOPs is so important. Despite that, the claimant accepts that she completed a return to the respondent which represented that staff had read and understood SOPs when that was not the case. In answer to a question from me about that, the claimant said that she knew what she had done was “*not right*”. She said that the form gave her the option of ticking “yes” or “no” and she chose “yes” when in fact the correct response was “no”. The claimant’s explanation was that she hoped to say in the return that staff were up to date with changes to SOPs, even though that was not so, and then she would then get staff up to date. In the circumstances it is difficult to see this as anything other than a wilful disregard for the respondent’s procedures.

49. The final allegation was that the claimant regularly signed SOP’s without reviewing, reading or understanding them. The claimant accepted she did this but gave no reason for doing so.

50. Turning to the matter of all the investigation notes not having been sent to the claimant, in my judgment the claimant's concern stems from a misunderstanding of what took place. It is clear that Ms Higgins had been investigating a customer's complaint. It was only as part of that investigation that concerns about the claimant's practices arose. The disciplinary hearing did not consider those investigation notes. They played no part in either the decision to proceed down the disciplinary route, or in Ms Cairns' decision to dismiss the claimant. Therefore in not supplying those documents along with the invitation to the disciplinary hearing the respondent was not in breach of its disciplinary procedure. All relevant documents were supplied.
51. The claimant seemed to criticise Ms Cairns for making up her mind about the dismissal prior to seeking advice from the respondent's Employee Relations Department (ERD). This stemmed from a question from me to Ms Cairns. I asked her about her decision making process and whether she had made her decision before she spoke to the ERD. She said she had. My question was aimed at a potential unfairness point which I may call the 'Ramphal' issue. This stems from the well-known case of **Ramphal v Department of Transport** [2015] UKEAT/0352/14, and is about the extent of the role of human resources (known by the respondent as the ERD) in disciplinary decision making. I was satisfied that the decision made was Ms Cairns' decision and it was right that she form her view independently of the ERD.
52. Turning to the appeal, the claimant criticised Mr O'Reilly asserting that he made up his mind to reject the appeal prior to completion of the appeal hearing, that is prior to it being completed on 17 November 2020. As I have set out above the appeal hearing took place on 22 October and 17 November 2020.
53. On 22 October 2020 the claimant raised the non-provision of the Higgins investigation notes discussed above. Rightly Mr O'Reilly wanted to look into that matter. He did so after the appeal hearing ended on 22 October 2020. At the end of that hearing it is plain that, subject to anything which he might discover in his further investigation, the appeal was in fact complete. The notes at [159] make this plain. The following exchange occurred:

“Tony: Anything else you wish to add?”

EH: No. I wasn't sure what to expect from today's meeting.

Tony: You raised a few things and had asked me to clarify about date checking and statements. Next steps – Tanu type up the notes and ER will get everything out to you by post/mail – will have full conclusions in terms of appeal”

54. Prior to 27 October 2020, Mr O'Reilly did carry out further checks and he ascertained that date checking had not been completed, which the claimant had queried, and that other statements collected by Ms Higgins did exist, but he concluded that they were not relevant to the claimant's disciplinary dismissal. Therefore by 27 October 2020 he had formed his conclusion about the appeal. The appeal was reconvened on 17 November 2020 to feedback and provide the outcome to the claimant which is what occurred. Again there was no procedural error or unfairness on the part of Mr O'Reilly specifically or the respondent more generally.
55. The final matter raised by the claimant was the central issue – the severity of summary dismissal. She says that due regard was not paid to her historic performance, her clean record and her years of service. Both Ms Cairns and Mr O'Reilly were clear that these were considered but they were consistent that the allegations were so serious that they outweighed any historic good performance or clean disciplinary record.
56. Finally then I turn to the questions I have to resolve. As Ms Rezaie submitted, the respondent's genuine belief was not in issue, and it is clear that they genuinely believed in the claimant's guilt.
57. Was that belief reasonably held? In my judgment there are two aspects to the belief question. First did the respondent reasonably believe that the claimant did what she was accused of?

58. In the circumstances it could hardly be otherwise. The claimant admitted all of the allegations.

59. The second aspect is whether the respondent reasonably believed that the claimant was guilty of gross misconduct; that is did she wilfully or negligently do what she was accused of?

60. For the reasons I have set out above it is clear that the respondent did reasonably believe that the claimant acted either deliberately, wilfully or negligently in respect of each of the four allegations she faced at the disciplinary hearing. The respondent reasonably concluded that the claimant knew what she ought to have done in each case but decided on a different course of action. That makes her actions deliberate or wilful save perhaps in respect of the allegation around the disposal of the blister pack, but then, in my judgment it was reasonable for the respondent to conclude that to dispose of the blister pack in clear contravention of the SOP was at best negligent.

61. In this context of course the claimant's clean record, seniority, years of service and previous good performance are a double-edged sword, because these all suggest that she knew or ought to have known what should have been done, what policy to apply, what process to follow, or, if in doubt, how to check or from whom to seek help (see for example **Strouthos v London Underground Ltd** [2004] IRLR 636 CA and **Somers v Metropolitan Police Authority Case 2318747/10** – length of service is relevant but can count against the claimant). Instead of complying or seeking help, the claimant simply decided not to follow process or seek help, and in so doing, she acted in breach of practice and policy as alleged

62. In my judgment the respondent's procedure overall was within the band of reasonable responses. The respondent also acted reasonably in concluding that the claimant had committed acts which amounted to gross misconduct

63. Of course, just because a claimant commits acts of gross misconduct it does not follow that dismissal will inevitably be fair so that leaves the final question – whether summary dismissal was within the band of reasonable responses.
64. The starting point is the disciplinary procedure which clearly identifies acts which will amount to gross misconduct. All of the allegations fall within the definition. The seriousness of the allegations from the respondent's perspective is discussed above, and I am satisfied that given her admissions, the claimant did repudiate her contract of employment.
65. All of the witnesses accepted the primacy of patient care and safety. All of them accepted that standardised procedures were part of ensuring patient safety and the claimant accepted that her actions put patients at risk albeit as far as is known no patient in fact suffered harm. I agree with Ms Rezaie who submitted that whether a risk materialised is irrelevant, the existence of the risk is the issue. That risk was created by the person at the branch with the ultimate responsibility for patient safety, the claimant. The respondent did take account of such mitigation as the claimant put forward and nevertheless concluded that summary dismissal was justified in this case.
66. I note that dismissal does not have to be the last resort before it can fall within the range of reasonable responses (see **Quadrant Catering Ltd v Smith** EAT 0362/10). The band or range of reasonable responses approach was approved by the Court of Appeal in **British Leyland (UK) Ltd v Swift** 1981 IRLR 91, CA, where Lord Denning MR stated:

'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.'

67. In the circumstances I find that a reasonable employer might reasonably have applied summarily dismissal in this case and I certainly cannot say that no reasonable employer would have summarily dismissed in these or similar circumstances.

68. Having found that the respondent acted procedurally fairly, having found that the claimant's actions were repudiatory and having found that dismissal was within the band of reasonable responses, I find that the claim of unfair dismissal fails and is dismissed.

Employment Judge: Martin Brewer
Date of Judgment: 08 June 2021
Entered in register: 23 June 2021
and copied to parties