



EMPLOYMENT TRIBUNALS

Claimant: Mr J Khan

Respondent: South West London and St George's Mental Health NHS Trust

Heard at: via CVP **On:** 5/10/2021

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Mr S Sudra - counsel

LIABILITY JUDGMENT

It is the Judgment of the Tribunal that the claimant's claims of unfair dismissal and wrongful dismissal succeed.

REASONS

1. The claimant was employed by the respondent as an Occupational Therapy Technical Instructor from 3/7/2017 (the respondent says from 17/7/2017) until he was dismissed for gross misconduct on 13/2/2020.

2. The claimant engaged in early conciliation between 2/9/2020 and 4/9/2010. He presented his claim on 30/9/2020. It became apparent after the hearing had concluded, that there was an issue with jurisdiction which had not been raised by the parties. The claimant had put in his ET1 claim form, the date of termination as the 28/7/2020, which was the date of the draft appeal outcome letter, not the date of termination (page 195). The respondent did not complete box 4 (employment details, including whether or not the dates given by the claimant were correct) of the ET3 response form (page 27). The claimant was dismissed on 13/2/2020 and therefore his claim (subject to Acas early conciliation) should have been presented on 12/5/2020. The claimant did not engage in early conciliation until 2/9/2020 and the claim presented on 30/9/2020 was therefore out of time.
3. The respondent did not take issue with jurisdiction. Once the Tribunal became aware of the point, the parties were asked for their submissions.
4. The respondent submitted that the claimant should have engaged in early conciliation on or before the 12/5/2020, that the claim was out of time by over four-and-a-half-months and no extension of time should be granted. It was reasonably practicable for the claimant to have brought his claim in time. On the 12/10/2021 the respondent took the position that the claim should be struck out as the Tribunal has no jurisdiction to hear it. This was despite a one-day hearing having taken place on 5/10/2021 at which the respondent was legally represented (as it had been throughout) and the jurisdiction point having not been previously raised. The respondent submitted that the claimant was a Trade Union member and is an intelligent man (he has a psychology degree). As the claimant was represented professionally by a solicitor at the time the claim was presented, if his solicitor's advice was incorrect, any course of action is against that firm.
5. The claimant attended a disciplinary meeting on 13/2/2020 without representation. He was informed he had been summarily dismissed (page 169). He then appealed by email on the 17/2/2020 and he stated that he had not at that point in time received written notification of dismissal (page 171). The claimant expected the appeal to be heard within four weeks and to be reinstated. For the reasons set out below, the appeal hearing was delayed. The decision to dismiss was upheld and a draft¹ appeal outcome letter was contained in the bundle dated 28/7/2020 (page 195). The claimant submitted that although he was informed of the appeal outcome on the 28/7/2020, he did not read the appeal outcome letter until 16/9/2020. He believed the termination date to be 28/7/2020² and the claim was presented on 30/9/2020.

¹ Described in the respondent's index as a 'draft' letter.

² This is consistent with the termination date given by the claimant in the ET1.

6. The claimant asked the Tribunal to consider the unprecedented situation between March and September 2020 due to the global pandemic and the lack of access he had to legal advice at the time. The claimant also submitted that if the respondent had genuinely believed the termination date to be 13/2/2020, they would have applied for the claim to be struck out as out of time. The issue was never raised by the respondent.
7. Whilst it is correct to say the claimant may have a course of action against his solicitor if he was incorrectly advised, it is of relevance that the remedy the claimant seeks is that of re-engagement (and compensation). It is not possible for the claimant's solicitor to provide the claimant with the remedy of re-engagement, although the firm could of course provide monetary compensation. If the claimant was misled as to the termination date or, should have been aware of what it actually was; equally, the respondent should have been so aware and have taken the jurisdiction point. It is noticeable the respondent did not raise the jurisdiction issue. As the respondent did not do so, the Tribunal finds that there was ambiguity in respect of the termination date in the mind of both parties and therefore, it was not reasonably practicable for the claimant to have presented his claim in time. The claim was presented within such further period as the Tribunal considered to be reasonable, when the claimant believed the termination date to be 28/7/2020. Acting upon that belief, the claimant engaged in early conciliation and presented his claim within a further reasonable period.
8. For those reasons, the time limit for presentation of the claim was extended to 30/9/2020 and it is the decision of the Tribunal to then consider the claimant's claims.
9. The claimant presented a claim of unfair dismissal and wrongful dismissal (notice pay).
10. The Tribunal heard evidence from the claimant and for the respondent; from Mr Mike Firn (dismissing officer) and Mrs Sharon Spain (appeal officer). The Tribunal had before it a bundle of 235-pages. Not all the matters which the Tribunal heard evidence on required a finding of fact being made and only relevant matters were considered.

Findings of fact

11. Besides his substantive role, the claimant also undertook 'bank' shifts for the 'stop smoking team' in 2018.
12. An issue arose in respect of his timesheets after the 19/8/2018. An administration officer processing the timesheet believed that it had

apparently been signed by someone who had left the respondent some months earlier.

13. This prompted the Project Manager of the stop smoking team to seek advice from HR. In an email of 22/8/2018 the Project Manager said:

'Jamil has been doing some weekend bank shifts for my project where he is usually assigned to deliver activities on three different wards for about 2 hours each. However, we've spotted that the timesheet for the work he did last Sunday was signed by a former employee of the Trust [Ms Chadwick]. We've contacted Wisteria ward today to enquire if [Ms Chadwick] was still working for the ward or has done any recent work for the ward. The staff at Wisteria adamantly replied that [Ms Chadwick] left the Trust about four months ago and they currently have a new manager in place. We've also asked if they keep a visitors' book and if we could have a confirmation that Jamil had visited Wisteria ward on August 19th between 1:15pm and 3:15pm. They have informed that they would check the book and contact us back. We are still waiting for their response.

Other discrepancies have also been observed in his previous timesheets to which we ensured to contact all activity champions to let them know that we are monitoring their shifts.

We have not contacted Jamil yet to discuss the issue as we would like your advice on this.'

[page 132]

14. On 23/8/2018 the Project Manager said:

'One of my team members went to Wisteria this morning and spoke to both [BD] (Deputy Ward Manager) and [TC] (staff nurse) who were on shift on Sunday the 19th August. They have confirmed that Jamil did not visit the ward on that day and that Deborah Chadwick could not have signed the timesheet as she last worked for the Ward in May.'

[page 131]

15. Although the Project Manager said she had made enquiries, there was no record of the conversations she had had or what questions had been put to the staff on Wisteria ward. It is not therefore clear which staff were adamant the claimant had not worked on the ward the previous Sunday.
16. The respondent did not contact Ms Chadwick and ask for her version of events. It is noted that the respondent believed Ms Chadwick had left the respondent around May 2018, but again, this was never separately evidenced and the view she had left was just accepted. The claimant suggested, when he was eventually interviewed, that former staff of the respondent would return and work bank shifts. This was not investigated.

17. The Project Manager emailed the claimant on 24/8/2018, the subject given as 'weekend shifts' and said:

'I tried to contact you on your mobile number earlier. Could you give me a call on 020 3513 6733 as soon as you can please?'

[page 108]

18. The claimant replied on 29/8/2018:

'I tried contacting your number on a few occasions but it was engaged.'

19. The Project Manager did not take any further action in terms of following up the email or chasing the claimant. The respondent sought to criticise the claimant for not taking any action in response, however, there was nothing in the email to indicate to the claimant that there was any cause for concern.
20. On 29/8/2018 the claimant enquired whether there were any bank shifts for the coming weekend (page 139). An administrator replied and said attempts had been made to contact the claimant and asked him to contact the respondent.
21. On 4/9/2018 the Project Manager contacted a Ms Murray (it is not clear what her role was) (page 129). She said that HR had instructed her to contact the claimant and to have an informal chat before moving the matter to a more formal platform. The informal chat did not happen. It is now clear that was the correct course of action the respondent should have taken. An informal chat, approached by the respondent with an open mind, may well have resolved matters at the time (August 2018).
22. The Project Manager recounted a conversation with the claimant, in which she said she told him he was suspended from bank shifts and that he was due to go on paternity leave on 1/9/2018. The claimant could not recall this conversation. He told the Tribunal that his daughter had been born two weeks early and it may well be that other domestic events overshadowed his work situation. It was certainly correct to say that the claimant was never informed in writing that he was suspended from bank shifts for the smoke free team. It is also correct to say that the claimant worked bank shifts for another department in December 2018 and that he was not prevented from doing so.
23. In addition, the claimant said that when he could not attend a bank shift (such as when he was ill) he could never get in touch with the smoke free team to inform them. It was not disputed that there were communication problems.

24. At some point (it is not clear when) the matter was referred to 'ttaa' the counter fraud organisation. Some enquiries were made of staff at the respondent in respect of the allegations made against the claimant. It is however important to note that the allegations were not put to the claimant and nor did counter fraud contact the claimant or interview him. At most, the claimant knew (although he could not remember) that he was suspended from working bank shifts for the smoke free team and that there was an issue with a timesheet. It is not even clear whether the claimant knew it was an issue with one timesheet or several.
25. Counter fraud contacted a ward manager on 28/11/2018 to go through the timesheets (page 124). There was an exchange of emails until the 6/12/2018 (page 121). Questions were asked of the Ward Manager who was new in post and so had not been the manager at the time the claimant was working bank shifts on that ward.
26. In amongst those emails, was an email from the smoke free Project Manager dated 28/11/2018 advising various managers of the names of two people who would be delivering activities on four wards on the forthcoming weekend (page 126). It was not clear if it was a regular procedure, or something which resulted from the issue with the claimant's timesheets. If it was a regular procedure, then there was no evidence produced by the respondent of ward managers being informed of the claimant's bank shifts and/or to cross-reference the shifts he was booked with those recorded on his timesheets.
27. The Tribunal finds it would be surprising if the smoke free team went to the time and trouble to find staff to fill bank shifts and to deliver activities to the patients and that if the member of staff did not turn up, that the Ward Manager would just ignore the non-attendance. The Tribunal would expect that at least, the non-attendance would be reported to the Project Manager; otherwise, the smoke free project would not be being delivered as expected. This was not a voluntary project and the project was funded, with its own Project Manager and administrator. It was clearly a prominent project at the respondent at the time. If the claimant did not attend when he was expected, that is something which the Ward Managers should have raised with the Project Manager.
28. It appears some enquiries were being made during November/December 2018 with one commentator, Ms Ugbele stating on 5/12/2018 (page 122):

'I have attempted to review the information regarding the Fraud enquiry, I have had confirmation from a couple of staff that they remember signing for this staff member during this time, equally the information above supports that Mr Khan attended the service to carry out activities during the weekends on Avalon ward at this time. as already indicated in earlier emails some of the time sheets match

the staff working on shift, others I am not able to confirm the signatures I am afraid as they are not clear.

Unfortunately the visitors sign in and out book for this period I have not been able to locate, so limited other evidence I am afraid.'

29. If the respondent was unable to locate this documentation (visitors' book) in December 2018, how did it expect the claimant to provide any evidence over a year later that he had worked the shifts he said he had. Furthermore, this evidence supports the claimant, yet it does not appear to have been considered, or followed-up. Who were the 'staff' referred to?

30. It is not clear what happened next. The claimant said that after his paternity leave, he was on annual leave and had some ill health absence. He worked bank shifts in December 2018. The next thing which seems to have happened was the report into this matter from Counter Fraud.

31. The report (which is labelled an 'interim' report) is dated August 2019. The report itself does not give the date in August, however in the Terms of Reference (TOR) the date is given as the 8/8/2019 (page 114). Aside from the cover sheet, the report is three pages long, with the final page containing 31-words (page 112).

32. Besides noting that Counter Fraud did not interview the claimant, the report stated the:

'scope of the investigation was to substantiate, with evidence, that the subject had submitted false timesheets.'

[page 111]

33. It appears therefore the premise was to establish that there had been fraud, rather than to investigate with an open-mind and to take into account matters which were in the claimant's favour.

34. The report went on:

'The CFS conducted further analysis on the data. The CFS then met with many of the ward managers and went through the timesheets. Some managers were unable to confirm signatures at the time. Therefore, the CFS sent emails to all managers, with copies of the timesheets, to request confirmation of the signatories on the timesheets.

This resulted in the following six timesheets being found to contain false signatures:

- 1st April 2018 – Not manager's signature
- 24th June 2018 – Signatory not working that shift

- 22nd July 2018 – Signatory not known on the ward
- 29th July 2018 – Signatory not known on the ward
- 5th August 2018 – Signatory not known on the ward
- 19th August 2018 – Signatory left the Trust several months before'

[page112]

35. That was the extent of the evidence. There was no record or appendix of which managers were approached, what questions they were asked and how they answered the question. The 'important'³ recommendation was:

'Disciplinary action to be taken in respect of the false timesheets submitted by the Subject and recovery of £180.24.'

36. At no point was the claimant given the opportunity to challenge which manager(s) was/were approached. One example is given of a Ward Manager named 'Keith'. Mr Firn assumed this to be Keith Desmond, a white Irish Ward Manager. The claimant referred to a colleague called Keith who was of African origin and from Nigeria or Ghana. One was European and one African. Another explanation which the claimant gave was that if he could not get his timesheet signed by the Ward Manager, he would ask another senior member of staff or even just a permanent member of staff to sign his timesheet. He said he did not necessarily know the names of the staff members and he understood that sometimes they would write the name of the actual Ward Manager on his timesheet (e.g. Keith Desmond), but sign it in their own name. Furthermore, the report does not set out who was the relevant Ward Manager interviewed. Nor was it put to the claimant who he thought he had asked to sign the timesheet. For example, the claimant had referred to a Keith of African origin, whereas the respondent had assumed he was referring to the Irish Ward Manager of the same name.

37. In not interviewing the claimant and not hearing his side of the story, Counter Fraud did not follow principles of natural justice and did not give him the opportunity to give his version of events.

38. Another criticism of the Counter Fraud report is the amount of time it took to produce a very succinct report. There was an initial flurry of activity in late 2018, but then nothing until the report which in substance is fewer than 850-words was produced in August 2019. Again, it is a breach of the principles of natural justice for an investigation and outcome to take so long.

³ The categories were '1' urgent, '2' important and '3' routine.

39. There was a huge disadvantage to the claimant as a result of the delay. He worked his last bank shift for the smoke free team on 19/8/2018. He did not know the staff on those wards particularly well. For example, he did not know the surname of the colleague Keith he had referred to, although he could describe him. This was particularly pertinent in light of the type of allegation the claimant was expected at a much later point in time to answer, relying simply on his memory.

40. One explanation for the respondent not running a concurrent investigation with the Counter Fraud one, was that it could not impinge on that investigation. This is not correct. The respondent's Disciplinary Policy and Procedure states:

'11 Fraud or Bribery

11.1 Any suspicions of fraud or bribery must immediately be reported to either the Local Counter Fraud Service (LCFS) or Director of Finance. **The Trust is permitted to undertake an internal investigation at the same time as a Counter Fraud investigation.** However, the Trust and LCFS will liaise with each other to ensure that neither investigation causes detriment to the other.'

[page 56 emphasis added]

41. It was therefore possible for there to have been an internal investigation running alongside the Counter Fraud one. Even once the Counter Fraud report was produced, this did not result in the claimant being informed promptly of the allegations. There was further unnecessary delay.

42. Furthermore, the Policy provides:

'5.5 Conduct investigation

All workers are required to co-operate fully with internal investigations. The Trust will expect contractors and employees of partner organisations to co-operate with internal investigations, but the investigating officer may need to explain the request for information to the individual's manager (which in some circumstances may require a request for co-operation from the commissioning manager). Approaches to patients, visitors or the public should be discussed with the PALS team in advance. Any individual providing information to the investigation should be provided with information on the issues under investigation. The information provided to the individual will be sufficient to allow him/her to contribute to the investigation, but may need to be limited, at the discretion of the investigating officer, to avoid prejudice to the investigation or breach of confidentiality. Individuals providing evidence to the investigation must be advised that he/she will be asked to provide a written statement or attend an investigatory meeting and formally confirm their evidence is true and accurate. They may be asked to provide evidence in person at a formal hearing.'

[page 67]

43. The respondent did not follow this policy.

44. The claimant was not informed of the investigation until the 30/10/2019 (page 233). He was given very limited information and was told:

'At this point the meeting is just to confirm the proceedings and to give you a letter outlining the nature of the allegations so that you are able to prepare a response.

I can tell you that these allegations relate to your Bank work with the Smoke Free Team not your substantive role. I have however informed your Manager [SP] that this is happening as per procedure

Subsequent to that we will seek a statement in response from you and an internal investigation will take place ...'

45. The final letter which was produced was not contained in the bundle. A draft unaddressed undated letter was enclosed (page 117). That letter informed the claimant that:

'I am writing to you with regards to a recent report that the Trust has received by NHS National Fraud Initiative regarding some alleged discrepancies in six timesheets you submitted for payment as part of your bank shifts during the period 3rd March 2018 and 19th August 2018. These allegations include:

- Fraudulent submission of timesheets (Fraud by False Representation).
- Dates not worked and in addition signed by a member of staff who left the employment of the Trust some months ago.'

46. No specific details were provided in respect of the allegations.

47. The claimant had also pointed out that the dates of and number of allegations were inconsistent. The Counter Fraud report looked at timesheets dated (page 112):

1/4/2018

24/6/2018

22/7/2018

29/7/2018

5/8/2018

19/8/2018

48. An email on the 12/11/2018 referred to the dates as (page 149):

19/8/2018

24/6/2018

22/7/2018

29/7/2018

5/8/2018

49. The email following that gave the following information on 13/11/2018 (page 148):

'These are the shifts we have on the bank system,

Request Id	Date	Start	End	Ward	Request	Grade	Skill	Finalized	Date Submitted	Date Has IV
"0618541136	24-Jun-2018	10:00	17:30	Smoke Free Projec	Band 4 HCS	2018	16-Jul-	16-Jul-2018		
"0718542085	01-Jul-2018	10:00	17:30	Smoke Free Projec	Band 4 HCS	2018	16-Jul-	16-Jul-2018		
"0718548556	22-Jul-2018	10:00	17:30	Smoke Free Projec	Band 4 HCS	2018	06-Auq-	06-Auq-2018		
"0718548557	29-Jul-2018	10:00	17:30	Smoke Free Projec	Band 4 HCS	2018	06-Auq-	06-Auq-2018		
"0718548558	05-Auq-2018	10:00	17:30	Smoke Free Projec	Band 4 HCS	2018	06-Auq-	13-Auq-2018		
"0818564953	19-Auq-2018	10:00	17:30	Smoke Free Projec	Band 4 HCS					

We don't do paper timesheets, Manager have to approve/ lockdown the shifts on health roster.'

[emphasis added]

50. It is not clear why this response said they did not 'do' paper timesheets, when that was what the claimant had been using, albeit the response was sent over 15 months after the last shift in question.

51. In this email exchange, there was also a question did a [D] Chapman work a shift on 19/8/2018 on Wisteria ward? To which the reply was (page 147):

'I don't have an [D] Chapman on the bank or ESR'

52. The query should have related to the person who signed the claimant's timesheet, which was [D] Chadwick, not Chapman.

53. It should also be noted these questions were being raised in November 2019, when the shifts in question took place in (according to Counter Fraud) April to August 2018.

54. On the 16/10/2019 Mr Firn drafted Terms of Reference for the investigation into the claimant's timesheets (page 114). The Terms of Reference stated that the claimant would be interviewed, along with his line manager. It did not state that any other members of staff would be interviewed. Mr Firn then emailed the claimant and invited him to a meeting on 4/11/2019 (page 233). The letter did not say what the issue was and referred to:

'At this point the meeting is just to confirm the proceedings and to give you a letter outlining the nature of the allegations so that you are able to prepare a response.

I can tell you that these allegations relate to your Bank work with the Smoke Free Team not your substantive role. I have however informed your Manager Susana Pando that this is happening as per procedure'

55. The claimant provided a statement on 7/11/2018 (page 118). He said that he was told by Mr Firn at the meeting on 4/11/2018 that the timesheets were from the previous year. He said quite simply that he could not now remember exactly what had happened over a year earlier. Had the respondent done what it said it was going to do, which was to speak informally to the claimant in August 2018 (notwithstanding his parental leave), it may have been that the claimant could then have gone to the Wisteria ward and established whether or not he had worked on the 19/8/2018. Clearly the claimant was still working later in August as he enquired about working a shift on 29/8/2018 (page 119). Furthermore in the investigation meeting on 12/11/2019, the claimant said he went on paternity leave on 8/9/2018 (page 144 – note the date is recorded as 8/9/2019, however it is assumed this is an error and the year should read as 2018, relevant to the events being discussed).

56. There is in the bundle a draft undated unaddressed letter (page 117):

'I am writing to you with regards to a recent report that the Trust has received by NHS National Fraud Initiative regarding some alleged discrepancies in six timesheets you submitted for payment as part of your bank shifts during the period 3rd March 2018 and 19th August 2018. These allegations include:

- Fraudulent submission of timesheets (Fraud by False Representation).
- Dates not worked and in addition signed by a member of staff who left the employment of the Trust some months ago.

As per Trust Disciplinary Policy and Procedure; I have commissioned an internal investigation into this disciplinary matter to which an investigating officer has been appointed to conduct the investigation.

The investigator will write to you in the next few days to invite you for an initial meeting to which you are entitled to attend accompanied by recognised trade union/staffside representative or work colleague who is not likely to be interviewed as a witness.

Please note that any further information regarding the above will be discussed in the meetings.'

57. It does not appear that the respondent has ever put in writing to the claimant the dates of the timesheets which were in dispute, nor put to the claimant what the dispute was on a particular timesheet.
58. An investigation meeting took place on 12/11/2019 conducted by Ms Pointon. She was also confused as to the correct name of the person who had signed the claimant's timesheet. The exchange is recorded as:

'Ms Pointon - On one there have written name of person in charge but they signed it- different name - 31/3/18- **[D] Chadwick** signed for wisteria- ward-

Claimant - Don't know who she was- Submitted weekly or monthly- not sure.

Ms Pointon - Different timesheets- 19/8/18- shift on wisteria- **[D] Chapman**- manager she left May 18. When they contacted the ward- staff said they hadn't seen you on the ward that day

(page 145, emphasis added)

59. Ms Pointon produced an investigation report dated 10/12/2019 (page 154). The outcome was that disciplinary action was recommended, as there could have been a breach of the Fraud Act 2006. Between the 13/12/2019 and 17/12/2019 there were further emails exchanged between Ms Pointon and others, asking for further information to be included in the pack (pages 159-163).
60. The Tribunal was not provided with a copy of the letter inviting the claimant to a disciplinary hearing, although the notes of the meeting and the outcome were provided. The outcome of the meeting on 13/2/2020 was recorded in a letter of the same date (page 165). It is not clear when the claimant received the letter and he had not received by the 17/2/2020 when he appealed via email (page 171). The claimant was unaccompanied to the meeting and the respondent sought to criticise him for that. The claimant's explanation was startlingly simple. He thought that there was a misunderstanding over the timesheet and he thought that once it was explained, he would be exonerated.
61. Mr Firm upheld the allegations made against the claimant and summarily dismissed him for gross misconduct and the claimant was informed of this orally at the meeting. The claimant exercised his right of appeal on the 17/2/2020 sending an email to Mr Firm and he said that he had not yet received written notification of the outcome (page 171).

62. In internal email exchanges regarding setting up the appeal, the respondent took petty points against the claimant, for example, saying that he had not appealed to the correct person and instead had appealed to Mr Firn. At the time he sent his email on 17/2/2020, the claimant said that he had not received the written outcome of the disciplinary hearing and no doubt, not wishing to fall foul of any deadline or condition, he made it clear to Mr Firn that he wished to appeal. There is also Mr Firn's comment, which the claimant took exception to, in an email (page 174):

'Despite telling us at the hearing that he would not appeal he has done so.'

63. The claimant felt that this showed bias against him. Whether or not that is the case and irrespective of what he said at the disciplinary meeting (he may well have been in shock, having been summarily dismissed), that kind of pejorative comment is unhelpful and can only foster an individual's sense of injustice.

64. Emails regarding arrangements for the appeal went to and fro. Despite the claimant having appealed on the 17/2/2020 and despite Mr Firn's last day at the respondent being the end of February 2020 and the claimant sending a chasing email on the 18/3/2020 (page 187); the appeal was not promptly arranged. Of course, later in February and into March 2020 the severe impact of the coronavirus pandemic was being felt, particularly in the NHS. By the 16/3/2020 the Prime Minister had announced that all non-essential travel and contact should cease and on the 23/3/2020 he announced the first 'lock-down' in the UK.

65. Clearly, by this point in time, the respondent's staff had far more serious and pressing issues to attend to. As a result of that, the appeal was not scheduled until the 23/7/2020, despite the claimant sending a further chasing emails on 25/3/2020 (page 183) and 10/6/2020 (page 188).

66. The management case for the appeal hearing stated there were seven (not six) timesheets that were in issue (page 192):

Shift Date	Service	Reason
31 st March 2018	Wisteria Ward	Staff on Day Off
1 st April 2018	Seacole Ward	Staff on Day Off
24 th June 2018	Crocus Ward	Staff on long term sickness
22 nd July 2018	Ward 3	Staff member not known on ward, staff with similar name not on shift
29 th July 2018	Ward 3	Staff member not known on ward, staff with similar name not on shift
5 th August 2018	Ward 3	Staff member not known on ward, staff with similar name not on shift
19 th August 2018	Wisteria Ward	Staff member left trust

67. The first time the allegations were framed, was in the Counter Fraud report of August 2019. That report found (page 112):

'This resulted in the following six timesheets being found to contain false signatures:

1st April 2018 – Not manager's signature

24th June 2018 – Signatory not working that shift

22nd July 2018 – Signatory not known on the ward

29th July 2018 – Signatory not known on the ward

5th August 2018 – Signatory not known on the ward

19th August 2018 – Signatory left the Trust several months before'

68. The allegation in respect of the 31/3/2018 did not feature in the report from Counter Fraud. The Tribunal finds that it was not expressly put to the claimant in writing during the disciplinary process. It did not feature in the discussions during the disciplinary meeting.

69. The allegation in respect of the 1/4/2018 has changed from, (Counter Fraud) not manager's signature; to, staff on day off. The 24/6/2018 has changed from, signatory not working that shift; to, staff on long term sickness. It is concerning that the allegations have increased from six to seven and that the basis for them had changed.

70. A draft appeal outcome letter was dated 28/7/2018 (page 195) was included in the bundle. It cannot have been the final version as it contained 'track changes'. If it was the final version then it was extremely sloppy. Ms Spain upheld the decision to summarily dismiss the claimant.

71. After the respondent had given its evidence and at the start of the claimant's evidence, when asked if there was any supplemental evidence

which he wished to give, the claimant said he wished to refer to messages he had exchanged with his partner, on the days in question, which he said demonstrated he was at work. The claimant was not permitted to rely upon that evidence as the respondent had concluded its evidence. This is however an example of why the claimant needed to be given the full details of the allegation, including, in this case; which Ward Manager the respondent believed had signed the timesheets and details of why that person said they had not done so (for example if they were not at work on that date). It may have been that had the claimant been given the full details of the allegation, he could have obtained other evidence to show he was in fact at work.

The Law

Unfair dismissal

72. In respect of time limits, s. 111 of the Employment Rights Act 1996 (ERA) provides:

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

73. S. 94 of the Employment Rights Act 1996 (ERA) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s. 98. The claimant must show that he was dismissed by the respondent under s. 95, in this case however, the respondent admits that it dismissed the claimant (within section 95(1)(a) ERA). S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the respondent must show that it had a potentially fair reason for the dismissal within s.98(2).

s.98 *(1) 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 subsection (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.*

(2) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) relates to the conduct of the employee,*
- (c) is that the employee was redundant, or*
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

74. The second part of the test is that, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason:

- s.98 *(4) 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.*

75. In the case of British Home Stores v Burchell [1978] IRLR 379 EAT, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal:

- (1) the employer believed the employee to be guilty of misconduct;
- (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
- (3) at the time it held that belief, it had carried out as much

investigation as was reasonable.

76. The respondent bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on respondents to prove the reason for dismissal is not a heavy one. The respondent does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As it was put in Gilham and ors v Kent County Council (No.2) 1985 ICR 233:

“The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness”.

77. In the case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.
78. In the case of Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.
79. The Court of Appeal in London Ambulance NHS Trust v Small [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82 the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer’s shoes: the Tribunal must not ‘substitute its view’ for that of the employer.
80. The Employment Appeal Tribunal in Clark v Civil Aviation Authority [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. Even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: Fuller v.

Lloyd's Bank plc [1991] IRLR 336. A Tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust UKEAT/0081/16.

81. In A v B [2003] IRLR 405 Elias J at paragraphs 59 – 61 provided clear guidance on the standard of reasonableness in cases where serious allegations are being made against an individual:

'59. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.

60. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

61. The Tribunal appear to have considered that the fact that there was a real possibility that the Appellant would never work again in his chosen field was irrelevant to the standard of the investigation. In our view the Tribunal was strictly in error in saying that it has no significance. However, it seems to us that it is only one of the very many circumstances which go to the question of reasonableness.'

82. The Acas statutory Code of Practice on discipline and grievance procedures provides:

'Establish the facts of each case

5. It is important to carry out necessary investigations of potential disciplinary matters **without unreasonable delay to establish the**

facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.'

[emphasis added]

Conclusions

83. The respondent may well have believed initially there was some misconduct on the claimant's part. There was a legitimate query in respect of the timesheets. Originally, the respondent had reasonable grounds for its belief of potential misconduct and it was entitled to investigate that belief. What then transpired was unreasonable. The Project Manager was told to have an informal chat with the claimant and she did not do so. The conduct from that point became unreasonable and therefore unfair.
84. What took place next, amounted to a secret investigation of the claimant, by counter fraud. The claimant was not informed of the investigation and did not participate in it. Records were not kept and the process was unreasonably protracted. The 'interim' report was biased and it was predicated on making a finding against the claimant. There was a delay in informing the claimant of the allegations and no explanation for that. Furthermore, there was no explanation for the unacceptable lack of communication and written records (the missing letters as noted above, never informing the claimant of the suspension or allegations in writing, lack of outcome letters, etc).
85. An organisation such as the NHS, with all the resources it has, in such a serious and potentially career ending matter, should have done better.
86. As soon as the allegation surfaced, there was in effect a witch-hunt designed to find the claimant guilty (see the terms of reference of the counter fraud investigation). The outcome was pre-determined and was designed to find against the claimant. The whole investigation and disciplinary process was prejudiced against the claimant and the outcome was inevitable.
87. Taking into account the size and administrative resources of the respondent, the process was unreasonable and therefore unfair. The claimant was not treated equitably, the respondent was determined to find against him. For example, the respondent did not, or if it did it did not record, speak to the Ward Manager in question, such as Ms Chadwick. The respondent did not even appear to know who she was and referred to

her as Ms Chapman. As per A v B, the outcome of this investigation and disciplinary process was potentially career ending for the claimant; he was dismissed for fraud amounting to gross misconduct. As a result, it was highly unlikely he would work in the NHS again. There does not appear to have been any scrutiny at any point about the merits of this case. The failure of the respondent to take the jurisdiction point, is indicative of that. The respondent's decision to dismiss in these circumstances therefore fell outside of the range of reasonable responses open to a reasonable employer.

88. For those reasons, the claimant's dismissal was unfair.
89. In respect of wrongful dismissal, there was no gross misconduct on the claimant's part and therefore, he was entitled to notice pay. The wrongful dismissal claim also succeeds.
90. Irrespective of the shambolic process he has been put through, it is to the claimant's credit that he is seeking re-engagement. It is to be remembered that the primary remedies are reinstatement (this also remains open to the claimant) and re-engagement, even if they are rarely awarded.
91. In light of the requirements of s.112 ERA and to give the claimant time to consider his options, a remedy hearing will be listed. The parties are encouraged to resolve this matter without the need for further intervention by the Tribunal. It should be a simple matter to agree re-engagement terms if that is what the claimant seeks. He may also wish to seek legal advice. The conciliation services of Acas may also assist.
92. The relevant legislation is:
- section 112 The remedies: orders and compensation.*
- (1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.*
- (2) The tribunal shall—*
- (a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and*
- (b) ask him whether he wishes the tribunal to make such an order.*
- (3) If the complainant expresses such a wish, the tribunal may make an order under section 113.*

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to be paid by the employer to the employee.

section 113 The orders.

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115), as the tribunal may decide.

93. To conclude, the claimant's claims succeed and he is entitled to remedy, which the parties should be able to agree and failing which, will be determined at a remedy hearing.

Employment Judge Wright

5th November 2021