



EMPLOYMENT TRIBUNALS

Claimant: Miss S Taylor

Respondent: Borough Care Ltd

Heard at: Liverpool

On: 1 October 2021

Before: Employment Judge Ord

Representation:

Claimant: In person

Respondent: Mr J Searle (Counsel)

JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded.

Reasons

Claim and Issues

1. By a claim form dated 9 March 2021 the claimant brought a complaint of unfair dismissal.
2. The issues for the Tribunal were:
 - What was the reason for the claimant's dismissal?
 - If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? In particular:
 - Did the respondent genuinely believe that the claimant had committed the misconduct?
 - If so, was this based on reasonable grounds?
 - At the time the belief was formed, had the respondent carried out a reasonable investigation?

- Was the procedure within the band of reasonable responses?
- Did the respondent act reasonably in treating the misconduct as sufficient to dismiss the claimant?
- Was dismissal within the band of reasonable responses?

Evidence

3. The Tribunal had the following documents before it:
 - a. a 80 paged bundle,
 - b. witness statements from Selina Taylor (the claimant), Jayne Hennessey (the respondent's HR director), and Julie Sutton (the respondent's operations director),
 - c. a video of the party
4. It heard oral evidence on oath from:
 - a. Selina Taylor
 - b. Jayne Hennessey
 - c. Julie Sutton

Findings of Fact

5. The respondent is a not for profit company providing residential care for the elderly and vulnerable across 11 Care Homes in the Stockport Area of Greater Manchester.
6. The claimant commenced employment with the respondent in November 2005 and worked for them for about 15 years. She had a clean work record. She was based at the respondent's Bamford premises. Her job at the material time was Care Home Manager. She was in a position of authority within the respondent's Care Home and responsible for the safety of residents and staff.
7. From 18 November 2020 to 7 December 2020 the claimant was on annual leave. On Saturday 28 November she received a text message from Pat Renshaw (care assistant) inviting her to a birthday gathering that evening at Pat's house. The claimant took up the invitation and went to Pat's house where six other more junior members of staff were present, who she managed.
8. On Monday 30 November the respondent received an email about a party with a video attachment. It was the gathering that the claimant had attended. The video had been seen on social media and depicted staff dancing and frolicking in close contact with one another. The claimant was visible in it. It was clear from the video that the event was a party without social distancing and without PPE.
9. The claimant did not inform anyone in authority at the respondent company about the event at that stage. Nor did she arrange for any immediate COVID testing of the staff present upon their return to work. They were not tested until the time of their routine tests on the following Tuesday.

Investigatory meeting

10. On second December the claimant picked up a voicemail on her phone from Anna Ward from the respondent's HR department, asking her to make contact with her. She returned to work, as planned, on 7 December and she was told that an investigation was being conducted by Anna Ward and Mark Dale into an allegation that the claimant had attended a party under lockdown.
11. On 8 December an investigatory meeting took place with Anna Ward as the investigating officer. The meeting notes record that the claimant was questioned about why she had not tried to stop the party. Her response was that it did not enter her head. She said she had been told it would be a couple of people having a curry.
12. The claimant named the other six staff people who attended and confirmed that they were not wearing masks. Regarding social distancing she said it was a big three storey house. She went on to say that she only stayed a short time and that she was spying on them. She admitted that she had never thought about the Government COVID rules but knew what they were, and that the staff present were in her work bubble.
13. When questioned about possibility of staff contracting COVID and delay in testing them, she admitted that she had been stupid and was sorry. When asked about why she did not stop the party or tell Pat it could not go ahead, she said she did not think she could do that. She was shown the video.
14. During the pandemic the respondent had infection control measures in place. An event such as this was in breach of these control practices.

Disciplinary meeting

15. On 10 December the claimant received an invitation to a disciplinary meeting. The allegation was broadly that she had attended a staff party at a colleague's house on Saturday 28 November 2020, which was in breach of Government COVID-19 guidelines and potentially brought the company into disrepute.
16. The disciplinary meeting took place on 17 December. It was chaired by Nerys Carpenter, the respondent's Area Manager, who was assisted by Jayne Hennessy, the HR Director.
17. The minutes of the meeting record that the claimant knew she was breaking Government guidelines but that she went to check that there were no other people (not from Bamford) there. She was asked why she did not contact HR about it and why she stayed. Her answer was that she was only there a short time. She said she attended because her curiosity got the better of her, although she did question whether Pat should have been doing it.
18. The claimant spoke again of the work bubble and only people from the care home being there. With respect to not arranging testing staff on the Sunday or Monday when they came back into work, she said she never

thought of that but knew they would be tested on the Tuesday. She admitted that she was scared to death about any of them testing positive.

19. When asked whether she wore PPE at the party, she said she took her mask off when having a drink and then put it back on. She said that others also took their masks off to drink. It is clear from the video that no-one was wearing masks. There were no masks in sight nor any other PPE. The video shows that participants were in close contact with each other and there was no evidence of social distancing.
20. On 22 December the claimant received a dismissal letter ending her employment with the respondent with immediate effect but with notice pay in lieu of notice. The reasons given were that she had 1) seriously breached the respondent's trust and confidence in her by breaking Government COVID lockdown guidelines and attending a house party without PPE; 2) potentially brought the company into disrepute, and 3) failed to stop the party and potentially endorsed others' attendance by her own presence.

Appeal

21. The claimant appealed. The appeal meeting took place on 12 January 2021 and was chaired by Julie Sutton, the Operations Director, who was assisted by Jaqueline Percival, an HR Advisor. It proceeded by way of a review rather than a rehearing.
22. The claimant's good work record and length of service was noted and the fact that the other staff had not been dismissed. The claimant also raised an issue about other managers' having gatherings and other people getting together, but she did not want to give any details. She explained that the video was on a private snap chat and was not widely publicised.
23. With regard to the PPE, the claimant again said she took her mask off to drink and put it back on again afterwards. She admitted that the party put residents at risk but said they were put at risk every day anyway.
24. The appeal not upheld and the outcome letter of 14 January 2021 (wrongly dated 14.1.20) confirmed this.

Other evidence

25. In her statement and at the Tribunal hearing, the claimant said that she went to the party to support Pat because of Pat's mental health issues. However, there had been no mention of this during any of the disciplinary stages, despite there being opportunity for it to have been raised.
26. With respect to checking up on her colleagues, there was no evidence of this as she did not report back to the respondent. Also she had admitted that her curiosity got the better of her.

The Law

27. Section 98 of ERA provides, so far as is relevant:

- (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)
 - b) Relates to the conduct of the employee

- 98(4) whether the dismissal is fair or unfair
- (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.

28. The ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 applies to the procedure followed.

29. The **main caselaw** that the tribunal took account of is set out below.

30. It was held in ***Abernethy v Mott, Hay & Anderson*** [1974] ICR 323 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee."

31. ***British Home Stores Ltd. Burchell*** [1980] ICR 303 held that "First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

32. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, EAT.

33. The test to be applied in determining reasonableness is whether the employer's decision to dismiss fell within the range of reasonable responses available to it – (1) ***Post Office v Foley*** (2) ***HSBC Bank plc v Madden*** [2000] ICR 1283, CA.

34. In *J Sainsbury plc v. Hitt* [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.
35. In *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854 it was held that where dismissal is for gross misconduct, the tribunal has to be satisfied that the employer acted reasonably both in characterising the conduct as gross misconduct, and then in deciding that dismissal was the appropriate punishment.

Conclusion

What was the reason for the claimant's dismissal? The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

36. Most of the facts of this case are not in dispute. In simple terms, the claimant attended a party along with six other members of more junior staff who she managed. This was a breach of the Government's Covid 19 lockdown restrictions and a breach of the respondents infection control practices at that time. The respondent had a genuine belief that this amounted to misconduct. Whilst there was some suggestion of a breach of trust and confidence, this is often part of conduct dismissals. In these circumstances I find that conduct was the reason for dismissal.

If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant?

37. The claimant breached Government guidelines and the respondent's infection control practices without good reason. Furthermore, her attendance at the party, even if only for a short while, had given support to other more junior staff in their breaches. Participants had intermingled in close proximity to one another and no PPE had been worn, which exacerbated the situation and increased the risk. It was of little consequence to the potential for transmission that it was a big three storey house.
38. The claimant ought to have been setting an example to more junior staff and not participating herself. She ought to have tried to stop the party happening in the circumstances. She did not report the event to the respondent and she did not suggest COVID testing for the relevant staff immediately upon their return to work on the Sunday and Monday. Some of those staff could have been COVID carriers and the claimant recognised this when she admitted she was scared that one or more might test positive.
39. The party consequently put the lives of vulnerable elderly people at unnecessary risk, and the claimant's attitude, in saying that they were at risk anyway, was irresponsible and unbecoming of a person in her position of seniority and authority.

40. Moreover, the footage of the party was posted on social media. Whether it was done privately or not, there was the potential for it to be shared more widely, thereby risking the respondent being brought into disrepute.
41. The respondent carried out a reasonable and proportionate investigation and acted in a procedurally fair manner. Although there was a difference in how the claimant and the more junior staff were disciplined, the respondent justified this according to the respective seniority and authority levels of the people concerned.
42. The respondent took the claimant's clean disciplinary record and length of service into account, but this was insufficient to overcome the seriousness of her conduct. This is understandable and reasonable in light of the pandemic and the disregard the claimant demonstrated for the risk to elderly residents' lives.
43. The respondent acted within the range of reasonable responses and the misconduct was sufficient to dismiss the claimant. Consequently, the claimant's complaint of unfair dismissal is not well-founded.

Employment Judge Liz Ord

Date 13 December 2021

JUDGMENT SENT TO THE PARTIES ON

22 December 2021

FOR THE TRIBUNAL OFFICE

Notes

1. Neither party objected to the hearing taking place on a remote video platform.