EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Faheem Amir	**v**	STM Group UK Ltd

Heard at: Watford **On**: 8 April 2022

Before: Employment Judge G D Davison

Appearances

For the Claimant: Mr E K Mahmood, Counsel
For the Respondent: Mr G Young, Head of HR

JUDGMENT having been sent to the parties on 12 April 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. At the conclusion of submissions, the Tribunal delivered its judgment. Mr G Young, representing the Respondent, asked for written reasons.

2. By a claim form presented to the Tribunal on 11 May 2021, the Claimant made a claim of unfair dismissal. He was claiming a redundancy payment, notice pay, holiday pay, arrears of pay and 'other payments' [6]. These arise out of his employment with the Respondent as a security officer.

3. There was initially a claim of discrimination, but this was withdrawn by the Claimant prior to the hearing.

4. The Respondent presented its response to the claim on 11 June 2021.

The issues

5. The issues were clarified at the hearing:

Unfair dismissal

5.1 What was the reason for the dismissal? The Respondent asserts that it was a reason relating to conduct which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996.

5.2 Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?

5.3 Has there been a reasonable investigation?

5.4 Following that investigation, did the Respondent hold a reasonable belief that the Claimant committed the acts complained of?

5.5 Was dismissal a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer.

5.6 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?

5.7 If the dismissal was procedurally unfair, can the Respondent prove that if it had adopted a fair procedure, the Claimant would have been fairly dismissed in any event, and/or to what extent and when?

The evidence

6. The Respondent called Mr Kuldeep Chumber who is employed by the Respondent as an 'Operations Manager.' He had ordered the investigation into the Claimant's conduct and presided over the disciplinary hearing. Following this he dismissed the Claimant for gross misconduct. The Claimant's appeal against this decision was heard by the Respondent's second witness Mr Leonard Murraine, a Regional Manager for the Respondent, he upheld the decision to dismiss.

7. The claimant gave evidence.

8. In addition to the oral evidence, the parties adduced a bundle of documents comprising of 176 pages. The statements of all three witnesses had been provided in addition to this bundle. During the course of the hearing it transpired the Claimant's representative did not have a paginated copy of the bundle, but did have all the documents contained therein. No further documents were produced during the course of the hearing. (numbers in [] refer to the paginated bundle of documents as produced to the Tribunal.)

Findings of fact

9. The Claimant worked for the Respondent from the 15 September 2015 until his dismissal on the 8 February 2021. He worked as a security officer.

Although his contract of employment was for 20 hours work a week, he worked on average 30 – 32 hours a week. His gross monthly salary was £1250.

10. The Claimant had an 'unblemished record' since joining the company [110].

11. On 1 January 2021 another colleague caught the coronavirus. Due to the government guidelines and the lack of contact between the Claimant and this colleague the Claimant was not notified by the Respondent that a 'close contact' had tested positive and that he needed to take a test or isolate. That employee did not contact the Claimant and the Claimant was not notified by NHS Track and Trace that he needed to either test or isolate.

12. The Claimant's work is public facing and he was a 'key' worker. He has a wife and a young child. Shortly before the 14 January 2021 the Claimant heard that other employees of the Respondent had contracted Covid-19.

13. As a result of these three factors, him being a key worker, having a young child at home who he wished to protect and having heard that there had been cases of corona virus amongst staff of the Respondent, he decided to take a test.

14. He attended a test centre on the 14 January 2021. He had no symptoms of Covid-19 when he attended. He was asked at the centre whether he had any Covid symptoms and he replied in the negative. He undertook the test and went to work.

15. On the 15 January, before attending work he was notified that his test had been positive. He immediately notified his employer and other employees he had been working with.

<u>The investigation</u>

16. Later the same day Mr K Chumber called the Claimant to check on his well being and ascertain the chain of events. Having found that the Claimant had attended work after having taken a Covid-19 test Mr Chumber instructed an operation supervisor (Mr B Dunia) to conduct an investigation.

<u>The disciplinary hearing</u>

17. On 27 January 2021 a Microsoft Teams meeting took place between the Claimant, Mr K Chumber and Ms Emma Bonici (HR Representative of the Respondent).

18. After the hearing Mr K Chumber dismissed the Claimant '*with immediate effect for gross misconduct due to our confidence and trust in you has been undermined for reasons of negligence, and bringing the company into disrepute….'* (Statement of Mr K Chumber)

The claimant's appeal

19. On 9 February 2021 an appeal was lodged. This was followed by a letter dated 10 February 2021 [117], inviting the Claimant to attend an appeal hearing, again over Microsoft Teams, on 16 February 2021. The appeal hearing was conducted by the Regional Manager Mr L Murraine. Ms E Bonici was again present to take notes.

20. Mr L Murraine found no '*mitigating circumstances'* and believed the Claimant had breached Government guidelines and placed members of staff and the public at risk by attending work having taken a Covid-19 test. He therefore upheld the dismissal.

Submissions

21. I have taken into account the detailed oral submissions made by the Representatives. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. I took into account the authorities I was referred to, as well as the ACAS Code of Practice and Guide on grievance and discipline.

The law

22. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and 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 employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

23. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

    23.1 First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

23.2 Second whether that genuine belief was based on reasonable grounds,

23.3 Third, whether a reasonable investigation had been carried out,

24. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

25. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

26. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

27. I must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for me.

28. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

29. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

30. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

31. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

32. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was in an epileptic seizure by sitting

astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, the comment made. The employment tribunal found by a majority that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677 in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

33. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

34. In the case of Thompson v Alloa Motor Co Ltd [1983] IRLR 403, the EAT, Lord McDonald, held that conduct within the meaning of section 98(2)b means "actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship", paragraph 5.

35. Evidence as to decisions made by an employer in "truly parallel circumstances" may be sufficient to support an argument, in a particular case, that it is not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate. "Employment tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar to afford an adequate basis for argument.", Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 EAT.

Conclusions

Unfair dismissal

36. In relation to what was the reason for the Claimant's dismissal I find the Respondent dismissed the Claimant for his failure to self-isolate immediately upon taking a Covid-19 test. It is the Respondent's contention that this failure was in breach of government guidance. As this relates to the Claimant's conduct it is a potentially fair reason for dismissal.

37. However, I find the Respondent did not have reasonable grounds. The Claimant has been consistent and clear from the outset of the investigation that he had no symptoms when he took the Covid-19 test. He took the test as a precautionary measure due to the three factors highlighted above. The Government Guidance applicable at the time, which was updated on 2 December 2020, and is extracted in the Claimant's witness statement, reads as follows:

> 'There is no legal duty to self-isolate while waiting for a test result…..' and
>
> 'A worker does not need to isolate whilst awaiting their result (of a test) unless they have COVID- 19 symptoms.'

38. I find there was no duty imposed by Government Guidelines at the time of the Claimant's test that required him to isolate pending the outcome of the test.

39. The Respondent had relied on an email of 4 January 2021 [94] to establish there was such a duty. However, this email starts by stating *'If you have any of the main symptoms of coronavirus (COVID-19)….'* I find this was addressed to employees who were symptomatic. The rest of the email appears to be cut and paste from the Government Guidance and quotes '*Main Symptoms'* and '*What to do if you have symptoms.*' Whilst this guidance was accurate for those with symptoms, it does not address the Claimant's position.

40. For the above reasons I did not find the investigation to be reasonable. Whilst I accept at the time the Government and companies were responding to the pandemic and what procedures were in placed changed frequently, I find a reasonable investigation would have unearthed the difference between the guidance for those with and those without symptoms. I find this failure in the investigation to be unreasonable.

41. Was dismissal within the range of reasonable responses? I do not put myself in the place of the reasonable employer. I find an employer possessed with the same information that this employer had may conclude there was no evidence that the Claimant had engaged in any wrongdoing. Dismissal was therefore outside of the range of reasonable responses. The Claimant had followed Government guidance. The Respondent raised no concerns or issues with the manner the Claimant handled the reporting of his positive test outcome on the 15 January or any of his actions post this date.

42. It follows from my conclusions that the claim for unfair dismissal is well founded. A remedy hearing has been set down for the 30 May 2022 before me.

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Employment Judge G D Davison
Date: 12 April 2022

Sent to the parties on:……...

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For the Tribunal Office