



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Rushton

Respondent: OC Cleaning Solutions Limited

Heard at: Manchester (by CVP)

On: 4 April 2022

Before: Tribunal Judge Callan

REPRESENTATION:

Claimant: Not in attendance

Respondent: Mr. M. White, Managing Director

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was employed as a cleaner by the respondent from 1 May 2015 to 19 September 2019.
2. The complaint of unfair dismissal is not well-founded. This means the respondent fairly dismissed the claimant.
3. The claimant's complaint that the respondent made an unauthorised deduction from her wages was not advanced but in any event would not be upheld. This means no wages are owed to the claimant.

REASONS

Introduction

1. The case had been listed previously on 23 March 2020 but postponed due to COVID.
2. The case was relisted for final hearing on 30 October 2020 but postponed pending consideration as to whether a preliminary hearing was required.

3. On 19 January 2021 the case was listed for a preliminary hearing on the issue of whether the claimant had the requisite service to bring a complaint of unfair dismissal. That issue was conceded in the claimant's favour by the respondent.

4. The hearing today was the second occasion the hearing had been listed this year and at which the claimant was not in attendance. On the first occasion, on 19 January 2022, the claimant had been admitted into hospital and requested an adjournment. The claimant produced medical evidence from the hospital on 10 February 2022 which confirmed her admission into hospital.

5. Attempts were made to contact the claimant by telephone and email, but no contact was made. I was provided with an electronic bundle of 334 pages and subsequently the respondent's disciplinary policy.

6. Having regard to rule 47 of the Tribunal Rules of Procedure 2013 I decided to proceed to hear the matter in the absence of the claimant. In doing so I considered the information available to me and that the claimant had not contacted the Tribunal, which she had done on the previous occasion.

Issues

7. The issues to be determined were whether the dismissal by reason of conduct was fair or unfair:

- (1) Did the respondent genuinely believe in that misconduct?
- (2) Did it have reasonable grounds for that belief?
- (3) Was there a reasonable investigation into the misconduct?
- (4) Were the procedures adopted fair?
- (5) Was the dismissal decision one which a reasonable employer could have reached?
- (6) If the dismissal was unfair, what is the appropriate remedy?

Evidence

8. I heard evidence from Mr Mark White, Managing Director, and considered the documentary evidence referred to in the bundle provided which included two witness statements from the claimant (pages 3-4 and 15-16).

Relevant Legal Framework

9. Section 98(4) of the Employment Rights Act 1996 provides as follows:

“Where the employer has fulfilled the requirement 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."

The Facts

10. The claimant was a cleaner employed by the respondent for 15 hours per week on a contract won by the respondent on 13 July 2018. The claimant was TUPE transferred into the respondent's employment and accordingly had continuous employment from 1 May 2015. She was dismissed on 19 September 2019.

11. The claimant's terms and conditions were included in the bundle at pages 17-30. Her monthly pay was £463.94 net.

12. The respondent's disciplinary procedure was provided. At paragraph 1.15 acts of gross misconduct included serious insubordination or wilful refusal to carry out reasonable management instructions.

13. There was a background of difficulty between the claimant and some of her colleagues including her supervisor, Lynn Clark, and three of her co-workers: Lisa, Meghan and Kara. This caused doubt amongst some of the staff as to what the duties of each were, as the claimant attempted to enter into "negotiations" as to what her duties were when the respondent's view was that they were clear.

14. By 26 July 2019 a total of ten points were raised in the disciplinary hearing on that date (see pages 31-32). They were mainly allegations of aggression towards her colleagues and failure to co-operate with her managers. Mark White chaired that meeting. The decision was to issue the claimant with a final written warning active for one year (pages 37-38).

15. The claimant appealed against the final written warning and that was heard on 23 August 2019 by Fiona Smithson, an external HR consultant. She upheld the final written warning for the reasons set out in her letter of 28 August 2019 (pages 44-45). In short, she upheld incidents of aggression against Kara and Meghan and the refusal to comply with a reasonable management instruction to meet with Mark White and Ben Summerfield. The claimant also had covertly recorded meetings in breach of the respondent's handbook at sections 17.6.10 and 17.6.11.

16. On 16 September 2019 the claimant was suspended by Mark White due to:

- (1) Failure to follow a reasonable management instruction to remove all bin bags from Utiligroup offices to the outside refuse areas; and
- (2) On 3 September 2019 inappropriate behaviour towards Mark White in that she was rude and would not cooperate fully in answering his

questions. The claimant was also late to work and did not clock in on time (letter at pages 46-47).

17. The claimant was provided with notes from an investigation (pages 48-49). The claimant provided a letter answering the allegations dated 17 September 2019 (page 51-52) in which she challenged the respondent's version of events.

18. A disciplinary hearing took place on 18 September 2019 chaired by Benjamin Summerfield, Services Manager. His decision was to dismiss the claimant for gross misconduct having found her explanations unacceptable (pages 52-53).

19. The claimant appealed against her dismissal and that was heard by an independent HR consultant (Debbie Sherrington). Ms Sherrington also heard the claimant's grievance concerning her treatment by the respondent. The appeal and grievance were heard on 2 October 2019. In respect of all the meetings, the claimant was invited to be accompanied by a colleague.

20. One or two of the meetings were on rather short notice (circa two days) but that did not render the procedure unfair as the respondent was open to adjourning if necessary (as was apparent from the notes during the dismissal hearing). In any event the defects, such as they were, were corrected at the appeal held on 2 October 2019, notice of which was given on 24 September 2019 (pages 54-55), and the issues were well-known to the claimant.

21. The claimant's appeal was dismissed for the reasons set out at pages 66-67. The decision maker (Debbie Sherrington) gave reasons which indicated she had reviewed the evidence and reached her conclusions which were set out in her letter. She noted that, in respect of the first allegation, the claimant refused to give her the name of the member of staff in order to allow her to investigate the matter. In respect of other matters, Ms Sherrington noted that there was witness evidence that the claimant was aggressive and unco-operative with Mark White.

Discussion and Conclusions

22. I accepted that the respondent had shown a potentially fair reason for the dismissal (conduct) and that conduct fell within the respondent's disciplinary rules. That being so, the question arose as to whether the dismissal was fair or unfair.

23. The question of fairness is whether the dismissal fell within the range of reasonable responses a reasonable employer might apply in the circumstances, and whether the dismissal was procedurally fair. I cannot substitute my views for those of the respondent. It is immaterial whether I would have decided to dismiss the claimant in these circumstances.

24. Turning to the fairness under section 98(4) and taking into account the size of the employer and its resources, I am satisfied the dismissal is procedurally fair. Such matters as to shorter notice were not such as to impact on that fairness, and the appeal remedied any residual unfairness that may have otherwise existed.

25. The reason for the dismissal was the claimant's lack of cooperation amounting to aggression at times, and this fell within the definition of gross misconduct within the respondent's rules. There was a current final written warning for similar misconduct (see paragraph 14 above) against which the claimant had unsuccessfully appealed. There was nothing in the evidence to suggest that the final written warning had been inappropriate or given in bad faith (**Stein v Associated Dairies** [1982] IRLR 447). Given that there was a final written warning which was still active for similar misconduct, I find that dismissal fell within the range of reasonable responses and was therefore fair.

26. The claimant's claim of unfair dismissal is therefore dismissed.

27. There was some ambiguity as to whether an unlawful deduction claim was outstanding. The respondent produced a document showing that the matter had been dealt with in or about November 2019, and the claimant did not raise the issue in her statements at pages 3-4 and pages 15-16.

Tribunal Judge Callan sitting as an Employment Judge

Date: 7 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: 28 April 2022

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