EMPLOYMENT TRIBUNALS

Claimant: Mr T Kuligowski

Respondent: Smurfit Kappa UK Limited

Heard at: Cambridge Employment Tribunal
On: 7 and 8 April 2022

Before: Employment Judge K Welch (sitting alone)

Representation
Claimant: In person
Mr J Edgley, non-legally qualified representative
Ms A Wiseman, Polish Interpreter

Respondent: Mr T Welch, Counsel

JUDGMENT having been sent to the parties on 29 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS FOR THE JUDGMENT

1. This is a claim brought by the claimant against his former employer for unfair dismissal. Whilst the response had initially dealt with a breach of contract claim for notice pay, the respondent contended that there was no such claim within the claim form. This was accepted by the claimant's representative, and I considered whether an application to amend should be allowed. As the claim form made no reference whatsoever to notice pay, and having heard representations from both parties, it was agreed, and I therefore decided, that the only claim for the Tribunal to decide was that of unfair dismissal.

Background/ Hearing

2. The hearing was held in person. The claimant was represented by Mr Edgley, a retired Civil Servant, and was assisted by a Polish interpreter.

3. I had been provided with an agreed electronic bundle of documents, and page numbers referred to in this Judgment refer to page numbers within that bundle.

4. I was also provided with witness statements for witnesses attending the Tribunal hearing. The claimant had sent a supplemental statement to the respondent earlier in the week before the hearing, having previously exchanged a witness statement in accordance with the case management orders. The respondent objected to the statement being adduced. Having heard from both parties, I exercised my discretion to allow the claimant's second statement to stand as his evidence in chief, and confirmed that I would afford the respondent the opportunity to ask its own witnesses supplementary questions should it wish to do so. The witnesses who gave evidence were:

    a. Mr D Bushnell, the respondent's H&S Manager;

    b. Mr G Coe, Investigating officer;

    c. Mr D Wyllie, Dismissing officer;

    d. Mr J McAllister, Appeal officer; and

    e. The Claimant.

5. I gave the parties an additional 45 minutes, in order that the respondent could take instructions on the claimant's second statement.

6. The witness statements stood as their evidence in chief, and the parties were given the opportunity to ask supplemental questions if considered necessary and relevant. The witnesses were cross-examined and also answered any questions I had.

7. Issues had not been agreed between the parties, but were discussed at the start of the hearing and were agreed as follows:

LIST OF ISSUES

Unfair dismissal claim

8. What was the reason or principal reason for dismissal? The respondent says primarily that the reason was conduct or, alternatively, some other substantial reason ('SOSR'). The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

9. If the reason is misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    a. there were reasonable grounds for that belief;

    b. at the time the belief was formed the respondent had carried out a reasonable investigation;

    c. the respondent otherwise acted in a procedurally fair manner;

    d. dismissal was within the range of reasonable responses.

Findings of fact

10. The Claimant was employed by the respondent as an operative, initially through an agency from some point in 2015; his continuous service as an employee of the

respondent commenced on 1 June 2016 and continued until his summary dismissal on 25 January 2021.

11. The respondent is a manufacturer of paper for the corrugated packaging industry, which provides packaging for food and drink. The March site, at which the claimant worked, had approximately 200 employees.

12. The respondent has a disciplinary procedure [page 31 - 36] which provided in part at page 32:

"*In the event of a disciplinary hearing taking place the Company will:…*

e) provide to the employee all relevant information (which should include statements taken from any fellow employees or other persons that the Company intends to rely upon against the employee) not less than two working days in advance of the hearing." It goes on to state under the heading 'the disciplinary hearing' that, "The employee will be entitled to be given a full explanation of the case against him/her and be informed of the content of any statements provided by witnesses."

13. In March 2020, the initial impact of Covid19 resulted in the Country's first national lockdown. During this time, as the respondent prepared packaging for the food and drink industry, its employees were classed as key workers which meant that they were entitled to attend work despite the national lockdown.

14. The respondent was clearly concerned about how an outbreak of Covid19 could affect its employees and its business. It introduced a number of safety measures in order to try and ensure that an outbreak of Covid 19 did not occur.

15. Posters were placed around the March site, on notice boards, in the canteen and in the information hub [P45]. These provided as the first safety measure:

"*Covid 19 – Safety Measures*

If you [are] have any symptoms of Covid 19 i.e. high temperature (above 37.8 deg), new

persistent cough, new loss of taste or smell

DO NOT attend the workplace -

self isolate and book a test"

16. The notice went on to confirm, what the claimant accepted he knew to be the case, namely that, "*Full company sick pay will be paid to all colleagues required to self-isolate for any of the above reasons*." This included where people were isolating due to having Covid 19 symptoms, even if they were not themselves ill.

17. Additionally, a letter was sent from the CEO of the respondent to all employees on 2 October 2020 enclosing a copy of the site safety measures. [P46 – 47]. The letter included a paragraph expressing thanks to the colleagues who remained working on site and which went on to say, that it wished to "*remind you of the importance of understanding and adhering to all of the site safety measures in place. They are in place to ensure your health is protected. Enclosed is a reminder of the key points for your information*."

18. The claimant gave evidence that he could not recall receiving this letter from the CEO and noted that his home address was incorrect and that this may explain why he had not received it. The respondent contended that, as the claimant had received a Christmas hamper sent to the same address, it was likely that he had received this letter. I make no such finding.

19. However, during cross examination, the claimant did confirm that he was aware that the respondent had safety measures and health and safety rules in place relating to Covid 19. It was therefore clear to me that the claimant had knowledge of the respondent's health and safety rules relating to the need to stay at home should he have any of the Covid symptoms outlined in the posters at the relevant time. I also accept the respondent's evidence that the media at this time were publicising the loss of taste and smell as one of the major symptoms.

20. The claimant had signed up to the NHS app since he was concerned over the health of his family and colleagues and wished to avoid the transmission of the disease, which at the time, with the lack of vaccines, was incredibly serious. The March site had in fact, had an employee who had been hospitalised with Covid 19 and placed in an induced coma and therefore everyone was aware of the serious implications of the disease at this time.

21. On 11 November 2020, the claimant received a text in Polish from his NHS test and trace app on his phone. This informed the claimant that he had been in proximity to someone who had tested positive for Covid 19. He showed this message to his line manager who, having considered this, instructed the claimant to continue working. It was accepted by both parties that this message did not tell the claimant to isolate and that the claimant had been told to continue working.

22. On 18 November 2020, the claimant received another text from the NHS test and trace app which told him that he must isolate for eight days. He again showed this to his line manager, SS, who immediately sent him home.

23. The claimant took a PCR test (lateral flow tests not being available at that time) and was surprised when he received a positive result. He informed his employer who told him not to return to work until 30 November 2020. The claimant had annual leave booked and therefore did not return until 6 December 2020.

24. On 19 November 2020, the claimant completed a Covid questionnaire, referred to as a tracing information form over the telephone with Mr Bushnell, the Health and Safety manager at the March site. The standard form was completed by Mr Bushnell [pages 49 to 53] following answers given by the claimant during their conversation. The claimant gave evidence that he felt pressured during this telephone call, but it appeared to me that this had been a general conversation between Mr Bushnell and the claimant, in which the claimant was asked the questions on the form. During this conversation, as

noted in the form, the claimant explained that he had, "*developed a loss of taste & smell on Monday 16th, but after speaking to his sister who had contracted Covid herself (lives in Poland) who had absolutely NO smell or taste, conceded his condition was more flu like because it was a deterioration not a complete loss. He did not inform any anybody of the situation.*"

25. Mr Bushnell was concerned over the answers given by the claimant, since it revealed that he had been experiencing one of the three main symptoms of Covid 19 at that time, had attended work for three days despite this and had not mentioned this to any of his managers.

26. The claimant's evidence was that he had experienced no high temperature (his temperature was taken every day when he attended work), and that he sometimes suffered with a loss of smell and taste due to his asthma.

27. There was a dispute of evidence over what was actually said by the claimant during the telephone conversation between him and Mr Bushnell when the tracing information form was completed. The claimant's evidence was that he felt pressured during the conversation and that if he had mentioned any partial loss of taste or smell, he had not related this to Covid. He admitted in cross-examination that he might have said something like that to Mr Bushnell. However, his evidence was that he never used the words "flu like". Mr Bushnell's evidence was that his notes of the telephone conversation, as contained in the tracing information form, were a true reflection of what had been said. On balance, I prefer the evidence of Mr Bushnell since , in my view, there was no reason for him to record anything other than what the claimant had said in the form and this was a relatively contemporaneous note of their conversation.

28. Further, I do not accept the claimant's assertion that he was being used as a scapegoat due to the company's failings in regards to Covid. Also, there were clearly a number of things which the claimant admitted he had said during the telephone conversation which

were included on the completed form (including talking to his sister who lived in Poland and who had contracted Covid herself). I do not accept that Mr Bushnell's credibility was adversely affected by the mistake in his statement where he confirmed that the site had not had any positive Covid cases during the period March to October 2020, when in fact, they had. That was accepted as being a mistake.

29. The claimant returned to work on 6 December 2020. The claimant was invited to an investigation meeting with Mr Coe on the 15 December 2020 concerning the events from 11 to 19 November 2020. During the meeting, the claimant was asked about the tracing information he had supplied to Mr Bushnell and in particular his, "*comment regarding a loss of taste and smell on 16th November*" [minutes P54 – 55]. The claimant was noted as saying during this meeting, "*not sure? I thought I had a normal cold, reason for test was because I wanted to return to work as soon as possible*." In the claimant's second statement, which stood as his evidence in chief, the claimant confirmed that he cannot dispute any of the report of that meeting as he was totally unprepared for the line of questioning and the aims of it.

30. Mr Coe took brief statements from three witnesses, namely, Mr Bushnell [page 56] which confirmed his discussion with the claimant to complete the tracing information form, JA, the claimant's line manager who instructed him to continue working on 11 November 2020 which was not disputed [page 57] and SS [page 58] concerning the claimant informing him that the NHS track and trace had told him to self-isolate, which again was not disputed. These statements were not disclosed to the claimant prior to the disciplinary hearing and/or appeal.

31. A further investigation meeting took place between the claimant and Mr Coe on 5 January 2021 [minutes at P59 to 60]. During the second meeting, the claimant is noted as saying, "*I wasn't sure how I felt as I didn't completely lose my sense of taste, I thought I had a cold. How can you measure loss of taste or smell, my sister couldn't taste*

anything when I spoke with her and I wasn't like that." The claimant's second statement again does not dispute or deny any of the comments as reported, but suggests that due to the pressure of the situation, his grasp of English had faltered.

32. The claimant was invited to attend a disciplinary hearing by letter dated 13 January 2021 [P61]. The allegation was that he, "*failed to adhere to the health and safety procedures in regards to Covid-19 guidelines. It is alleged that [he] attended site three days whilst [he] had symptoms of Covid-19 (Loss of loss of taste and smell)*."

33. The letter enclosed the investigation meeting notes from the two meetings with the claimant dated 15 December 2020 and 5 January 2021, the letter from the CEO together with the poster with the Covid 19 safety measures, the tracing information form and the respondent's disciplinary policy. The claimant was given the right to be accompanied by either a work colleague or trade union representative.

34. The disciplinary hearing took place on 25 January 2021 before Mr Wyllie, operations director for the March site [minutes P63 – 65]. The claimant prepared a statement [P62] which was read out during the disciplinary hearing. This statement stated that, "*At no point did I suggest, that my symptoms were flu like. Neither did I say that, I lost my sense of taste and smell*." It went on to say that the claimant's temperature was normal during the whole period, that he had no cough and that he did not really know if his sense of taste and smell was different and that, "*maybe [his] words did not make this clear. But I did not say I had lost either*."

35. During the disciplinary hearing, the claimant confirmed that asthma could have resulted in him losing his smell and taste, something which had not been stated previously. At the end of the hearing, My Wyllie confirmed the claimant's summary dismissal and stated to him, "*I am not saying you did this deliberately but you did put everyone at risk in the business. This is negligence and very serious*."

36. An outcome letter confirming the claimant's dismissal was sent to him [P66 – 67]. This confirmed the reasons for the claimant's dismissal. It explained that Mr Wyllie believed the claimant had stated and acknowledged what the symptoms of Covid were, that he was negligent in attending site whilst having Covid symptoms and had put his colleagues and the community at risk by attending work. The letter also gave the claimant the right of appeal.

37. The claimant appealed by letter dated 28 January 2021 [P68]. This stated that he considered that the decision was too severe considering his length of service and good record. He had not acted recklessly. The documents that the respondent had where he "*admitted to a loss of taste or smell were inaccurate, maybe due to a misinterpretation of [his] speech at the time*". And that his temperature tests had been ignored and there was a predetermined decision to dismiss.

38. Mr McAllister was appointed to hear the claimant's appeal, which he did on 2 March 2021. [The minutes from the appeal appear at pages 70 to 74]. An appeal outcome letter was sent to the claimant on 4 March 2021 [P75 – 76]. The decision taken by Mr McAllister was to uphold the claimant's summary dismissal. It confirmed that the claimant was fully aware of the rules and procedures in place to protect the respondent's employees, and that these had not been adhered to when he attended the site experiencing symptoms of Covid. Whilst the letter acknowledged that the claimant's employment record had been good over the years, it was thought that the claimant's actions were negligent and put colleagues at serious danger of catching Covid, and therefore the decision was not too severe. It went on to say that there was no reason to believe that the tracing information form was inaccurate. There was no dispute that the claimant's temperature had been normal throughout this period, but the claimant had had Covid symptoms during this time. Finally, the letter explained that there was no evidence that the decision to dismiss had been taken regardless of whether the claimant was guilty or not.

Submissions

39. The respondent provided me with written submissions and both were given the opportunity to address me orally on the case.

40. In brief, the respondent contended that this was a fair dismissal since the test in BHS v Burchell had been satisfied. The claimant was not dismissed as a scapegoat, an assertion which was not supported by any evidence. The claimant had been dismissed for his conduct. The investigation was thorough, and this led to a genuine belief in both the dismissing officer's and the appeal officer's minds that the claimant was guilty of misconduct. The respondent contended that there were reasonable grounds on which to base that belief, namely that the claimant knew he had symptoms of Covid yet nevertheless attended work between 16 and 19 November 2020. There was a difference in evidence over what the claimant had said concerning his loss of taste and smell in the telephone conversation with Mr Bushnell, but that he had confirmed in cross-examination that he might have said something about this. During an investigation meeting on 5 January 2021, the claimant confirmed what he had told Mr Bushnell, namely that he didn't completely lose his sense of taste and that he had compared this with his sister's symptoms. Whilst the respondent accepted that three statements had not been provided to the claimant prior to his dismissal, this was not a breach of the respondent's disciplinary policy. The statements were not relied upon by the respondent in coming to the decision to dismiss the claimant. There been no unfairness to the claimant, since he had raised the issues concerning the evidence in his meetings. If the dismissal was procedurally unfair there should be 100% reduction on the grounds of Polkey and/or the claimant's contributory fault.

41. The Claimant's representative addressed me orally. The respondent's poor management of the situation on 11 November 2020, when the claimant initially

informed his line manager that he had been in proximity with someone with Covid, had led to the claimant's dismissal and this Tribunal. Had the management acted appropriately, and carried out an investigation, the claimant would not have been dismissed.

42. The failure to provide the statements of the three witnesses in advance of the disciplinary hearing denied the claimant the opportunity to raise issues he would otherwise have raised. The claimant accepts that he might have committed misconduct, but disputes the allegation that he brought up asthma at a late stage as a smoke screen. He did not believe he had Covid at the time he attended work. He genuinely believes that his dismissal was unfair.

Law

43. Unfair dismissal is also governed by Employment Rights Act 1996 ('ERA'). The employer is responsible for showing a potentially fair reason for dismissal under section 98(1)(b) or (2) ERA. The respondent relies upon conduct or, possibly, some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held ('SOSR') as potentially fair reasons for dismissal.

44. Once an employer has proven that the reason for dismissal is potentially fair, "*the determination of the question 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*." Section 98(4) ERA.

45. Since this is, in my view, a misconduct dismissal, I bear in mind the guidance from BHS v Burchell [1980] ICR 203, Post Office v Foley [2000] IRLR 827, and

Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, I need to consider the following:

a. Firstly, whether there was a potentially fair reason for the dismissal under section 98(2) ERA and whether the employer had a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

b. Secondly, whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4).

c. In particular, did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses?

46. Iceland Frozen Foods Ltd v Jones [1983] ICR 17, subsequently approved by the Court of Appeal in other cases, is authority for the well-known proposition that a tribunal must not substitute its own decision on the reasonableness of a dismissal for that of the employer; rather the tribunal must decide, objectively, whether the decision to dismiss was within the range of reasonable responses of a reasonable employer. The range of reasonable responses applies to all stages of the process, including the investigation and the decision to dismiss.

47. In relation to the issue of fairness under section 98(4) ERA, I also considered the ACAS Code of Practice on Disciplinary and Grievance procedures. I note that compliance or non-compliance with the Code is not determinative of that issue.

48. I was referred to a number of authorities by the respondent in its closing submissions, and I was provided with the cases of Lynn v British Steel plc EAT/156/92 and Adesokan v Sainsbury's Supermarkets Ltd [2017] EW CA Civ 22. The first is authority for the requirement to consider whether dismissal is within the range of reasonable responses, rather than for the Tribunal to substitute its own view. The latter case related to a wrongful dismissal claim and is not therefore entirely on all fours with this unfair dismissal claim, but provided guidance in respect of gross misconduct dismissals in cases of gross negligence.

Conclusions

49. For the unfair dismissal claim, I am satisfied that the respondent had a potentially fair reason for dismissal, namely conduct. There was no real case advanced for an alternative reason for dismissal, but, if the respondent had contended that the reason was SOSR, I do not accept that to be the case. I find the reason for the claimant's dismissal was his conduct in attending work between 16 to 19 November, whilst displaying Covid 19 symptoms, namely a loss of taste and smell, which he failed to inform his employer of.

50. Having found a potentially fair reason for dismissal, I then need to consider whether the respondent acted reasonably in accordance with section 98(4) ERA in treating that as a sufficient reason for dismissal. I had regard to BHS v Burchell as outlined in brief above.

51. I am satisfied that the dismissing officer, Mr Wyllie, and the appeal officer, Mr McAllister, both had in mind the claimant's conduct in attending work on 16 to 19

November 2020 whilst having Covid 19 symptoms as the reason for his dismissal. They did not consider he had done so maliciously or deliberately, but that he was grossly negligent in doing so and that this carried with it great risk to the respondent's business.

52. Was this based on reasonable grounds following a reasonable investigation? I am satisfied that this was so.

53. Whilst I acknowledge that the short witness statements for the three witnesses, Mr Bushnell, JA and SS were not provided to the claimant prior to the disciplinary hearing, I am satisfied that this was not a material failure by the respondent. The statements were not relied upon in the disciplinary hearing and/or the appeal hearing. They were factual accounts of what had taken place, and concerned matters on which the claimant was already aware and, save for the difference in the content of the tracing information document, were undisputed. The claimant's responses during cross-examination about the lost opportunity to raise issues concerning those statements, confirmed my view that they were not material to the claimant's dismissal.

54. What was material was that the respondent honestly and genuinely believed that the claimant had negligently attended work on the 16 to 19 November 2020 at a time when he had experienced some loss of taste and smell, one of the main symptoms of the disease at that time. It was accepted by the respondent that the claimant had not wilfully or maliciously attended the workplace whilst knowing or believing he had Covid 19, and I accept that to be the case.

55. On balance, I am satisfied that a reasonable procedure was followed. It was not perfect, but it was within the range of reasonable investigations/ procedures required for a case like this. The claimant was provided with the tracing information document prior to the disciplinary hearing, on which much of the decision to dismiss was based.

56. Finally, I am satisfied that the decision to dismiss was within the range of reasonable responses open to an employer. It is not for me to substitute my view, but I consider that an employer acting reasonably could have dismissed in these circumstances, even if others, including myself, would not have.

57. I had some sympathy for the claimant in this case, since he genuinely believed that he had not got Covid 19 at the time that he attended work on 16 to 19 November 2020. It was clear to me that he was a good and valued employee with a good record whilst working for the respondent. However, I have to apply the law in considering whether the dismissal in these circumstances was outside the range of reasonable responses open to an employer and, in light of the serious consequences of Covid 19 which were evident at the time, I find that it was not.

58. Therefore, the unfair dismissal claim is dismissed.

Employment Judge Welch

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Written reasons dated 9 June 2022

WRITTEN REASONS SENT TO THE PARTIES ON

13 June 2022

FOR THE TRIBUNAL OFFICE