



EMPLOYMENT TRIBUNALS

Claimant: Mr H McCarthy

Respondent: Sue Ryder (a charity)

Heard at: Southampton (by video)

On: 4 and 5 July 2022

Before: Employment Judge C H O'Rourke
Ms C Lloyd-Jennings
Mr C Williams

Representation

Claimant: Mr C Francis – family friend

Respondent: Mr J Jackson - Counsel

JUDGMENT having been given to the parties on 5 July 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

Background and Issues

1. The Claimant was employed by the Respondent for approximately a year, until his dismissal, with one week's pay in lieu of notice, with effect 29 October 2020, on alleged grounds of incapability. He had been the manager of one of the Respondent's charity shops, in the Portswood Centre, in Southampton. As a consequence, he brings a claim of automatic unfair dismissal.
2. There has been a case management hearing in this matter, on 20 October 2021, [37], which set out the issues as follows (and which were, with some amendment, agreed at the outset of the Hearing):

Automatic Unfair Dismissal (s.104(4)(d) Employment Rights Act 1996 (ERA))

2.1 Did the Claimant assert a statutory right in respect of annual leave and/or daily rest breaks, within the meaning of s.104, by alleging that the Respondent had infringed such a right?

2.2 If so, were such assertions the reason (or, if more than one, the principal reason) for his dismissal?

2.3 As the Claimant did not have at least two years' service, the burden is therefore on him to show jurisdiction and accordingly to prove that the reason for his dismissal was his assertion of a statutory right.

The Law

3. S.104 ERA states the following:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b) the right conferred by section 86

(c) the rights conferred by

(d) the rights conferred by the Working Time Regulations 1998, and

(e) the rights conferred by

4. Mr Jackson referred us to a range of authorities, but, in brief, the case law indicates the following:

a. That assertions as to breach of statutory rights must be clear and actual infringement must be alleged (**Mennell v Newall and Wright**)

(Transport Contractors) Limited [1997] ICR 1039 EWCA and Spaceman v ISS Mediclean Ltd [2019] ICR 687 UKEAT).

- b. That the reason for dismissal is a set of facts or beliefs held by the Respondent and in this case, Mr Lobo, in person (**Orr v Milton Keynes Council [2011] ICR 704 EWCA**).

The Facts

5. We heard evidence from the Claimant. He also provided a statement from a former colleague, a Mr Dean Williams, but as he did not attend the Hearing to be cross-examined, we gave it little weight. For the Respondent, we heard evidence from Mr Nick Lobo, the Retail Sales Manager for the relevant area and who was also the Claimant's line manager and from Ms Sara Hyett, a then People Advisor for Retail and Corporate Services, who advised Mr Lobo and who attended the Claimant's probationary meeting.
6. We set out the following uncontentious chronology:

29 October 2019 – the Claimant commenced employment, following interview by the then Retail Sales Manager, a Mr Gordon. He was initially on six months' probation.

29 January 2020 (all dates hereafter 2020) – at his 12 week review point, Mr Gordon recorded the Claimant's performance in a generally favourable light, but said that the *'biggest area of concern is communication, reading and replying to emails. This will allow Harry to plan and be more organised'* [81].

Late March – he and other staff were placed on furlough due to the Covid pandemic and related lockdown.

May – Mr Lobo took over the line management role from Mr Gordon.

Late July – the Claimant returned from furlough, as the shop was to be re-opened. Mr Lobo visits the shop on a couple of occasions that month.

27 July – two days before it was due to expire, the Claimant's probation was extended, as it was considered that due to his absence from his role during lockdown he had *'not had sufficient time to demonstrate your abilities as a shop manager'* [83].

8 August – Mr Lobo visited the shop.

11 September – A further visit.

14 September – the Claimant's probation was further extended, to 31 October, *'due to some serious concerns about your performance ... as you know Nick visited you last week and there were a number of health and safety concerns'* [85].

25 September and 20 October – Mr Lobo visited the shop.

26 October – the Claimant was invited to a probationary review meeting by Mr Lobo, to *'discuss continuing concerns I have about your performance.'* He went on to say that although *'we had agreed some immediate actions to improve matters in the shop ... these actions had not been completed.'* He was warned of the possibility of dismissal and informed of his right to be accompanied [120].

29 October – the meeting takes place, with the Claimant, Mr Lobo and Ms Hyett in attendance. At the conclusion of it he was informed that he was dismissed and of his right of appeal, which he did not avail himself of [124].

2 November – a letter from Mr Lobo confirms the decision and which refers to his *'unsatisfactory'* management of the shop, about which he'd been spoken to *'on a number of occasions'* and given *'specific tasks to complete'*. It went on to say that despite coaching and support that he'd been offered, he had *'still not met the standards'* required of him [134].

5 November – the Claimant emailed, requesting a copy of the meeting minutes and asked for evidence to support what he said were allegations made against him of misconduct, at the meeting [156].

6 November – the minutes were sent to him. He did not, at that point, dispute their accuracy [158].

28 November – the Claimant presented his ET1 [16].

9 December – Ms Hyett wrote to the Claimant confirming that he was dismissed for capability reasons and any concerns raised about one of the volunteers in the shop were *'not the deciding factor in your dismissal'* [159].

7. The Claimant's evidence in respect of assertion of a statutory right as to holidays and daily breaks. The Claimant agreed in cross-examination that the first occasion that on which he had alleged that his making of such an assertion was the reason or principal reason for his dismissal was at the case management hearing, on 20 October 2021. He said the following in his statement and in cross-examination:
- a. That when he was first recruited, he was told by the regional training manager, a Mr Powers that in respect of annual leave and breaks that if there was no available suitably authorised cover *'an Area Retail Manager had the option and authority to close the shop, however that would not please Head Office'* and that this was confirmed by Mr Gordon who warned him *'that failure to obtain this requisite authorisation before taking leave or breaks would be a breach of my contract.'*
 - b. He was challenged in cross-examination on this evidence and pointed to both his contract [49], which stated that he was entitled to an unpaid daily break of thirty minutes and to a working time policy document, which confirmed this entitlement and stated that *'if staffing is limited then the shop may be closed for thirty minutes over the*

lunch period to ensure that a break is taken. Clear signage will be provided for customers' [166]. He confirmed that he was aware of these documents and that he understood that they contradicted what he said as to needing prior authorisation from his manager, but confirmed that nonetheless that is what he had been told.

- c. He said that on 11 September, while he'd been out of the shop, Mr Lobo had called and there had been an argument between him and the volunteer in the shop, Mr Dean Williams, as to Mr Williams eating at work and that he, Mr Williams had raised the issue of breaks, but to which Mr Lobo did not respond. He viewed this as proof that Mr Lobo's authorisation was required to close the shop, in order to take a break. He said that when he arrived back in the shop, he asked Mr Lobo for a date when he could take leave, as he'd previously refused his request of 20 August [172]. He said that Mr Lobo had referred to it being difficult to find cover but would do his best to arrange it, but didn't.
- d. He agreed in cross-examination that his contract specified that leave should be taken with the prior approval of his manager [50], not, as he had done, by contacting Head Office, the Covid queries line or payroll. It was suggested to him that there was no documentary evidence that he had ever once requested Mr Lobo's authorisation for leave and his answer to that was that the Respondent should '*check their records*'.
- e. He said also, in cross-examination that he raised the issue of breaks directly with Mr Lobo. He was challenged as to why he'd never previously said this, most importantly in his witness statement, or why there was no documentation in the bundle to support this assertion, or he'd not brought a grievance on this issue and he said that he had tried to obtain emails or records from the Respondent, but didn't '*know where they'd gone*' and that '*Mr Lobo did a lot verbally*'.
- f. It was then suggested to him that while he had provided copies of various emails from him to Head Office, the Covid query line etc. [139-152], these related not to requests for holiday, but to holiday pay that he considered that he was due for a week's leave while on furlough. He also suggested in these emails that he was too busy to take leave and would prefer simply to be paid in lieu. He said '*I would rather just have the week's money in my pay and then continue to work to build money for the shop and the charity*'. [148]. He was told on 29 July that as he was now back from furlough, he would hereafter be expected to '*book annual leave in the usual way through your line manager and you will be paid for this when you take it.*' He responded the same day stating that he understood, but '*due to the other members of staff being on furlough and I have still August to do anything (sic), it's almost impossible to take any holiday leave, so it looks like I will lose annual leave for nothing.*' [147]. When it was put to him that that comment was not based on anything that Mr Lobo had said to him, he said that Mr Lobo '*could have phoned me*'.

- g. When it was suggested to him that from Mr Lobo's perspective all he was aware of was that he (the Claimant) was looking for payment of furlough leave money, not that he wished to book annual leave, he said '*I don't know*'.
 - h. The Claimant was challenged as to his assertion that he'd discussed his leave requests with Mr Lobo, face to face in the shop, on 27 August and 27 September, when Mr Lobo's diary entries for the former and his Google location history for the latter [84] showed that he had not visited the shop and he said he '*couldn't comment*' and '*can only go by my statement*.'
8. Respondent's Evidence on Assertion of Statutory Rights issue. Mr Lobo's evidence, from his statement and from cross-examination, was as follows:
- a. He said that at no point, either during the probation meeting, or at any other time, did the Claimant make any mention of breaks or annual leave.
 - b. The Claimant was not prevented from taking meal breaks and the working time policy permitted him to decide to close the shop, if there was insufficient staff. It was asserted to him by Mr Francis that this document may have been fabricated, as it was not signed and dated on each page and he said that, firstly, there was no requirement to do so, secondly, the document would have been PDF-locked on production, so it couldn't be altered and thirdly, the document accurately set out the policy.
 - c. The Claimant never raised the issue of breaks, or the booking of annual leave with him, either in person, by telephone or email. He referred to the Claimant's allegation as to such discussions in the shop, on 27 August and 27 September and his (Mr Lobo's) records as to being elsewhere on those days.
 - d. Had the Claimant requested leave, there was an arrangement in place to 'un-furlough' additional staff, to provide cover.
 - e. Since the Claimant brought his claim, Mr Lobo has been made aware of the emails the Claimant sent to the Covid helpline, as to wishing to take leave in August [140]. Mr Lobo said that these emails were not forwarded onto him and that the Claimant had never mentioned these requests to him.
 - f. He was challenged, in cross-examination as to why, at the end of the probation meeting, when discussing the Claimant's annual leave entitlement, he had used the phrase '*you will then get the 10 days annual leave you have not been able to take*' (with the implication that the Claimant had been unable to take it because he (Mr Lobo) had refused it) [124]. He said that this was simply his '*choice of phrase*' at the time and he was conducting a housekeeping exercise to ensure that the Claimant was paid for his outstanding leave entitlement. He pointed out that if the real reason for dismissal was

the Claimant's demands for annual leave, he would have been very unlikely to have '*brought it up*'.

- g. Ms Hyett, in cross-examination, was challenged as to the accuracy of the notes she took of the probation meeting, it being asserted that they were either incomplete, or had been altered, in particular in respect of complaints the Claimant allegedly made as to his holidays and breaks. She denied any such action by her and said that the notes were an accurate record of the meeting and that if the Claimant had made such comments, they would have been included in the notes.

9. Conclusion on Assertion of Statutory Right issue. We find that the Claimant did not assert infringement to his right to annual leave and breaks, for the following reasons:

- a. As suggested to him by Mr Jackson, this entire issue was an 'afterthought' by him, once he realised that he could not, otherwise, bring a claim of automatic unfair dismissal and he therefore needed to 'construct' a rationale to support such a claim. We conclude this because:
 - i. Despite having had the opportunity to do so at his probation meeting, or in any appeal he might have chosen to bring, or in his ET1, he did not in fact raise this issue until almost a year after his dismissal, at the case management hearing. We don't believe that if he genuinely thought that annual leave and breaks was a factor in his dismissal that he would not have mentioned it earlier.
 - ii. His assertions, in cross-examination that he had not done so because his intention was to '*add mention of annual leave and breaks on after*', or that they '*would come later, this was the first part of my case*' and that he '*thought they were all linked*' and that '*I'm not trained in law*' is unconvincing. If a claimant genuinely believes that they have been dismissed because they had asserted infringement of a statutory right to annual leave or breaks, then there is no plausible rationale, regardless of any lack of legal knowledge, not to say so, at the earliest opportunity.
 - iii. This view is further strengthened by the fact that despite the entire claim being centered on this issue, Mr Francis failed to even refer to it in his closing submissions, until prompted by the Tribunal and then doing so in only cursory terms, indicating to us either his lack of understanding of the claim now brought, or the true merit he and the Claimant attached to those allegations.
- b. There was no documentary evidence whatsoever that the Claimant had either directly requested authorisation of leave from Mr Lobo, or that it had been refused. He was specifically told by the helpline, in

answer to queries made by him as to leave that he should put such requests directly to Mr Lobo, but there is no evidence he did. We don't accept that Mr Lobo's reference, in the meeting, to the Claimant '*not being able to take*' the ten days leave remaining to him is evidence that Mr Lobo refused such requests, but simply, as he said, his choice of words to describe the Claimant's remaining leave entitlement (which, of course, if he had continued in employment, he had until the end of March the following year to take.).

- c. While the Claimant asserted that he had made verbal requests to Mr Lobo for leave authorisation and complained about breaks, such assertions were denied by Mr Lobo. We prefer Mr Lobo's evidence on this point, as we found the Claimant, on occasion, to be evasive in answering questions, such as when confronted with the direct diary and google location evidence that Mr Lobo could not have been at the shop, when the Claimant said he was. In contrast, we found Mr Lobo's evidence to be as direct as possible (considering that some of the questions put to him were difficult to understand). We also note the Claimant's complete failure, until the case management hearing, to even raise this issue. While we note the Claimant's attempts to rely on the results of a polygraph test apparently taken by him to 'prove' that he was telling the truth, there is no authority in English law for us to take account of such a test, or its results, which we note, in any event, was taken independently by the Claimant, without seeking the Tribunal's approval, or the involvement of the Respondent and there is no expert evidence before us as to the accuracy or otherwise of the results, or their reliability. We therefore give them no weight.
- d. The probation review meeting notes make no reference to the Claimant requesting authorisation for leave, or complaining about breaks, but the Claimant asserts that such references were made, but were left out of the notes, or removed subsequently. The Claimant has no evidence whatsoever to support such an assertion. Ms Hyett was quite clear that the notes, while not verbatim, were accurate and that if the Claimant had said such things they would be recorded. The burden of proving such an allegation is on the Claimant and he has completely failed to satisfy it, merely making unfounded allegations. We note also that despite having received a copy of the typed notes shortly after his dismissal, he made no complaint at the time, or since, until now, as to their accuracy. Nor did he take notes himself, or bring a colleague with him to do so.

10. Accordingly, therefore, the burden of proof being on the Claimant to show that his alleged assertions in respect of leave and breaks were the reason or principal reason for his dismissal, he has failed to discharge that burden and he was not, therefore, automatically unfairly dismissed contrary to s.104.

11. Respondent's Reason for Dismissal. While, strictly speaking, unnecessary for us to consider the reason advanced by the Respondent for dismissal, the Claimant's incapability, there was ample evidence (whether the

Claimant agreed with it or not, or whether he considered it fair) that Mr Lobo considered that he was underperforming, for example, as follows:

- a. The Claimant's failure to keep adequate records of staff health and safety training and qualifications and the completion of health and safety checks on electrical equipment. We were shown numerous examples of such failures, including his staff not signing to confirm receipt of training and the Claimant not recording checks on relevant equipment. These failures were contrasted with the accurate and complete records kept by his predecessor and successor [96-113].
 - b. A general complaint of being a poor communicator, which was pointed out at the very outset of his employment by another manager.
 - c. The fact that his probation was extended and which he at the time said he 'understood'.
 - d. The fact that at both the probationary review meeting and in cross-examination in this hearing, he accepted that there weaknesses in his performance as a manager.
 - e. The fact that at the end of the probationary meeting, as recorded in notes that we have found to be accurate, he stated that '*maybe I need a stern talking to*' and that the decision to dismiss him was '*the right decision*' and that he had no intention of appealing [124].
12. The Claimant asserted that the reason for his dismissal was unclear to him, but based on the evidence before us that is simply unsustainable. There was a host of evidence in the bundle as to Mr Lobo raising concerns with him, face to face in the shop, such as notes recorded by Mr Lobo, 'to-do' lists and 'cheat sheets', recording a list of the Claimant's daily tasks [94-95]. The invitation to the probationary meeting said that he had been given a '*further opportunity to demonstrate your capability in undertaking the shop manager role*', but that '*immediate actions to improve matters ... had not been completed*' and that Mr Lobo had '*serious concerns regarding your performance*' [120]. The minutes of the subsequent meeting disclose numerous examples of those concerns and the dismissal letter referred to his '*continuing unsatisfactory performance*' and that Mr Lobo was '*not confident that you will improve in the future*'. In those circumstances, we simply don't accept the Claimant's assertion as to him not understanding why he was dismissed. He may not agree with Mr Lobo's conclusions, but that is a different matter.
13. We had no reason to consider that Mr Lobo's concerns in this respect were not genuine or what he believed at the time (**Orr**). The fact that the Claimant may (and in fact does) disagree with Mr Lobo's views as to his performance does not change the fact that they are the reasons that Mr Lobo relied upon to dismiss him, not, as the Claimant alleges, any assertion by him as to his statutory rights to leave and breaks. If the Claimant were bringing a claim of 'ordinary' unfair dismissal, based on having two years' service, he would have been able to challenge Mr Lobo's reasoning for his dismissal and its

overall fairness, but he cannot do so. We do not need to consider whether or not Mr Lobo was behaving fairly in deciding to dismiss the Claimant for poor performance, or whether the Claimant could have had more training or support, or whether Mr Lobo should have taken any account of an anonymous complaint by a volunteer, or that the Claimant may not have been provided with the right forms, but merely that that was Mr Lobo's reason for dismissing him, which, as should be clear, we have found it was, not, as asserted by the Claimant, alleged assertions of infringement of his statutory rights.

Judgment

14. Accordingly, the Claimant's claim of automatic unfair dismissal fails and is dismissed.

Employment Judge O'Rourke

Date: 7 July 2022

REASONS SENT TO THE PARTIES ON
12 July 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE