



THE EMPLOYMENT TRIBUNAL

Claimant: Mr P Peter

Respondent: Serco Limited

Heard at: East London Hearing Centre (by CVP)

On: 28 October 2022

Before: Employment Judge Siddall

Representation

For the Claimant: Ms S Sullivan

For the Respondent: Mr B Frew

JUDGMENT

1. The judgment of the Employment Tribunal is that:
 - 1.1 The claim for unfair dismissal is not well-founded and it does not succeed.
 - 1.2 The claim for accrued holiday pay is dismissed upon withdrawal.

REASONS

1. The Claimant claims unfair dismissal in relation to his dismissal on 7 July 2020. He also claimed holiday pay, but Ms Sullivan confirmed during the course of the hearing that the Claimant now accepted the evidence presented by the Respondent on that issue, and that no further sums were due. I heard evidence from the Claimant himself. Mr Mahroof Nazir, General Manager at Newham University Hospital and Moira Hedley, General Manager at Royal London Hospital Whitechapel gave evidence on behalf of the Respondent.
2. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.

3. The Claimant was initially employed to work as a porter by the relevant hospital trust at St Bartholomew's hospital in London ('Bart's). He says that while he worked directly for the hospital, he was not required to undertake any form of health screening.
4. His employment transferred to the Respondent under TUPE in 2017.
5. At page 106 of the bundle there is a copy of Bart's 'staff immunisation and health screening policy'. I accept that under the terms of their contract with the trust, the Respondent had a duty to ensure that staff on site met the requirements of this policy. It applied to contractors as well as staff who are directly employed. It applied to all staff including porters.
6. Under 'health screening' the policy states that all staff who have direct patient contact are required to undergo standard screening and immunisation. This included screening for TB and Hepatitis B.
7. At page 168 of the bundle there is an email from Bart's to the Respondent dated 27 September 2019 recording that there were 756 members of staff whom occupational health had no records for. In reply on 30 September the Respondent replied that they were concerned about these numbers and how the gaps in record would be covered. It seems that a plan was put in place to ensure that all staff had been screened.
8. It was Mr Nazir's evidence which I accept that during the COVID pandemic around June or July 2020 Bart's advised that they wanted everyone to have antibody tests because a lot of staff had COVID. The trust was concerned about risks to the health of both staff and patients. The trust required anyone working on site who had not been cleared by occupational health ('OH') to be screened as a matter of urgency. An email from OH on page 186 dated 16 October 2020 makes it clear that anyone who did not have health clearance would have to be removed from site.
9. The Respondent's evidence is that there was no general communication to their staff about this, but that information was cascaded via line managers and staff were spoken to individually. The Claimant was in the group for whom OH did not have records. He says that he was given no information about why he was being asked to attend an OH assessment. His line manager was not called to give evidence. On balance I accept that at this stage the Claimant was not clear about why he had to undergo a health assessment in 2020 having worked in the hospital for many years.
10. On 3 September the Claimant's line manager whom I shall refer to as MH wrote to Bart's requesting that a number of people including the Claimant be sent an appointment to attend occupational health as soon as possible. The Claimant was sent an appointment for 17 September 2020.
11. There is a record from OH relating to the Claimant on page 191 of the bundle which records: 'he came into clinic. Refused on religious grounds, he said he

- would contact line manager 17/9/20. Tried calling refused to talk stated that he is busy and hunged up (sic) 21/9/20 message left 22/9/20’.
12. The Claimant says that he did not attend an appointment on 17 September. He asserts that he only went to OH once on 29 October 2020 but on the basis of this record I accept that the Claimant attended the appointment he had been sent for 17 September 2020. The note records what happened. There would be no reason for OH to fabricate this evidence and the Claimant has not suggested one.
 13. After that the Claimant provided a notarized document to the Respondent stating that he was a ‘freeman’. He explained at the tribunal that this document set out his personal beliefs about how people should be treated.
 14. An email dated 28 October 2020 (197) records that on 23 October 2020 Mr Nazir met with the Claimant and his line manager and one other (WN). Mr Nazir told the Claimant that as he had not been cleared, he could not work with patients and that OH had requested his removal. He was told to go home and asked to attend a further OH appointment on 29 October. The email records the Claimant ‘stated he did not want any vaccinations and would decline blood tests as this was his right’. He was told that if he could not be cleared to work, a risk assessment would have to be carried out and this might have an ‘impact on his employment status’.
 15. The Claimant agrees he attended OH on 29 October 2020. He says that he was not offered an antibody test first but was told that he would have to be vaccinated. In contrast, the OH note records: ‘met this person in clinic today he declined all occupational health input and did not want to be bled or have his BCG scar checked’. He was told he would need to be cleared from a TB point of view. OH informed the Respondent that as a result of what the Claimant had said they could not clear him to work.
 16. On 2 November 2020 the Respondent made enquiries about whether the Claimant could be moved to a different role with minimal client interface (202). On 5 November WN advised that ‘there is no role within the site that has zero patient contact’.
 17. A meeting described as an ‘investigation meeting’ took place on 6 November 2020. In advance of this meeting the Claimant provided a written list of questions (207) that included: ‘where is the evidence to prove to me its law I have to have these test against my rights (sic)’.
 18. The Respondent provided written answers to the Claimant’s questions at or around the time of the meeting. These stated: ‘You are contractually required to have OH clearance to work in your position as Porter’ and ‘there is no law stating you must have these tests/vaccinations against your will ...however by contractual obligation to gain OH clearance to do your job and a failure to obtain this results in a breach of your contract of employment which in turn could result in your employment ending (sic)’. It was pointed out to the Claimant that other staff had also been removed for not having clearance.

19. It appears that the Claimant's position had not changed at that meeting and so he was called to a disciplinary hearing on 17 November 2020 regarding a 'refusal to obtain OH clearance leading to an inability to fulfil your contractual obligation'. He was warned that dismissal could be an outcome of the meeting.
20. The Claimant submitted a very lengthy document in which he asserted his human rights and his right not to be discriminated against. He asked again 'where is the evidence to prove it's the law I have these tests against my rights'. He argued that it was not a requirement for him to be vaccinated for his job.
21. The disciplinary hearing took place on 20 November. There is a written record of the meeting which is not disputed. The Claimant asserted that he was not refusing to be vaccinated and he asked if he would have an antibody test first to see if injections were necessary. Mr Nazir confirmed that he would have an antibody test first but that if vaccines were required, he would need to have them. He was asked if he would comply, and the Claimant replied that 'he would need to think about them [vaccines]'.
22. Mr Nazir adjourned to speak to OH. They confirmed that the process had been explained to the Claimant when he attended his appointments. They had told him that they would take a blood sample to conduct an antibody test. Once they had the results, if a top up vaccination was required, they would then administer it. They confirmed that the Claimant had refused to have an antibody test done. He therefore could not be cleared to work.
23. Mr Nazir returned to the meeting and spoke to the Claimant. The Claimant stated that if this was a requirement, he wanted it in writing. Mr Nazir replied that he was being told that it was a requirement. He queried why the Claimant had not approached his GP for screening if he did not want it done by OH but the Claimant replied that his GP had stated that he did not need screening and vaccination.
24. The Claimant then said again that he wanted a blood test done first.
25. Mr Nazir concluded that he had no option but to dismiss the Claimant for a substantial reason, due to his contractual requirement to obtain OH clearance. He advised the Claimant that a review had been carried out but that there were no other available positions where vaccinations would not be required. He received twelve weeks' pay in lieu of notice and was informed of his right of appeal.
26. The outcome was set out in a letter dated 25 November 2020 which suggested that the Claimant had failed to comply with the requirement to obtain occupational health clearance by refusing to have an antibody test completed and refusing vaccination boosters if needed. As such OH could not clear him to continue working as a porter. Mr Nazir said in evidence that he was not convinced that if he arranged for a further OH screening appointment that the Claimant would co-operate and consent to either a blood test or vaccinations.

27. The Claimant appealed. He said that the new requirement to have health clearance had not been explained to him. He had simply attended OH and been told that he needed vaccinations. He had always worked under his old Trust contract. He said that he had agreed to undergo an antibody test but had still been dismissed. He had only been to OH once. He had been told he could not be referred again because of the cost.
28. The appeal was conducted by Ms Hedley who is the Respondent's general manager at a different hospital. The hearing took place on 16 December 2020.
29. The Claimant alleged that the requirement to undergo health clearance had not been explained to him. He had attended OH once on 29 October and they had indicated they wanted to vaccinate him without offering him an antibody test. He denied that he had refused a blood test at this appointment. Ms Hedley asked the Claimant if he understood that the reason he would need inoculations is to ensure that he was not carrying infections that could be transferred to any of his colleagues or patients; and whether he understood that if this did not happen he could not work in the hospital. He replied that he did not understand although later said that he did. However, he then reiterated that he did not understand why he could not continue working without health clearance. Finally, he stated that he would attend OH if asked to have blood taken and if required would have inoculations and boosters done.
30. Ms Hedley informed the Claimant that she was upholding the decision to dismiss him.
31. The outcome letter dated 17 December notes that the Claimant had refused to comply with a requirement to attend an OH screening appointment. His responses at the appeal had been contradictory. At the appeal hearing he had said that he would attend an appointment for a blood test and inoculations. He had not provided a satisfactory answer to why he had refused previously. She concluded 'you did not provide me with any additional appropriate evidence that in any way demonstrated that you did not refuse the occupational health recommendations prior to your dismissal or that you were unfairly dismissed'. In evidence, Mrs Hedley said that she considered that the Claimant had been disingenuous in the evidence he had given about his interactions with OH and what had happened previously. She had considered his previous long service but concluded that it would not be appropriate to revoke the dismissal and replace it with a warning.

Decision

32. The first question for me to decide is the reason why the Respondent dismissed the Claimant, and whether this is a potentially fair reason under section 98(4) of the Employment Rights Act 1996.

33. I accept that from 2019 onwards the trust required the Respondent to ensure that all staff working on site had occupational health clearance. If not, those staff were to be removed from site. This requirement was seen as more critical during the COVID pandemic.
34. As a result, the Claimant was requested to attend an OH appointment to undergo health assessment on two occasions. I find that on both occasions he refused to undertake a blood test and refused to consider any vaccinations.
35. I accept that while the Claimant worked directly for St Bart's, prior to the TUPE transfer to SERCO, he may well not have been under a written contractual requirement to undergo health screening. I was not shown any such contractual provision. Given the lack of health records for him and for others that was identified, it appears more likely than not that the requirement for staff to be screened had not been implemented strictly whilst the Claimant was employed by the trust.
36. I accept however that the requirement to have all staff screened was imposed upon the Respondent post-transfer and that it took on particular urgency during the COVID pandemic given the risks of infection to staff and patients. Health and safety concerns can change over time. As a result, an employer may need to impose different requirements upon their employees.
37. I find that as a result even if there was no express contractual requirement for him to do so, it was reasonable for the Claimant to be instructed to undergo a screening appointment in the autumn of 2020.
38. I accept also that the trust was by this point operating a rule that if he was not cleared, he could not continue in his role.
39. I accept that the Claimant was dismissed for refusing to undergo assessment and vaccination. This resulted in him having to be removed from site. That amounts to a substantial reason for the termination of his employment.
40. Was the decision to dismiss reasonable in all the circumstances?
41. On balance in light of the evidence I have heard I am prepared to accept that the reasons why the Claimant was being asked to undergo a health screening may not have been fully explained to him before the appointment on 17 September. However even if that was the case, the importance of the screening was set out for him during the meeting on 23 October. During this meeting the Claimant was warned for the first time that if he could not be cleared by OH it may have an impact upon his continued employment.
42. He was then asked to attend a second OH appointment. I find that on this occasion he again declined to take a blood test and to be vaccinated if necessary. I do not accept the Claimant's evidence that he was not offered a blood test first. OH had a clear process and this was explained to the Claimant on 23 October 2020.

43. The situation was discussed again at the meeting on 6 November. The Claimant was given full and written answers to his questions and he was warned that if he could not be cleared, this may result in the termination of his employment.
44. The Claimant was called to a disciplinary hearing and warned again that the outcome could be his dismissal. By this stage, the Claimant had been informed on three occasions that if he was not screened and cleared by OH, it was possible that his employment could not continue.
45. The Claimant's position did not change at this point. He submitted a very lengthy document in which he queried why he was being asked to do the assessment. This contains no suggestion that it is something he was prepared to undergo.
46. At the disciplinary hearing the Claimant maintained that he had not refused an antibody test and was prepared to take one. This account was contradicted by OH when Mr Nazir spoke to them.
47. In addition, the Claimant would not commit to being vaccinated at that meeting and only said he would think about it. This is important as the trust required all staff to be protected against TB at the very least. I find that Mr Nazir was justified in reaching a conclusion that there was no guarantee that the Claimant would co-operate with the screening process.
48. I accept that Mr Nazir could have decided at the end of the disciplinary hearing that the Claimant would have one last chance to undergo health screening, whilst warning him that if he did not obtain clearance he would be dismissed. However, it is not for the tribunal to substitute their view of what they would have done if faced with that decision. Having obtained further details from OH about what had happened on the two occasions that the Claimant had been to see them, he formed the view that the Claimant had refused even to have a blood test and was unlikely to co-operate at any further screening appointment. The question is, was Mr Nazir's decision within the range of reasonable responses open to the Respondent? I find that it was. The Respondent had checked and had discovered that there were no alternative positions available where the Claimant would have no patient contact and would not require screening. Mr Nazir had satisfied himself that OH had explained to the Claimant properly what the screening process involved i.e. an antibody test first followed by vaccinations only if necessary. He did not accept that the Claimant had been required to have vaccinations without any prior screening and it was reasonable for him to take that position. In light of his discussions with the Claimant and with OH he decided that it was not worth arranging a further screening appointment. The Respondent accepts that all OH appointments incurred a cost, but submitted that this was not the overriding consideration and I accept that. The main reason why Mr Nazir did not arrange another appointment is that he had no confidence that the Claimant would consent to a blood test followed by any necessary vaccinations when he got there. It was reasonable for him to form that view

on the evidence available to him. As the Claimant had not undergone screening and had not been cleared by OH to work on site at Bart's, he could not continue in his role.

49. The appeal was conducted by an independent manager who considered what had happened so far. She gave the Claimant a full opportunity to explain the grounds of his appeal. I accept that the Claimant's position by this point had changed again and he stated that he would undergo both an antibody test and any necessary vaccinations. However, Ms Hedley's view was that the Claimant had been disingenuous in the statements he had made about what had happened previously. She took into account his long service but also noted that he was equivocal about the need to protect himself, his colleagues and patients. She reached the view that based on the Claimant's previous refusals to undergo screening, there was no basis on which to change the earlier decision and the dismissal should stand. Again, whilst other options were available at the appeal, that was a decision that she was entitled to come to on the evidence. I therefore conclude that the dismissal was fair.

50. At the end of the hearing, I told the Claimant that I understood why he had brought the claim. He had long service at the hospital. He was liked by patients and staff. He had worked for many years without being screened or facing a possible requirement to be vaccinated. It is not surprising that he viewed the decision as harsh. Nevertheless, an employer's requirements can change over time, particularly during severe circumstances such as the COVID pandemic. The Respondent was bound to follow the new, stricter requirements imposed by the trust. Throughout the process the Claimant was resistant to the idea of screening even when he was warned that his job was at risk. Unfortunately, his change of heart at the appeal stage came too late.

**Employment Judge Siddall
Date: 7 November 2022**