



EMPLOYMENT TRIBUNALS

London South Employment Tribunal
26 & 27 October 2023 (video)

Claimant: Maurice Trotman

Respondent: The Royal Star & Garter Homes

Full merits hearing

Before: Judge M Aspinall (sitting alone as an Employment Judge)

Appearances: Dr P Fields, Counsel for Claimant
Miss G Kennedy-Curnow for Respondent

JUDGMENT

1. UPON receiving written and oral evidence from the parties and submissions from their advocates, the Tribunal finds that the claim for unfair dismissal is made out and succeeds.
2. UPON hearing from the parties as to remedy, the Tribunal orders that the Respondent shall pay the sum of £1,394.22 as a basic award, £9,185.46 as a compensatory award and interest (to 27 October 2023) of £1,558.26. These are the sums to be paid after the deduction of any tax, national insurance, or other statutory deductions.
3. The Respondent is thereby ordered to pay the total sum of **£12,137.94 net** to the Claimant forthwith. The Claimant shall bear responsibility for properly accounting to HMRC for any other applicable taxes or sums due to them.
4. AND UPON receiving a request from the Solicitors representing the Claimant, by email on 3 November 2023, below are the written reasons for the decision of the Tribunal pursuant to Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 (as amended).

Reasons

5. This is a claim of unfair dismissal brought by Mr Maurice Trotman against his former employer, The Royal Star & Garter Homes. Mr Trotman was dismissed on 23 December 2021 after working for the respondent care home operator for just less than 3 years.
6. Though the parties disagree on the fairness of the dismissal, certain preliminary facts are undisputed. It is agreed between the parties that the claimant was employed by the respondent as a care assistant continuously from 3 June 2019 until the termination of his employment on 23 December 2021. The claimant contends, and the respondent does not dispute, that the claimant was dismissed by the respondent on 23 December 2021.

7. It is also not in contention that the claim was brought within the requisite time period, nor are there any jurisdictional issues arising that would prevent me from hearing the merits of the claimant's unfair dismissal complaint. I can therefore proceed to evaluate the fairness of the dismissal based on the relevant facts and circumstances in dispute.
8. Prior to bringing his claim, the claimant contacted ACAS on 11 and the early conciliation certificate was issued on 16 March 2022. On 20 March 2022, the claimant presented a claim of unfair dismissal to the Employment Tribunal; and other claims which were subsequently withdrawn and with which this judgment is, therefore, not concerned.

Factual background

9. The key facts are largely undisputed. In July 2021, regulations were passed by Parliament requiring care home staff to be fully vaccinated against COVID-19 or have an approved clinical exemption [Authorities Bundle p.101-102; examination by Dr Fields of Kate Silver in cross-examination]. The deadline for this was originally set as 11 November 2021.
10. On 15 September 2021, the regulations were updated to allow staff to self-certify as medically exempt until they obtained formal clinical proof. The respondent was made aware of this change but did not refer to self-certification as an option in communications with Mr Trotman [Letter dated 16 September 2021, Bundle p.143; Evidence of Mr Trotman].
11. Mr Trotman provided an exemption certificate from his union on 7 November 2021 [Bundle p.153-156]. The respondent rejected this and required Mr Trotman to use the government's self-certification form instead [Letter dated 23 November 2021, Bundle p.156]. Mr Trotman maintained his certificate was valid and did not complete the government form.
12. On 8 November 2021, the regulations were amended again, extending the deadline for staff to become fully vaccinated or to provide proof of clinical exemption until 1 April 2022, with the ability to self-certify remaining with a deadline date of 24 December 2021 for doing so [Authorities Bundle p.106; examination by Dr Fields of Kate Silver in cross-examination].
13. Despite this extended deadline, Mr Trotman was dismissed on 23 December 2021, solely for failure to provide what the Respondent considered to be acceptable proof of vaccination or exemption, that being the UK Government issued self-certification form [Bundle p.146; Oral evidence of Kate Silver].

Reason for dismissal

14. The sole reason given by the respondent for Mr Trotman's dismissal, both in the dismissal letter and confirmed in oral evidence, was that there was a statutory restriction prohibiting his continued employment without evidence that he was fully vaccinated against COVID-19 or had a formal clinical exemption.
15. The reason given for Mr Trotman's dismissal in the respondent's letter dated 8 October 2021, and repeated in later letters, was:

"Your dismissal would be because it was no longer possible to carry out your role due to a statutory restriction, namely the legal requirement on us to have evidence of full vaccination or clinical exemption..." [Bundle p.146]
16. This was confirmed as the sole reason for dismissal by Ms Kate Silver, Director of People, under cross-examination.
17. Ms Silver accepted there were no other reasons for Mr Trotman's dismissal. The respondent's stated position was therefore, unambiguously, that Mr Trotman was dismissed due to a legal requirement mandating his dismissal at that time.

18. The reason cited by the respondent, of complying with vaccination and exemption regulations, could potentially qualify as a fair reason for dismissal under s.98(2)(d) of the Employment Rights Act 1996 as a statutory restriction.
19. However, even if a potentially fair reason is established, under s.98(4) it then falls to the Tribunal to determine whether in the circumstances the employer acted reasonably or unreasonably in treating that reason as sufficient for dismissing the employee. This requires assessing the substantive grounds on which they dismissed and the procedures followed, based on principles of equity and the merits of the case. Therefore, I must closely examine whether the respondent having relied on regulations requiring vaccination as grounds for the claimant's dismissal was reasonable in light of the full factual matrix.

The law

The law on unfair dismissal

20. This claim is brought under Part X of the Employment Rights Act 1996, which contains the law relating to unfair dismissal. The specific right not to be unfairly dismissed is set out in section 94 of the Act.
21. Section 98(1) states that a dismissal may be fair if the reason, or principal reason, for it was one of those listed under section 98(2), which includes at subsection (d) that the employer cannot continue to employ the employee in the particular position without contravening a duty or restriction imposed by any enactment. This is the reason cited by the respondent for the claimant's dismissal.
22. Under section 98(4), even if a potentially fair reason is shown, the determination of whether the dismissal was fair or unfair depends on whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
23. Section 98(6) states that the determination of reasonableness shall be in accordance with equity and the substantial merits of the case. Should the dismissal be unfair, compensation can be awarded under sections 112-123.
24. The respondent argues they dismissed the claimant based on a statutory restriction under section 98(2)(d), while the claimant contends that there was in fact no such legal prohibition making dismissal mandatory at the relevant time. Therefore, the key issues I must determine are first whether the reason relied upon by the respondent is made out based on the legal context, and if so, whether the decision to dismiss was nonetheless unfair based on all the circumstances of the case and section 98(4).

The amended regulations (July 2021)

25. The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 were made on 27 July 2021 and were due to come into force on 11 November that year. That commencement date was subsequently varied by order of the Secretary of State for Health and Social Care; ultimately, they were due to come into force on 1 April 2022. Those changes were made to allow time for those who were unable to receive a Covid-19 vaccination for medical or clinical reasons to obtain clinical certification of the same.
26. They did not, in the event, come into force as the Secretary of State made an order revoking the regulations which was laid before Parliament in January and February 2022. The regulations were, therefore, revoked after the Claimant had been dismissed but before they ever formally came into force.

27. It was accepted – rightly – by Dr Fields, for the Claimant, that the Respondent could not have been reasonably expected to know in December 2021 that Parliament would approve the Secretary of State’s revocation of the regulations in early 2022.
28. Ms Silver's evidence before me was that at the time she dismissed the Claimant on 23 December 2021, the ‘in force’ date of the regulations had moved from 11 November 2021 to 31 March 2022.
29. The regulations, so far as is material said:

Amendment of regulation 12 (safe care and treatment)

5. In regulation 12, after paragraph (2), insert—

“(3) For the purposes of paragraph (2)(h), a registered person (“A”) in respect of a regulated activity specified in paragraph 2 of Schedule 1 (accommodation for persons who require nursing or personal care) in a care home must secure that a person (“B”) does not enter the premises used by A unless—

(a) B is a service user residing in the premises used by A;

(b) B has provided A with evidence that satisfies A that either—

(i) B has been vaccinated with the complete course of doses of an authorised vaccine; or

(ii) that for clinical reasons B should not be vaccinated with any authorised vaccine;

Precedent

30. During evidence and submissions, I was referred to a number of cases and authorities and I have taken these into account, considered them, and applied them to the facts of this case in order to reach my decision. I do not address them all here.

Adama v Partnerships in Care Ltd

31. The claimant has referred me to the case of *Adama v Partnerships in Care Ltd* (UKEAT 0047 14 MC). This case establishes that even where there is a potentially fair reason for dismissal under s.98 of the Employment Rights Act 1996, the employment tribunal must still assess whether the dismissal was substantively fair based on the reasonableness of the employer's actions.
32. When considering reasonableness, the tribunal should assess whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. Relevant factors include the nature of the employee's conduct, the circumstances known to the employer, and whether disciplinary process was followed.
33. The claimant contends *Adama* is relevant because even if this Tribunal finds the respondent perceived a potentially fair reason to dismiss the claimant based on the vaccination regulations, their response in dismissing him was substantively unfair as it was not reasonable in the circumstances. The respondent dismissed the claimant based on a purported statutory restriction requiring this when the deadline had been extended and no such prohibition existed at the time. Their response was therefore outside the range of reasonable responses open to a reasonable employer aware of the true circumstances.

34. Applying the principles from *Adama* to the facts here, I accept the claimant's submission. While the respondent may have genuinely believed there were grounds to dismiss the claimant under the regulations, their response in doing so was not reasonable given there was in fact no legal requirement mandating dismissal specifically in December 2021. Their genuine but mistaken belief as to the regulations did not make the dismissal substantively fair, as dismissing the claimant at that time was an unreasonable response by the employer in the circumstances known to them.

Docherty and another v SW Global Resourcing Ltd

35. The claimant has referred me to the case of *Docherty and another v SW Global Resourcing Ltd* (2014 S.C. 180). This case establishes that in assessing the reasonableness of a dismissal under unfair dismissal law, the focus should be on whether the employer acted reasonably or unreasonably in all the circumstances at the time.

36. The court must put itself in the position of the employer at the time of dismissal to evaluate reasonableness, not in hindsight. However, the employer must show it acted on a genuine belief based on reasonable grounds for the dismissal to be potentially fair.

37. The claimant contends *Docherty* is relevant as it requires this Tribunal to focus its analysis on whether the respondent acted reasonably at the time of dismissal based on what a reasonable employer would have objectively known about the legal context. The respondent dismissed the claimant based on a purported statutory restriction, yet the evidence shows there was actually no such prohibition mandating dismissal at that time.

38. Applying the principles from *Docherty*, I accept the claimant's submission that the respondent has failed to show their belief in the need for dismissal was reasonably held, given the regulations did not in fact require it in December 2021 when the claimant was dismissed. As in *Docherty*, I have evaluated reasonableness based on what the respondent knew or reasonably should have known at the time. Their response in dismissing the claimant was not objectively reasonable in the circumstances.

Eversheds Legal Services Ltd v De Belin

39. The claimant has referred me to the case of *Eversheds Legal Services Ltd v De Belin* [2011] ICR 1137. This case establishes that an employer's ignorance or mistake of the law does not automatically render a dismissal fair. Even if the employer genuinely believes there is a fair reason, it may still be unreasonable for the employee to bear the consequences of the employer misinterpreting its legal obligations.

40. The claimant contends *Eversheds* is relevant because the respondent dismissed the claimant based on a mistaken belief that regulations mandated dismissal in December 2021, when in fact no such legal prohibition existed at that time. Their genuine but mistaken view of the law does not absolve the dismissal of being unfair.

41. Applying the principles from *Eversheds* here, I accept the claimant's submission. While the respondent may have genuinely believed the regulations required the claimant's dismissal specifically in December 2021, I have found this belief was mistaken - there was no such legal requirement at that time. Following *Eversheds*, it is not reasonable that the claimant be subjected to the consequences of the respondent misconstruing the applicable regulations and guidance. Their genuinely held but erroneous view of the law does not render the dismissal fair in the circumstances.

Kelly v University of Southampton

42. The claimant has referred me to the case of *Kelly v University of Southampton* [2007] UKEAT-0295-07-ZT; in particular paragraph 65, which states that while statutory dismissal

procedures may not apply where the reason for dismissal falls under section 98(2)(d), matters of procedure can still be relevant in assessing the fairness of the dismissal.

43. The claimant contends this paragraph is relevant because it establishes that even if the respondent genuinely believed there were grounds to summarily dismiss the claimant without following full procedures, their failure to follow a reasonable process could render the dismissal unfair.
44. Paragraph 65 states that whether it is reasonable to dismiss without procedures depends on the circumstances. Failure to follow reasonable procedure can make the dismissal unreasonable.
45. Applying this to the present case, I accept the claimant's submission that the respondent's failure to follow a reasonable procedure reinforced the unreasonableness of the claimant's dismissal, given the mistaken basis they proceeded upon regarding the regulations. As paragraph 65 in *Kelly* makes clear, failure to follow reasonable procedure can render a dismissal unfair even if the employer believes there are valid dismissal grounds.

Application to this Case

46. The respondent has maintained there was a statutory prohibition under section 98(2)(d) of the Employment Rights Act 1996 - namely the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 - that legally restricted Mr Trotman's continued employment in December 2021 without proof of vaccination or exemption.
47. However, based on the evidence presented and the timeline of events, I am satisfied this is incorrect and no such prohibition or restriction existed mandating Mr Trotman's dismissal at the time he was dismissed by the respondent.
48. The key facts are:
 - a. The original regulations were made in July 2021 and initially due to come into force on 11 November 2021. This would have required care home staff to show proof of vaccination or exemption.
 - b. On 15 September 2021, the regulations were updated to allow staff to self-certify medical exemption until formal proof was obtained. Despite being aware of this change, Ms Silver did not refer to the self-certification option in communications with Mr Trotman.
 - c. The regulations' commencement date was then delayed to 1 April 2022 to allow more time for clinical exemptions to be obtained. This amendment was made on 8 November 2021.
 - d. Mr Trotman provided a medical exemption certificate from his union on 7 November 2021, which the respondent rejected requiring him to use the government self-certification form instead. The respondent did not explain their reasons for rejecting this document and Ms Silver's evidence was that she had not sought to validate this document in any way insofar as Mr Trotman was concerned. She did say that such enquiries had been undertaken with the Union in regard to other staff; it would have been reasonable, therefore, for such similar enquires to be made with the union about Mr Trotman.
 - e. Despite the 1 April 2022 extended deadline, Mr Trotman was dismissed on

23 December 2021 solely for not providing acceptable proof of vaccination or exemption.

- f. In oral evidence, Ms Silver confirmed she was aware at the time that the deadline had been extended to 1 April 2022, though her dismissal letter made no reference to this.
- g. No other applicable regulations or statutory restrictions were evidenced mandating Mr Trotman's dismissal specifically in December 2021 rather than at the extended deadline. The Respondent did not, in fact, claim that there was any such other regulation or statutory restriction.

- 49. Given the deadline had been extended to April 2022, there was no statutory basis under the regulations prohibiting Mr Trotman's continued employment without vaccination or certification in late December 2021. The regulations themselves did not come into force until 1 April 2022.
- 50. While the respondent understandably sought to comply with its perceived legal obligations, it acted unreasonably in misinterpreting the law and falsely claiming a statutory restriction existed requiring Mr Trotman's dismissal at that precise time. This view was genuinely but mistakenly held.
- 51. The failure to follow any reasonable procedure or appeal process further reinforced the unreasonableness of the dismissal in the circumstances, where there was no urgent need for summary dismissal absent the believed legal requirement. I will return to the issue of the procedure later.
- 52. I accept the respondent acted in good faith in seeking to protect its residents by complying with the vaccination regulations. However, the case law establishes that even a genuine belief reasonably held by an employer does not automatically render a dismissal fair if that belief proves to be mistaken, as occurred here. It is not reasonable that Mr Trotman bear the consequences of the respondent's misinterpretation of the legal context.
- 53. The respondent's alternative argument that there was "some other substantial reason" for dismissal is also rejected. The contemporaneous evidence, and the evidence given to this Tribunal orally, clearly shows Mr Trotman was dismissed solely because of a perceived statutory restriction requiring this.

Evidence and submissions

Documentary and Written Evidence

- 54. The Tribunal was provided with two bundles of documents by the parties – an agreed hearing bundle and a further bundle from the Claimant which his Counsel confirmed was not required. Additionally, the Claimant provided a bundle of legal and other authorities.
- 55. Key documents included (this is not an exhaustive list):
 - a. The original vaccination regulations from July 2021 (Authorities bundle p101-102) showing the initial deadline of 11 November 2021.
 - b. Amended regulations from September 2021 (Bundle p143) introducing self-certification of medical exemptions.
 - c. Mr Trotman's union exemption certificate dated 7 November 2021 (Bundle p153-156).

- d. Letter from respondent dated 23 November 2021 (Bundle p156) rejecting the union certificate.
- e. Amended regulations dated 8 November 2021 (Authorities bundle p106) extending the deadline to 1 April 2022.
- f. Mr Trotman's dismissal letter dated 23 December 2021 (Bundle p146) citing a purported statutory requirement for dismissal.

Oral Evidence

- 56. The Tribunal heard sworn oral evidence from two witnesses - Mr Trotman, the Claimant and Ms Kate Silver, Director of People, for the Respondent.
- 57. Mr Trotman's evidence covered his employment history with the respondent, the vaccination requirements, providing his union exemption certificate, and communications about compliance. He maintained his certificate should have been accepted.
- 58. Ms Silver's evidence covered the care home's need to comply with regulations and to keep their residents safe – which I do not criticise at all, seeking proof of vaccination/exemption from staff, rejecting Mr Trotman's certificate, and deciding dismissal was required. She confirmed under cross-examination that she knew the deadline had been extended at the time of dismissal.

Submissions

- 59. The Claimant's Counsel, Dr Fields, submitted that the sole reason given for Mr Trotman's dismissal was legally mistaken given the extended regulations deadline. He argued the dismissal was therefore unfair, with authorities supporting the fact that an employer cannot rely on an error of law.
- 60. The Respondent's representative, Ms Kennedy-Curnow, submitted Mr Trotman was dismissed for failure to provide acceptable proof of vaccination/exemption. She argued his union certificate was invalid and the employer acted reasonably in requiring government approved evidence.

Discussion and conclusion

- 61. Having set out the background facts, the reason for dismissal, the relevant legal provisions, and precedent cases above, I now turn to discuss the evidence presented and apply the law to make my determination on the fairness of Mr Trotman's dismissal.

The Evidence

- 62. In written and oral evidence, Ms Silver confirmed that the sole reason for Mr Trotman's dismissal was that the respondent believed regulations mandated dismissal if he could not provide proof of vaccination or exemption by December 2021.
- 63. While Ms Silver mentioned the need to protect residents in passing, she reiterated clearly and consistently that the decisive factor was their understanding that the regulations required Mr Trotman's dismissal at that precise time absent the required proof.
- 64. I accept Ms Silver's evidence that the respondent genuinely sought to comply with its perceived legal obligations. However, the fact remains that its understanding of what the regulations required in December 2021 was mistaken, as confirmed below.
- 65. The documentary evidence clearly shows the regulations' commencement date was amended to 1 April 2022 on 8 November 2021 [Bundle p106]. Mr Trotman was not dismissed until 23 December 2021.

66. Ms Silver confirmed in cross-examination that she was aware of the extended 1 April 2022 deadline at the time she dismissed Mr Trotman. However, this awareness is not reflected anywhere in the dismissal letter or related communications.

The Hierarchy of Laws and Guidance

67. In reaching my decision, it is important to delineate between different sources of law and authority.

68. Statutory law, enacted through Acts of Parliament, represents primary legislation creating legal rights and obligations. Regulations made under statutory authority constitute secondary legislation.

69. Case law establishes binding legal precedent where courts interpret and apply statutory law. The ratio decidendi (reasons for deciding) in judgments create binding principles.

70. Government guidance provides advisory information on how statutes and regulations should be followed. However, guidance does not hold the force of law itself unless expressly required by legislation.

71. Here, the key binding legal sources are the Employment Rights Act 1996, the statutory regulations regarding vaccination requirements, and relevant case law like those already referred to above.

72. While government guidance encouraged employers to require a certain exemption form, this did not make it unlawful to accept alternatives where the regulations did not mandate a specific process. Guidance must give way to what is legally required or permitted at the time.

73. As the regulations did not prohibit continued employment until April 2022, dismissing Mr Trotman in December 2021 went beyond what guidance advised to contravene what the law actually required at that time. The respondent erred in treating non-binding guidance as equivalent to the regulations in force.

Application of the Law

74. Applying the statutory test in s98(1) and (2)(d) of the Employment Rights Act 1996, I find the respondent has not shown a statutory restriction or prohibition mandating dismissal specifically on 23 December 2021, as claimed.

75. The regulations provided a potential fair reason for dismissal based on vaccination status from 1 April 2022 onwards. However, that reason had not yet crystallized when Mr Trotman was dismissed in December 2021.

76. I accept the respondent likely would have satisfied s98(2)(d) had they waited to dismiss Mr Trotman until the 1 April 2022 deadline, if he remained unvaccinated and without exemption.

77. However, no statutory reason capable of justifying dismissal existed in December 2021 when the actual dismissal occurred. The respondent has therefore failed to establish the reason relied upon.

Mr Trotman's Exemption Certificate

78. I do not need to make a finding on the validity of Mr Trotman's union exemption certificate. Even if invalid, that would not have created an immediate statutory requirement to dismiss in December 2021, given the extended regulations deadline.

79. The respondent purported to dismiss solely due to a statutory restriction requiring dismissal at that precise point. I have found no such prohibition existed then. The validity of Mr Trotman's exemption evidence is therefore immaterial.
80. Had the respondent advanced a case that they held a genuine and reasonable belief that the certificate was invalid, creating a fair reason for dismissal on that alternative basis, the Tribunal may have needed to explore that issue further. However, that was not the reason presented for Mr Trotman's dismissal either at the time or in these proceedings.

Dismissal and Appeal Procedure

81. The evidence showed that Ms Silver, as Director of People, was the decision-maker regarding Mr Trotman's dismissal. She signed the dismissal letter dated 23 December 2021 dismissing him effective that day. She also signed all the previous Notices of Dismissal to which the Tribunal was directed.
82. No formal disciplinary process was followed and Mr Trotman was summarily dismissed without being given an opportunity to attend a disciplinary meeting or make representations as to why he should not be dismissed. The respondent had sufficient resources to follow a proper procedure given its size.
83. Allowing the same person, Ms Silver, to handle Mr Trotman's appeal against her own decision to dismiss also failed to meet the standard of impartiality required. The ACAS Code stipulates that an appeal should be dealt with impartially by someone not previously involved.
84. While Mr Trotman was given an appeal hearing on 18 January 2022 after requesting it on 30 December 2021, the outcome was predetermined by the lack of independence. Ms Silver unsurprisingly upheld her original decision in a letter dated 20 January 2022.
85. I find the respondent acted unreasonably and in breach of the ACAS Code by failing to follow any fair disciplinary process before summarily dismissing Mr Trotman and then allowing the same decision-maker to handle his appeal. Procedural flaws compounded the substantive unfairness of the dismissal based on an incorrect understanding of the legal requirements regarding vaccination status. Both elements rendered the dismissal unfair.

Conclusion

86. In conclusion, I find that the sole reason relied upon by the respondent for Mr Trotman's dismissal has not been made out based on the evidence and applicable regulations. There was no statutory basis requiring dismissal specifically on 23 December 2021.
87. While the respondent acted in good faith based on a genuinely held view that regulations mandated action, that view was mistaken. It is not reasonable that Mr Trotman bear the consequences of the respondent's legal error.
88. Even though the respondent perceived a potentially fair reason, their response of dismissal at that time was substantively unfair based on the circumstances. Their genuine but mistaken view does not provide a defence to unfair dismissal on these facts.
89. I therefore conclude that Mr Trotman was unfairly dismissed. The claim succeeds on the basis that the reason asserted has not been established as sufficient to justify dismissal when it occurred.

**Judge M Aspinall
11th November 2023**