



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL

BEFORE: EMPLOYMENT JUDGE F SPENCER

MEMBERS: MR D SCHOFIELD
MR I MCLAUGHLIN

BETWEEN: MR J JAMES CLAIMANT

AND

CLAREMONT HOTEL MANAGEMENT LIMITED RESPONDENT

ON: 11-13 DECEMBER 2023

Representation

For the Claimant: in person
For the Respondent: Mr A Powis, solicitor

REASONS

(Requested by the Claimant following oral Judgment given on the 13th December 2023)

1. The Claimant was employed by the Respondent at the Hard Rock Hotel (which has now been renamed the Cumberland Hotel) as a Safety and Security Officer from 3 June 2022 until 28 July 2022.
2. He brings a claim that he was unfairly dismissed for a health and safety reason.
3. Because the Claimant is unrepresented we start with a statement of the applicable law .

The law.

4. By virtue of section 108 of the Employment Rights Act 1996, the general right (under section 94 of that Act) not to be unfairly dismissed does not apply to the dismissal of an employee with less than two years service. However section 108 provides a number of exceptions to this provision; and, in particular, it does not apply if section 100 of the Act applies. So far as relevant, Section 100 provides
 - (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—
 - (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
 - (c) being an employee at a place where—
 - (i) there was no such representative or safety committee, or
 - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.
5. So an employee who is a designated health and safety employee and who is dismissed because he carried out those health and safety activities will have been unfairly dismissed. The Respondent accepts that the Claimant was a designated health and safety officer.
6. The issue for the tribunal is to establish what was the reason for the Claimant's dismissal or, if more than one, the principal reason. Was it because he carried out his health and safety activities, as the Claimant contends? Or was it because of his poor performance as the Respondent contends? If the reason for the Claimant's dismissal was not because he carried out health and safety activities, (or was not because he brought to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety) – but was for performance – then, because of section 108, the reasonableness of that decision is not an issue for this Tribunal.
7. The issues were set out in a case management order made by Employment Judge Webster on 31st July 2023. The Respondent concedes that the Claimant was designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work

and accordingly that he falls within section 100 (1) (a) and is entitled to bring a claim under that section.

8. As set out in that order the health and safety activities that the Claimant relies on were twofold:
 - (i) Reporting that a fire alarm was sounding because a smoke detector was apparently removed. The Claimant reported this to a maintenance person and to the duty manager, Marlon, approximately one week before dismissal. (Note the Claimant clarified in the hearing that what he meant by this, was that an alert was sounding on the fire control panel, and not that the fire alarm was going.)
 - (ii) Reportedly taking too long to carry out the electronic checkpoint checks despite being asked to cover the lobby area part way through the checking process.

We observe however that (ii) above is not, strictly speaking, carrying out a health and safety activity. Rather, it is a criticism for being too slow in doing his patrols.

9. The Tribunal heard evidence from the Claimant. On behalf of the Respondent we heard evidence from:
 - a. Mr F Nistor, a Safety and Security Manager at the Hotel, who took the decision to dismiss the Claimant.
 - b. Mr M Chajdacki, a Cluster Safety and Security Manager, who heard the Claimant's appeal against his dismissal.
 - c. Mr M Poderys, also a Cluster Safety and Security Manager.
 - d. Mr A Bah, a Safety and Security Team Member at the Hotel, who was involved in training the Claimant.

We also had a bundle of documents running to some 227 pages.

9. The Claimant's evidence was at times hard to follow, as was his written word. We also observed during the hearing that he had a tendency to misunderstand what was being said to him, however clearly it was explained.

Findings of fact

10. The Claimant was engaged to work as a Night Safety and Security Officer by the Respondent. He began work on 3 June 2022. We understand that there would generally be three Safety and Security officers on duty at any one time: the Duty Security Officer, would be in charge, one security officer was to patrol the hotel and report any health and safety issues, and a third officer would be stationed in the lobby. The Claimant who had just joined would either be on lobby duty, or would be required to patrol the hotel and

to tap in at various electronic checkpoints as he did so. We accept the Respondent's evidence that a full patrol of the hotel should take between 1.5 and two hours.

11. The Claimant undertook some training at the start of his employment but refused to sign the training record.
12. The Claimant's line manager at that time was a Ms Da Silva. She left the business in June 2023. The Tribunal did not hear evidence from her.
13. On 25th July Ms Da Silva undertook a 30 day review of the Claimant's probation. (104 – 107) It is recorded that: "*Jay always questions teaching methods and needs reassurance all the time. Jay has not settled well with the other team members and [sic] not cooperating or instructions or training given*". He was also marked as not having met expectations in the following matters:
 - a. quality and accuracy of work
 - b. efficiency
 - c. attendance
 - d. timekeeping
 - e. work relationships (teamwork and interpersonal communication skills).

She also noted that the Claimant had "*shown unwillingness to accept feedback from his team leader and colleagues with his poor interpersonal skills, such as listening, he doesn't show signs of any improvements since he started in June 2022*" and "*I'm not confident that an extension of the probation period will help him in fitting in the role or reach the expectations of the position*".

14. Mr Nistor began working at the Hotel as a Safety and Security Manager on 27th July – the day before the Claimant's dismissal. Before starting the role he shadowed Ms Da Silva for three days to familiarise himself with the hotel and the members of the team. Ms Da Silva told Mr Nistor that other members of the security staff (Marlon, Gagan and Chris) had asked not to be on the same shift as him. She also told him that there were issues with his timekeeping, that he did not allow them to train him and that he challenged every instruction. Mr Nistor was shown the 30 day review.
15. The following day there was a meeting between the Claimant, Ms Da Silva and Mr Nistor. They told the Claimant that he had failed his probation, that the Respondent had received negative feedback regarding his interactions with other colleagues, and that his behaviour and performance were generally below the standards required. Mr Nistor also told the Claimant that he had been taking too long to do his routine patrols.
16. Mr Nistor told the Tribunal that it was his decision to terminate the employment of the Claimant – but he was relying on information given by, and the opinion of, Ms Da Silva. At the end of the meeting the Claimant was

given a letter from Mr Nistor (108) confirming the termination of his employment because he had not met the standards required for the role, and that he was not confident, even if a further extension to the probation period was allowed, that the Claimant would be able to reach the expectations of the position.

17. It was Mr Nistor's evidence that he was not aware at the time that the Claimant had ever reported issues with a smoke detector; and this formed no part of the meeting on 28th July. He told the tribunal that all the team members had asked Ms Da Silva to change the rota, so none of them would have to work with the Claimant. (We note though that for his part Mr Bah, denied having done so). He also said that the Claimant would not cooperate during training, that several times when the Claimant had been on patrol duty he would come back after three hours and that he had been seen coming back with a shopping bag from a store nearby. He had also been struggling with timekeeping. Mr Nistor had been shown messages sent to Ms Da Silva that the Claimant had not arrived on shift yet. He was also told that on one occasion, during the night shift, the Claimant had left the lobby where he was stationed, and had gone outside to check a fire alarm in another building. (201)
18. The Claimant on the other hand says (though not very clearly) that the reason for dismissal was (as set out in his witness statement) "fire alarm system representing the fire control panel; policy, Procedure and code of conduct. Other reason for dismissal; fire checkpoint; it was stated that the Claimant took too long to complete the fire patrol regards the checkpoints." In cross examination the Claimant again said that he was specifically told that he was dismissed because he had reported the removal of a smoke alarm.
19. The Tribunal unanimously prefer the evidence of Mr Nistor for reasons set out more fully below.
20. In his evidence before the Tribunal the Claimant explained that, on a date in July, the fire control panel was sounding an alert that a smoke detector was missing. He had reported this to the night duty support officer and to the maintenance man, a Mr Muniaun Ali. As he was on probation he was not entitled to log the incident. He had reported it but it was not logged. However the Respondent says that they had no record of an employee named Muniaun Ali.
21. In his witness statement the Claimant said that the fire alarm was sounding "regarding the removal of a smoke detector on the eighth floor". (He clarified this as meaning the fire control panel rather than the fire alarm) He contacted maintenance and Marlon, the night duty officer. Marlon had criticised him saying he was not supposed to contact maintenance or himself and didn't have to do anything. The Claimant then said that *"I sent the maintenance person to the fire alarm system at the staff entrance to check information and location. Check the fire alarm system for location;*

and again proceeded to location of where he found a smoke detector on the floor". He said that he put back the removed smoke detector.

22. The Claimant appealed his dismissal on 1 August 2022 (133). His grounds of appeal were as follows *"Policy And Procedure/Training Module/Appraisal/Breach Of Equality Treatment Indifferently/Untrue Statements Representing Events/Rates Of Pay Agreed And Not Correct/Wages Not Correct/Defensive When Questioned/Safety And Security."* There is no reference to a smoke alarm, fire alarm, or fire control panel. In his appeal letter the Claimant also says that *"They deem in the probationary letter and email given and sent, that terms have been failed. When understanding the full direction Of events or direction taken to me, it would suggest in true worthiness, I'm not worthy of termination of employment and the direction taken to me should come under enquiry and questioning."* We read that as saying that his performance had not been sufficiently poor to warrant terminating his employment.
23. By letter dated 4 August the Claimant was invited to an appeal. This was heard by Mr Chajdacki on 10th August. Before the hearing Mr Chajdacki spoke to Ms Da Silva and enquired about the training he had received. He was told that the Claimant had received the required training, but had refused to sign to confirm he had done it. She told him that the Claimant had not been getting on well with team members.
24. The notes of that appeal appear in the bundle 110 – 129 .The Claimant said that he had not received training and the main point that he focused on was whether the Respondent was correct regarding *"pay training – is this all correct policy as was all late."* (113). He said he had training but this was inadequate. He said that the Respondent had breached acts of law and that *"Manuela told me I weren't fit as it took too long to do checkpoints I learnt do it quicker however was told it was still too long however I was called to cover the lobby. So she was untrue."* (124) He was saying it was not true that he took too long to do his rounds as he had been called to cover the lobby.
25. There is no reference in the appeal notes to a smoke detector. However, during the hearing, the notes record that the Claimant *"explains issue with fire alarm and was told wrong policy and process followed. I was told I wasn't meant to do anything with it which was incorrect to the policy."* In brief the Claimant said he believed the done the job correctly, and was unhappy to have been criticised.
26. Mr Chajdacki wrote to the Claimant on 12th August and dismissed the appeal. Amongst other things he said he looked into the issue of training further and understood that the Claimant had completed the training, but had refused to sign off the train sheets. Mr Chajdacki told the Tribunal that he had no knowledge of the Claimant ever having reported that a smoke detector had been removed. Mr Chajdacki's evidence was that, even if the Claimant had reported such an issue, it was his job to do so.

27. Mr Bah gave evidence that the Claimant had not reported a missing smoke detector to him and that he had checked the daily occurrence loss in June and July and could not find any report for the device. The logs appeared in the bundle (168 – 200)
28. The Claimant had been ordered to provide the name of the man in the maintenance section that he had reported the issue to. He did not do so until 9th October 2023.

Submissions

29. For the Respondent Mr Powis submitted that the evidence showed that the Claimant had not reported any issues with a missing smoke detector. In any event, if he did, the decision-makers were unaware of any such issue. Taking too long to carry out electronic checkpoint checks was a performance issue not a health and safety activity. In brief the principal reason for the Claimant's dismissal was performance and was not because he carried out health and safety activities or because he brought to the Respondent's attention circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.
30. The Claimant began his submissions by reiterating that it was possible to claim for unfair dismissal for any length of service. (The difference between "ordinary" unfair dismissal and dismissal for a specific reason, such as health and safety, had been explained to him by the Tribunal at the start, but we were not certain that the Claimant understood.) He submitted that the Respondents were in contempt of court because they had not called Miss Da Silva, Marlon and Mr Ali as witnesses. He submitted that the Respondent had failed to investigate whether a smoke detector had been removed. All the Respondent's witnesses agreed that in such circumstances the right thing to do was to report the missing smoke detector and send the maintenance man to look at it; and this is what he had done. He had not taken too long to do the checkpoints. If he had taken too long, it was because he had been called into the lobby during the course of his patrol . This is not been investigated by the Respondent.

Conclusions

31. We are satisfied that the principal reason for the Claimant's dismissal was his poor performance. Although Ms Da Silva, who managed the Claimant during his time at the Respondent, was not present to give evidence, we accept that she had considerable issues with his performance, as contemporaneously documented in the 30 day review.
32. We do not accept the Claimant's evidence that Ms Da Silva told him that he had been dismissed because he had reported the removal of a smoke alarm. This was categorically denied by Mr Nistor who was at the meeting. We note also that the Claimant makes no reference to the removal of a smoke detector in his grounds of appeal (133). During the appeal itself the Claimant does not say that Ms Da Silva told him that he had been dismissed

because he had reported the removal of a smoke alarm. What he does say regarding the “issue with fire alarm” is that he was told that he wasn’t meant to do anything which was the incorrect policy. That is a wholly different proposition.

33. Further it is inherently implausible that the Respondent would dismiss an individual, who has been engaged specifically to carry out fire safety checks, for essentially doing his job.
34. We are also satisfied that the Respondent was unaware that the Claimant had reported a missing smoke alarm when he was dismissed. This has been denied by Mr Nistor and Mr Chajdacki, whose evidence we accept. Both Mr Nistor and Mr Chajdacki said that they first that they had heard of a missing smoke alarm was in preparing for these proceedings. The daily occurrence log for the period of the Claimant’s employment does not show any issue with a missing smoke alarm. Mr Bah and Mr Poderys also said that they had no knowledge of a missing smoke detector. As Mr Bah said in evidence “Issues relating to a missing smoke detector would be a serious matter and I believe I would recall if there had been a problem.”
35. There was in the bundle (140) an email sent by the Claimant to himself on 11 August 2022. In that document he sets out the same account of what happened with the missing smoke detector as is set out in his witness statement. We accept, however, that the Respondent did not see this document until the Claimant produced it as part of his documents in disclosure. When asked about this in cross examination Claimant said that he had sent a version of this to HR but was unable to provide any record of his having done so.
36. While we accept the Claimant’s evidence that he was not allowed to enter matters into the daily occurrence log, we find it inherently implausible that had he reported it to Marlon or anyone else, that individual would not have entered it into the log. Further Mr Nistor gave evidence that had a smoke alarm been removed this would have triggered a full fire alarm – and there was no record of any such fire alarm having taken place during the period relied on by the Claimant. We are therefore satisfied that the Claimant did not make any such report.
37. In any event , even if he had reported a missing smoke alarm to Marlon, the maintenance man or anyone else, it cannot have been the principal reason for his dismissal because the dismissing officers were not aware of it.
38. While it is apparent that taking too long to carry out his rounds was part of the reason for his dismissal (though we do not say was the principal reason for dismissal) this is not a reason which relates to him carrying out for carrying out health and safety activities. It is a reason which relates to for poor performance.

39. In short the Claimant was not dismissed for carrying out his health and safety activities or for bringing to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. As the Claimant did not have two years service it was not necessary to go on and consider whether the Respondent had properly investigated matters relating to his poor performance or otherwise carried out a fair process.
40. The claim is dismissed.

Employment Judge Spencer

24/01/2024

JUDGMENT SENT TO THE PARTIES ON

25/01/2024

FOR THE TRIBUNAL OFFICE