



EMPLOYMENT TRIBUNALS

Claimant: Mr G Clarke

Respondent: Department for Work and Pensions

Heard at: Liverpool

On: 2 – 4 January 2024

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr A Jones - Counsel

JUDGMENT having been sent to the parties on **15 January 2024** 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

Introduction

1. The claimant was dismissed from his role as a Service Delivery Worker responsible for interviewing applicants for universal credit for the respondent, on 9 January 2023. The claimant commenced early conciliation with ACAS on 8 February 2023 and received the certificate on 20 February 2023. The claimant presented his claim on 19 March 2023. On 24 April 2023 the respondent submitted a response denying that the dismissal was unfair.

Issues

2. The final hearing was listed to be heard on 14 August 2023. Due to a late change in the format of the hearing, it was not possible to go ahead with the final hearing on that date.
3. However, during the course of that hearing I determined that the claimant was unable to formulate a claim for unfair dismissal or detriment because of a

protected disclosure. I therefore determined that the issue for the final hearing was that of “ordinary” unfair dismissal in accordance with section 98 of the Employment Rights Act 1996.

4. The matter was listed for three days and I determined that the issues were as follows:

Unfair dismissal

Dismissal

- a. The claimant was dismissed on 9 January 2023.

Reason

- b. Has the respondent shown the reason or principal reason for dismissal?
- c. Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

- d. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?
- e. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - i. The respondent genuinely believed the claimant had committed misconduct;
 - ii. there were reasonable grounds for that belief;
 - iii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iv. the respondent followed a reasonably fair procedure;
 - v. dismissal was within the band of reasonable responses.

Evidence

5. The parties agreed a joint bundle of evidence totalling 348 pages. The respondent also submitted a supplemental bundle from pages 349-358. At the outset of the hearing, the claimant waived his right to legal privilege and

submitted documents and advice he had obtained during the course of parallel proceedings in the Magistrates Court.

6. I heard evidence from Andy Gerrard, a District Business Manager, who was responsible for dismissing the claimant. I also heard evidence from Helen Saul, Senior Operations Leader, who dealt with the claimant's appeal against dismissal. Finally, I heard evidence from the claimant. Both parties were given an opportunity to make submissions.

The Law

7. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

8. The primary provision is section 98 which, so far as relevant, provides as follows:

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
- (a) the reason (or, if more than one, the principal reason) for the dismissal and**
 - (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
- (2) A reason falls within this sub-section if it ... relates to the conduct of the employee ...**
- (3) ...**
- (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
 - (b) shall be determined in accordance with equity and the substantial merits of the case”.**

9. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

10. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal. The “**Burchell** test” involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of

the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is “yes”, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

11. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

12. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

Relevant Findings of Fact

Claimant's employment

13. The claimant worked for the respondent from 5 September 2017 until 9 January 2023. The claimant's contract of employment provided that he was bound by the respondent's Standards of Behaviour Statement. The contract also provided that the respondent had a disciplinary procedure which was contained on the respondent's intranet site. As a civil servant, the claimant was also bound by the Civil Service Code.
14. The Standards of Behaviour policy provided that mutual trust was the foundation of the employment contract and that there were clear expectations that employees were to act with, amongst other things, honesty and integrity.
15. The Standards of Behaviour procedures provided that:
- Employees should not use their official position or information acquired to further their private interests;
 - Employees receive only benefits and funds to which they are entitled.
16. The Civil Service Code also provided that employees should carry out their fiduciary obligations responsibly which included making sure public money was used properly and efficiently.
17. During the disciplinary process, the claimant confirmed that he was aware of both the Standards of Behaviour and the Civil Service Code and understood that both applied to his employment.
18. In 2020 the claimant moved from processing carers allowance to processing universal credit claims. It was the claimant's role to interview applicants for universal credit and verify their details and identity. The claimant was not responsible for deciding if an applicant was eligible to make an application. The application was forwarded to a different team in the respondent's

organisation. The claimant was responsible for informing an applicant that if they received an advance payment, prior to verification of eligibility, they would have to repay the advanced amount, if subsequently deemed ineligible.

19. The claimant gave evidence that he thrived in his role which led to the respondent asking him to deputise as a team leader and take part in an outreach project dealing with vulnerable applicants.
20. The claimant's line manager was Dawn Lyons. The claimant worked in a small team and one of his colleagues was Julie Collins. Julie Collins was the same grade as the claimant, except when the claimant deputised as team leader, she then became a subordinate member of staff.
21. The claimant's gross salary was £18,500 per annum. The claimant's gross monthly salary was £1541.67. The claimant confirmed in evidence that on occasion he would work overtime and as a result, the claimant's gross monthly pay would increase.

Universal Credit Claims

22. Helen Saul gave evidence that Universal Credit is paid to those on low income or who are struggling to meet financial commitments. Eligibility for a universal credit payment is determined by income.
23. The claimant gave evidence that it can take up to five weeks to verify eligibility for a payment. As a result, the respondent offers advance payments to any applicant whilst eligibility is verified. If an applicant is subsequently not eligible, they are required to repay the advance payment.
24. The gross monthly earnings threshold applicable in 2022/2023 was £494. Any applicant who earned in excess of this amount could be ineligible for universal credit.
25. An applicant is required to sign a statement of commitments agreeing to actively look for work or better paid work. If an applicant does not sign this statement the application will be closed without payment of universal credit and the respondent will seek repayment of any advance monies.
26. The respondent's employees were not precluded from making applications. When making such applications, the respondent's employees could nominate which colleague processed the application. The respondent did not require a team leader to authorise the making of any such application.
27. On 14 September 2021 the claimant, knowing he was not eligible to receive universal credit, submitted an application for universal credit and asked his colleague, Julie Collins to process the application. In so doing, Julie Collins authorised an advanced payment of £694.11 to the claimant.
28. The claimant confirmed during the disciplinary process and in live evidence that he did not consider he was doing anything wrong, because nobody from the respondent's organisation told him he was doing anything wrong despite his knowledge that he would not be eligible for the payment.

29. The claimant justified the application on the basis that he was in dire financial need and needed to use the advance payment as an interest free loan, which he knew he would always have to pay back.
30. During live evidence, the claimant stated that the ability to claim an advance payment in the absence of eligibility was a flaw in the system which he had exploited.
31. The claimant admitted he had processed similar claims for members of the public who earned in excess of the monthly threshold.
32. The claimant failed to sign the statement of commitments and therefore, his application was closed and he was required to repay the advance payment. The claimant subsequently repaid the advance monies.
33. On 18 June 2022 the claimant, knowing he was not eligible to receive universal credit, made a second application for universal credit which was processed by Julie Collins. The claimant subsequently received advance payments of £704.26 and £348.
34. During the disciplinary process and in live evidence, the claimant admitted that he was a dire financial situation and wanted to utilise the advance payments as interest free loans.
35. Some months later, the claimant was asked to process a claim for a colleague. As the colleague worked from a different office, the claimant sought advice from Dawn Lyons as to whether he could transfer the application onto his case load.
36. Dawn Lyons informed the claimant that the colleague would not be eligible for universal credit and should not have made an application. The claimant informed Dawn Lyons that he had done the same thing on two separate occasions. Dawn Lyons subsequently closed the claimant's second application.
37. Another colleague subsequently reported the claimant and his colleagues to the respondent's internal fraud department.

Disciplinary procedure

38. On 7 October 2022 the claimant was informed that he was to be investigated for claiming advance payments when not eligible for universal credit. Tracey Allen was appointed as the investigator. The claimant was known to Tracey Allen as she had previously managed the claimant when she was a deputy team leader.
39. The claimant was provided with a guidance document and informed of his right to be accompanied at the meeting.
40. On 12 October 2022, the claimant attended the meeting without a representative. The claimant admitted that he understood the threshold for eligibility for universal credit and that he wouldn't qualify for the payment. The

claimant stated that anybody was entitled to make a claim and nobody said he couldn't make a claim.

41. The claimant admitted that he made the second claim because nobody had told him that he should not have made the first claim.
42. Julie Collins was also interviewed by Tracey Allen. During her interview, Julie Collins stated that she processed the claim because the claimant told her it was ok to do it and he sounded like he knew what he was doing. Julie Collins said that because the claimant was the deputy team leader she believed what the claimant had told her.
43. On 9 November 2022 Tracey Allen completed her investigation report and concluded that the claimant had a case to answer for gross misconduct because the applications for universal credit amounted to a breach of the standards of behaviour and the civil service code.
44. On 14 December 2022, Andy Gerrard invited the claimant to a disciplinary meeting to answer two allegations:
 - 1) Claims for universal credit which claimant knew not entitled to receive;
 - 2) Abuse of position by asking a colleague to process the claims and knew correct procedures not followed.
45. The claimant received a copy of the investigation report, a guide for employees about the disciplinary process and was informed of his right to be accompanied at the meeting.
46. On 4 January 2023, the claimant attended the meeting without a representative. Andy Gerrard was assisted by a note taker. During the meeting the claimant admitted that he considered the advance payment to be a loan. The claimant also asserted that nobody had told him he couldn't make the claims and had he known he should not have claimed, he would not have done so. The claimant also commented that Tracey Allen could not be independent as she had previously managed the claimant.
47. On 9 January 2023 Andy Gerrard wrote to the claimant and informed him that his employment had been terminated with immediate effect. Andy Gerrard had decided that the claims amounted to an abuse of the claimant's position and a breach of the Standard of Behaviour and the Civil Service Code. Andy Gerrard concluded that as a result, there had been an irrevocable breach of trust between the claimant and the respondent.
48. The claimant was informed of his right to appeal the decision to dismiss. The claimant was also provided with a copy of the notes of the meeting and given an opportunity to comment on the notes.
49. On 11 January 2023 the claimant emailed Andy Gerrard and asked why the notes omitted his comments that Tracey Allen was not an independent investigator.

50. On 12 January 2023 the claimant appealed the dismissal. Helen Saul was appointed as the appeal decision maker. On 14 January 2023 the claimant was invited to an appeal hearing, provided with a further copy of the guide for employees and informed of his right to be accompanied.
51. On 16 January 2023, Andy Gerrard forwarded the claimant's email of 11 January 2023 to Helen Saul.
52. On 24 January 2023 the claimant provided Helen Saul with the final grounds of appeal.
53. The claimant asserted that he should not have been treated any differently than a member of the public who had made a claim, who was subsequently not eligible. The claimant maintained that he had not been told by anybody that he could not make such a claim.
54. The claimant complained that Tracey Allen was not an independent investigator and that there were inaccuracies in the minutes of the disciplinary meeting.
55. The claimant also complained that the respondent had failed to offer any welfare support during the process and breached his confidentiality. Finally, the claimant complained of inconsistent treatment.
56. On 25 January 2023, the claimant attended the appeal meeting accompanied by his trade union representative. Helen Saul was assisted by note taker.
57. During the meeting the claimant said he submitted claims because nobody ever told him that he was doing anything wrong in doing so. The claimant admitted that he knew he would not be eligible for universal credit when he made the claims.
58. Following the meeting, Helen Saul asked the claimant to check and agree the minutes of the meeting before she used them to make her decision.
59. On 1 February 2023 Helen Saul wrote to the claimant and dismissed his appeal. Helen Saul agreed that anybody could make a claim for universal credit. However, because the claimant had admitted that he knew he would not qualify for universal credit but had made the application to receive the advance payment, he had breached the respondent's trust by using his position for personal gain and to further his private interests.
60. Whilst Helen Saul concluded that the investigator was not independent, she confirmed the claimant's dismissal was correct in light of the data that was collected during the investigation.

Submissions

Claimant's Submissions

61. The claimant submitted that he had been open and honest with his managers prior to making his claims. The claimant contended that he did not understand why he was considered to be dishonest.

62. The claimant maintained that his colleague had been treated more favourably by being reinstated.
63. The claimant submitted that the respondent should have told him that he couldn't have made the claims.

Respondent's Submissions

64. The respondent's representative provided submissions in writing and during the course of the hearing.
65. The respondent contended that the appointment of the investigation manager did not render the procedure used by the respondent as unfair.
66. The respondent submitted that the claimant admitted that he had exploited a flaw in the respondent's system and confirmed that his behaviour was wholly incompatible with the role he performed for the respondent, such that the respondent had no choice but to dismiss the claimant.
67. The respondent submitted that it had a genuine belief of gross misconduct given the claimant's admissions during the process.
68. The respondent maintained that it had conducted a fair procedure to which the claimant did not object.

Discussion and Conclusions

69. The claimant was summarily dismissed on 9 January 2023 by Andy Gerrard following the disciplinary hearing. The reason for the claimant's dismissal was gross misconduct. Gross Misconduct is a fair reason for dismissal.
70. During the investigation meeting, disciplinary meeting and appeal meeting the claimant admitted that before he made the claims, he knew that he would not qualify for the payment of universal credit. The claimant also admitted that it was his intention to use the advance payments as interest free loans. The claimant gave the rationale that because nobody told him he couldn't make the claims, he did not consider that he was doing anything wrong.
71. Julie Collins told the investigator that she believed what the claimant told her to do, when asking her to process his claims and advance payments, because he was the deputy team leader.
72. The Standards of Behaviour policy, to which the claimant must adhere, is clear that the employment relationship is based on mutual trust between the claimant and the respondent and the claimant is expected to act with honesty and integrity.
73. The claimant's admissions revealed that he acted without honesty and integrity when making the claims. The claimant admitted in live evidence that he used knowledge acquired in his job when he had processed claims for applicants who earned in excess of the income threshold and received the advances, to acquire the advance payments.

74. The claimant had admitted during the process that he knew he was obtaining benefits to which he was not entitled.
75. The respondent therefore had a genuine belief that the claimant had committed gross misconduct. The Civil Service Code requires employees to carry out their fiduciary obligations responsibly which requires them to make sure public money is used properly and efficiently. The claimant admitted during live evidence that he knew advance payments were made to those who would be eligible for universal credit to help with bills whilst their applications were processed. The claimant knew he wasn't eligible for universal credit and therefore knew he wasn't using public money for the intended purpose.
76. The respondent had reasonable grounds for the belief based on the claimant's admissions throughout the process and Julie Collins evidence that she did what the claimant asked as she trusted he was correct because he was her deputy team leader. The claimant confirmed in evidence that the respondent had believed he excelled in his role by asking him to deputise as team leader and take part in the outreach project. It was not therefore, unreasonable of Julie Collins to hold this belief or for the respondent to conclude that the claimant was aware that this was a widely held perception of him.
77. During the appeal process Helen Saul concluded that there was a conflict of interest between the claimant and Tracey Allen as she had previously been the claimant's team leader. However, the ACAS Code of Practice on Disciplinary and Grievance Procedures does not state that the investigator must not know the employee to be investigated. Rather, the Code suggests where practicable, the identity of the investigator must be different to the identity of the person holding the disciplinary meeting. The ACAS Guide on Discipline and Grievances at Work suggests that a management representative conduct the investigatory meeting and that the employee is treated in a fair and reasonable manner.
78. The appointment of Tracey Allen as the investigator was fair and reasonable. Whilst she had previous knowledge of the claimant, she was a management representative and there was no suggestion from the claimant that there were any residual issues between the two. Tracey Allen was not responsible for deciding whether the claimant should be dismissed. The claimant did not provide any evidence to suggest that Tracey Allen did not conduct the investigation in a fair and reasonable manner.
79. The claimant did not contend that the respondent did not follow a fair procedure. The claimant accepted that he had received all the appropriate paperwork throughout the process and had been informed of his right to be accompanied at each meeting. The claimant was aware of the nature of the allegations he faced and the potential outcome following the meeting with Andy Gerrard.
80. The claimant was also afforded the opportunity to check the minutes of each meeting and provide his comments. In particular, Helen Saul gave the

claimant this opportunity before she herself considered the minutes when making her decision.

81. Part of the claimant's appeal raised the issue that the disciplinary meeting had not been recorded. Helen Saul dealt with this point during the appeal and informed the claimant that she considered the presence of the note taker and the claimant's opportunity to comment on the notes as fair and reasonable, and in fact, in accordance with the ACAS Code of Practice. Neither the ACAS Code nor Guide requires or suggests that such meetings be recorded.
82. The claimant's dismissal was within the range of reasonable responses. The claimant's role required him to act with honesty and integrity and ensure that public money was used properly and efficiently. The claims submitted by the claimant and the admissions made by the claimant during the process meant the respondent reasonably lost trust in the claimant's ability to perform his role to the standards expected of him.
83. The claimant did use knowledge acquired in his role for personal gain. It is unfortunate that the claimant found himself in dire financial straits but there were other external options available to him.
84. During the course of these proceedings, the claimant has submitted that he was treated differently to a colleague. The colleague submitted claims for universal credit and was dismissed on similar grounds to the claimant. However, the colleague was reinstated on appeal after the respondent discovered that the colleague was eligible for the payment of universal credit.
85. The claimant's dismissal is not analogous with that of his colleague. The claimant was ineligible for the payment of universal credit. The claimant admitted he knew he was ineligible and that the advance payments would only ever be loans that would have to be repaid.
86. Given the breach in trust and the nature of the claimant's role, as a gatekeeper to the public purse, the respondent could not issue any type of warning which would have allowed the claimant to continue in his role. The respondent had no option but to dismiss the claimant.
87. The claim of unfair dismissal is unsuccessful and is therefore dismissed.

Employment Judge Ainscough
21 February 2024

REASONS SENT TO THE PARTIES ON
7 March 2024

FOR THE TRIBUNAL OFFICE

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