



EMPLOYMENT TRIBUNALS

Claimant

Miss G. Thompson

Respondent

Forest Healthcare

v

Heard at: Watford

On: 31 July 2017

Before: Employment Judge Heal

Appearances

For the Claimant: Miss E. Godwins, consultant

For the Respondent: Miss E. Rowley, consultant

JUDGMENT

The hearing is postponed, without having heard evidence, to 13 and 14 December 2017.

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within 2 days. It has been listed at Watford Employment Tribunal, to start at 10am or so soon thereafter as possible on **13 and 14 December 2017**. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the claimant's intention to give evidence and call no further witnesses and the respondent's to call 3 witnesses. The time will probably be used as follows:-
 - 1.1. Maximum 1 day for oral and other evidence on liability;
 - 1.2. A maximum total of one hour (half each) for submissions on liability;
 - 1.3. Approximately two hours for the Tribunal to determine the issues which it has to decide and reach its conclusions;
 - 1.4. Half an hour for the Tribunal to give judgment, with reasons if possible;
 - 1.5. The remainder of the time is for the Tribunal to identify issues relevant to remedy, hear further evidence if appropriate and reach its conclusions in respect thereof, if the claimant succeeds in whole or part.

The complaints

2. By a claim form presented on 9 March 2017, the claimant brought complaints of unfair dismissal and breach of the Working Time Regulations 1998. The respondent defended the claims. In essence, they arise out of an incident on 2 November 2016 when the respondent alleges that the claimant was asleep on duty and the claimant alleges that she was on her rest break. The respondent says that it dismissed the claimant because of this incident and matters arising from it.

The issues

3. I now record that the issues between the parties which will fall to be determined by the tribunal are as set out below. These issues define **authoritatively** what the case is about: they show the parties what their evidence should cover, they will help the tribunal decide what evidence is relevant and they will govern the matters to be covered by the tribunal's decision.

4. *Unfair dismissal claim*

- 4.1. The respondent accepts that the claimant qualifies to claim unfair dismissal, the claim was presented in time and the claimant was dismissed.
- 4.2. What was the reason for the dismissal?
- 4.3. Was the respondent requiring the claimant to work for more than 6 hours without a break in breach of regulation 12 (1) of the Working Time Regulations 1998?
- 4.4. If so, did the claimant refuse to comply with that requirement?
- 4.5. If so, was that refusal the reason, or if more than one the principal reason, for the dismissal?
- 4.6. Alternatively, did the claimant refuse or propose to refuse to forego a right conferred on her (that is to take a rest break after 6 hours)?
- 4.7. If so, was that the reason, or if more than one the principal reason, for the dismissal?
- 4.8. The respondent asserts that the reason for dismissal was one related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. In particular, the respondent says that it dismissed the claimant because:

4.8.1 She was found to be asleep whilst on night duty when she should have been awake;

4.8.2 she failed to provide fluid and nutrition to residents in her care as specified in their care plan

The respondent must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

- 4.9. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

- 4.10. On the same burden of proof, did the respondent carry out as much investigation was reasonable in all the circumstances?
- 4.11. The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:
- 4.11.1. The claimant says that she was dismissed for exercising her right to a rest break or for refusing to forego that right;
 - 4.11.2. the investigation officer did not look at all the documents and at the time she made the decision to send the case for disciplinary hearing, she had not interviewed all the witnesses and had not investigated the claimant's explanation for allegation (2).
 - 4.11.3. The disciplinary officer did not take into account the claimant's witness statement at the disciplinary hearing;
 - 4.11.4. the disciplinary officer did not take into account the claimant's medical condition;
 - 4.11.5. the disciplinary officer was already of the opinion that the claimant had committed the act so the claimant did not have a fair hearing;
 - 4.11.6. the claimant had complained about Amos, one of the witnesses, and the disciplinary officer did not look into that, or into the circumstances behind the final written warning;
 - 4.11.7. because the claimant was exercising her right to a rest break, the dismissal was outside the reasonable range of responses.
- 4.12. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 4.13. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct in that the claimant was guilty of the misconduct alleged above and more specifically had not informed the registered nurse that she was taking a break, she did not take a break in the allocated space (the staff room), she did not complete the appropriate record during her shift and she pre-populated the notes (i.e. the residents records) by 2.00am ? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.
- 4.14. Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place? The respondent says that in the circumstances, including the final written warning, it was 100% likely that the claimant would be dismissed in any event.

Breach of Working Time Regulations 1998

- 4.15. Has the respondent breached the claimant's entitlement to a rest break after 6 hours of daily working time (regulation 12(1))? You easier

Employment Judge Heal
31/7/17

Date:
19/8/17

Sent to the parties on:

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For the Tribunal Office