



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106946/2018

Held in Glasgow on 25 and 26 October 2018

Employment Judge: Iain F. Atack

Allan Lafferty

**Claimant
Represented by:
Mr D McCusker
Solicitor**

Nuffield Health

**Respondents
Represented by:
Mrs Duddles
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that the claimant was not unfairly dismissed and that the claim be dismissed.

REASONS

Introduction

1. In this case the claimant claims to have been unfairly dismissed. The respondent admits that the claimant was dismissed but alleges that it was for a potentially fair reason, namely some other substantial reason and that the dismissal was, in all the circumstances, fair.
2. The tribunal heard evidence for the respondent from Matthew Lamb, a hospital director based at the respondent's Newcastle hospital and from John Lofthouse the regional operations director for the respondent for the North of England and Scotland region. The claimant gave evidence himself.
3. The parties produced a joint bundle of documents extending to 84 pages. Reference to the bundle will be by reference to the page number.

4. At the outset of the hearing Mr McCusker for the claimant confirmed that in the event of the tribunal finding in favour of the claimant the remedy which he sought was reinstatement.
5. From the evidence which I heard and the documents to which I was referred I found the following material facts to be admitted or proved.

Material Facts

6. The respondent is an independent sector healthcare organisation. It is a registered not for profit charity. It owns and operates a number of hospitals throughout the United Kingdom including the hospital in Glasgow where the claimant worked.
7. The claimant was employed by the respondent as an HSSU Coordinator and Theatre porter. He had been continuously employed by the respondent since 1996. He had an unblemished disciplinary record with the respondent.
8. Part of the claimant's duties involved transporting patients to and from operating theatres in the hospital. Those patients would be in a vulnerable position when being transported due to the effects of anaesthesia.
9. On 17th February 2018 the claimant was arrested by the police and charged with assault to injury with intention to rape. He appeared in court and was released on bail.
10. On 20th February 2018 the claimant informed Julie Campbell, the hospital director, and Elaine Kennedy, theatre manager, of the fact and circumstances of his arrest.
11. The police called at the hospital and informed Julie Campbell of the claimant's arrest on 21st February. Prior to doing so they had visited the claimant at his home to ascertain if he had informed his employer of the situation.

12. Julie Campbell met the claimant on 22nd February at the hospital at which time he was suspended on full pay.
13. The claimant was invited to an investigatory meeting with Julie Campbell on 7th March. He attended the meeting. The notes of the meeting are produced at pages 44-56.
14. Following the meeting, Julie Campbell prepared an investigation report, pages 58-59. She concluded that due to the potential reputational damage the charge against the claimant might bring to the respondent it was her recommendation that a further meeting be held with the claimant to discuss his ongoing employment.
15. On 9th March 2018 Matthew Lamb wrote to the claimant inviting him to attend a meeting, page 57. The invitation letter advised him that the purpose of the meeting was **“to discuss your being charged with assault to injury with intent to rape and its potential impact upon the Nuffield Health reputation.”**
16. The letter also stated: **“As this meeting may result in a decision being taken that may affect your continued employment, with Nuffield Health, you are entitled to be accompanied at the meeting.”** Enclosed with the letter were copies of the notes of the meeting the claimant had had with Julie Campbell and her investigation report.
17. The meeting between Mr Lamb and the claimant took place on 14th March 2018. Notes of the meeting are produced at pages 60-69. The claimant was accompanied at that meeting by Elaine Kennedy.
18. The focus of Mr Lamb’s questions at the meeting was on the potential reputational damage to the respondent rather than whether or not he was guilty of the charges. Mr Lamb made it clear to the claimant that he was not making a judgement on his guilt or innocence.

19. Following the meeting, Mr Lamb decided to dismiss the claimant. He considered that from the facts which he had ascertained there were only two options open to him, namely to suspend the claimant on full pay or to dismiss him. He did not consider given the nature of the charges that it would be appropriate to allow the claimant to return to work until his trial had taken place.
20. It was Mr Lamb's opinion that should the claimant be found guilty of the charges against him that would cause reputational damage to the respondent. He was aware that other charities had recently had problems regarding inappropriate behaviour which had impacted upon their reputation.
21. The claimant was unable to give any information as to when his trial might take place and accordingly any period of suspension on full pay would have been open ended. Mr Lamb did not consider that payment of full pay whilst on suspension for an unlimited period of time was an option open to him. He was concerned about the proper use of charitable funds.
22. Mr Lamb formed his opinion regarding possible reputational damage using his experience as a manager over some 30 years. He did not seek outside advice on that point.
23. For Mr Lamb the question was whether the seriousness of the charge had the potential to impact upon the reputation of the respondent. The guilt or innocence of the claimant was not part of his concern.
24. The hearing was adjourned to allow Mr Lamb to consider what had been said. When he returned he advised the claimant that his decision was to dismiss the claimant with notice.
25. He advised the claimant that the decision was not based upon his innocence or guilt but on the question of potential reputational risk to the respondent.
26. Mr Lamb took into account the fact that the claimant had been a long serving employee but in his opinion the risk of potential reputational damage outweighed that factor. He also took into account that the Charities Commission

had recently issued a release to charities reminding them to have concern about reputational damage.

27. Mr Lamb confirmed his decision in a letter to the claimant dated 18th March 2018, page 70.
28. The claimant was advised that his last day of employment with the respondent would be 14th March 2018 and that he would receive payment in lieu of 12 weeks' notice together with any outstanding holiday entitlement. He was also advised of his right of appeal.
29. The claimant appealed against the decision by letter dated 18th March 2018, page 71.
30. On 27th March the claimant was advised that his appeal would be heard on 6th April 2018 by John Lofthouse, page 72. He was advised of his right to be represented.
31. On 3rd April 2018 the claimant's solicitors wrote to the respondent elaborating upon the grounds of appeal, page 73. They stated the claimant's position was that dismissal was a "knee-jerk" reaction. They also stated that the claimant believed there was insufficient enquiry into the alleged incident and that was no evidence to justify his dismissal in all the circumstances. They stated that the claimant had not been convicted of any criminal offence and the mere fact he had been charged with an offence was not sufficient on its own for the employer to conclude that the offence had been committed, nor that the employer would suffer any reputational damage.
32. The appeal hearing took place on 6th April 2018 before John Lofthouse. The claimant was again accompanied by Elaine Kennedy. The notes of the appeal hearing are contained at pages 74-82.
33. At the appeal hearing Mr Lofthouse had before him the documents which Mr Lamb had seen and also the notes of the hearing Mr Lamb had conducted together with the letter of appeal and the letter from the solicitors.

34. Mr Lofthouse ascertained from the claimant that there had been no change to his position since the hearing before Mr Lamb. In particular no date had yet been fixed for a trial and the claimant was still on bail.
35. The claimant stated he felt his dismissal was unfair as he had not been convicted of the charges. Mr Lofthouse explained that the process was not to judge the claimant but to consider the potential for damage to the reputation of the respondent.
36. Mr Lofthouse considered the important facts were that the claimant had been charged with a serious crime and this had not yet been resolved; that he been very open about what happened and had not tried to hide the facts and that he was good employee who had a good track record. He adjourned the appeal hearing to consider his decision.
37. Mr Lofthouse did believe that there was potential for reputational damage to the respondent. He felt this would happen when the case came to court and might attract publicity. He considered the potential for reputational damage was considerable if the claimant was to be found guilty. The claimant was employed in a hospital where all the patients could be regarded as being vulnerable.
38. The area in which he worked was where there were at their most vulnerable. Mr Lofthouse's concern was that if the claimant was found guilty it might be felt that the respondent had not been fulfilling its duty of care to their patients if they had continued to employ someone facing such serious charges. The respondent is a charity and he considered that the public have high expectations of charities and expect them to protect the beneficiaries.
39. At the appeal hearing Mr Lofthouse had conveyed to the claimant his understanding of the meaning of "reputational damage".
40. Mr Lofthouse balanced his concerns about potential reputational damage to the respondent against the fact that the claimant was a long-standing employee with a clean disciplinary record.

41. Having considered all that been said at the appeal hearing Mr Lofthouse decided to uphold the decision to dismiss with notice.
42. He did consider the question of injustice to the claimant, in the event that the claimant might be found not guilty or the charges against him dropped. He advised the claimant that in the event of his being acquitted or having the charges dropped he would be reinstated with the respondent on the same terms and conditions.
43. Mr Lofthouse considered that he could not continue with the employment of the claimant even on suspension with full pay. He did not consider that would avoid the risk of reputational damage. He considered his offer of reinstatement to be sufficient to alleviate injustice to the claimant.
44. Mr Lofthouse confirmed his decision to the claimant in a letter dated 10th April 2018, page 83. In that letter he stated that in the event of the charges being dropped or the claimant been found not guilty following his trial the respondent would reinstate him in his previous position on the same terms and conditions and with continuity of employment preserved. He stated that the claimant would not be paid for the period during which he had not been employed by the respondent.
45. The post which the claimant held is being kept open by the respondent. The work is currently being covered by temporary labour. That situation is pending the outcome of the claimant's trial given the offer of reinstatement.
46. In the event that the tribunal found in favour of the claimant and ordered reinstatement Mr Lofthouse would be concerned about the question of reputational damage if that occurred prior to the outcome of the trial.
47. The claimant's trial in respect of the charges against him is due to take place on 8th November 2018.

48. The parties did not produce any evidence as to the claimant's losses between the date of dismissal and the tribunal hearing. They both agreed that the claimant would have been entitled to a salary increase with effect from 1st April 2018 which would have produced a gross salary of £22,600 per annum. Details of gross and net weekly earnings were not produced.

Submissions

Respondent

49. Mrs. Duddles, for the respondent, submitted that the dismissal was because of potential reputational damage to the respondent. This was, she submitted, a dismissal for some other substantial reason in terms of section 98 of the Employment Rights Act 1996. That was a potentially fair reason and she submitted that in all circumstances it was a fair dismissal.
50. The claimant had been charged with a serious offence. The area in which he worked meant that he was in contact with vulnerable patients. He worked with a mainly female workforce.
51. Charities were under particular scrutiny at this time and have been warned by the charities commission to consider the matter of reputational risks.
52. The police had contacted the respondent at the hospital to confirm that the claimant had told his employers of his arrest and charge. The respondent's concern was that they might be seen as not exercising sufficient care for patients by allowing the claimant to continue to work in the hospital should he be found guilty of the charges against him.
53. The decision to dismiss was not taken lightly and Mr Lofthouse had assessed the risk as high. It was the potential risk which justified dismissal.
54. The issue for the tribunal she submitted was, did the respondent act fairly. Her submission was that question had to be answered in the affirmative. The procedure which was followed was fair and the decision to dismiss was fair. The respondent was not concerned with the question of the guilt or innocence of the

claimant but purely with the question of potential reputational damage to their brand.

55. The respondent did not feel they could continue to employ the claimant whilst the charges were in existence and they could not suspend him on full pay indefinitely. The respondent considered the alternatives to dismissal and considered there were none. Mr Lofthouse had considered the question of injustice to the claimant and had endeavoured to mitigate that by offering to reinstate him should the charges be dropped or he be acquitted after trial.
56. She referred to the case of **Leach v The Office of Communications (Ofcom) [2012] IRLR 839** as authority that proposition that the question is not whether the employee has suffered injustice, but whether the employer has behaved reasonably in the circumstances. She submitted that case was in point. Any potential injustice to the claimant was mitigated by Mr Lofthouse's offer of reinstatement.
57. It was her position that the dismissal of the claimant was a potentially fair reason and was in the circumstances fair.

Claimant

58. For the claimant, Mr McCusker submitted that the dismissal was both procedurally and substantially unfair.
59. He submitted that neither Mr Lamb nor Mr Lofthouse had consulted any media or public relations advisers before reaching their conclusions relating to alleged potential reputational damage. A reasonable employer would have used such resources.
60. He also submitted that no questions were asked of the claimant about the matter of potential reputational damage and that was unfair.
61. There was confusion about the nature of the meetings and Mr Lofthouse had referred in the appeal to the meeting with Mr Lamb as being a "disciplinary" meeting.

62. The appeal hearing was not in fact a rehearing as had been stated.
63. There was no risk assessment policy and Mr Lamb and Mr Lofthouse had simply relied on their own skills in deciding the question of reputational damage.
64. There was no consideration of any alternative to dismissal such as retaining the claimant in employment with reduced duties or having the portering aspects of his job removed from him until his trial was concluded.
65. Mr McCusker submitted that the dismissal did not fall under the heading of some other substantial reason. The claimant was an innocent man and this was he said a financial decision wrapped up as a reason for dismissal for potential reputational damage.
66. He referred to the cases of **Leach v The Office of Communications (OFCOM)** (above); **White v Reflecting Roadstuds Ltd [1991] ICR 733** and **Z v A 2013 WL 10924069** and **UKEAT/0380/13**.
67. He also submitted that the ACAS code of practice was relevant in considering this case.
68. The remedy which the claimant was seeking in the event of his success would be reinstatement.

Decision

69. The issues for the employment tribunal to consider were:-
 1. Had the respondent shown the reason for the dismissal of the claimant and that it was a reason which was potentially fair in terms of section 98 of the Employment Rights Act 1996?
 2. If so was the dismissal fair in terms of section 98(4) of that Act?
70. Section 98 (1) of the **Employment Rights Act 1996** (ERA) makes it clear that it is for the employer to show the reason for dismissal which should be one of the potentially fair reasons set out in section 98 (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. If an employer can show that the reason for dismissal is one falling within the scope of section 98 the tribunal must then go on to consider whether the dismissal is fair or unfair. This will depend on whether in the circumstances (including the size and administrative resources of the undertaking) the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and is to be determined in accordance with equity and the substantial merits of the case.

71. The tribunal must not substitute its own decision for that of the employer. Rather, it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case – **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**. I bore in mind throughout what this test means in practice. In a given set of circumstances one employer may decide that dismissal is the appropriate response while another employer may decide, in the same circumstances, that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of the case.
72. In this case the respondent argued that the dismissal of the claimant was for some other substantial reason. The reason was because they considered the fact he had been charged with assault with intent to rape had the potential to cause them reputational damage if the facts of the case become public.
73. A respondent seeking to argue that a dismissal was for some other substantial reason must establish that the reason is a substantial reason and not frivolous or trivial.
74. The respondent's position was not to consider whether the claimant was guilty or innocent of the charges brought against him, rather they were concerned about reputational damage to their business should the charges be proven. I was satisfied from the witnesses for the respondent that their concerns about potential reputational damage were not frivolous or trivial but were sincerely held. Part of the claimant's job involved taking patients to and from the operating

theatre at a time when they would be at their most vulnerable. The respondent's concern, should the claimant ultimately be found guilty of the charges, was that they could be said by having continued to have employed him to have failed in their duty of care to patients and as a result suffer reputational damage. There was also evidence that the Charities Commission had advised charities to consider potential threats to their reputations. I accepted the evidence, which was unchallenged, that the public had a higher expectation of the behaviour of charities than might be expected of other organisations.

75. I also accepted that both Mr Lamb and Mr Lofthouse had sufficient experience of management to be able to assess the question of the risk of potential reputational damage themselves without requiring to seek external advice on that matter. The question of assessment of potential reputational damage is essentially a managerial one.
76. It was suggested by Mr McCusker that the decision to dismiss the claimant was in reality a financial decision wrapped up and presented as a reason for reputational damage, namely some other substantial reason. That argument ignores the fact that the respondent following the dismissal of the claimant held his role open, by using temporary labour, pending the outcome of the criminal trial. No evidence was led that the decision to dismiss was taken for financial reasons.
77. All the evidence indicated that the claimant had been a long serving employee with an impeccable disciplinary record. There was no suggestion that the respondent wished to be rid of the claimant for any other reason. The respondent had indicated that in the event that the charges against the claimant were dropped or he was found not guilty after trial that he would be reinstated in his old position on the same terms and conditions. That is not the action of a respondent wishing to dispense with the services of an employee such as the claimant.
78. The first question I had to consider was whether the respondent's reason for dismissal of the claimant was "**some other substantial reason**" within the

meaning of section 98 (1) (b) ERA. In short was it a reason which a reasonable employer could rely on to justify a dismissal as being potentially fair for the purposes of section 98 (4)?

79. I was satisfied that the respondent had shown that the reason for the dismissal of the claimant was because they considered that should he ultimately be found guilty of the charges against him there was a genuine risk of potential damage to their reputation. I considered that was a reason which a reasonable employer could rely upon to justify dismissal as fair.
80. The second question was whether it was fair to dismiss for that reason in terms of section 98 (4).
81. In this case I bore in mind throughout that the claimant vigorously denied the charges brought against him and that he was an innocent man until those charges were proven. The charges might well be dropped or he might be found not guilty and acquitted.
82. The claimant informed the respondent of the charges against him as soon as possible. The respondent then carried out an investigation with the claimant on 7 March into the circumstances. As a result of that investigation a report was prepared by Julie Campbell which stated, **“due to the potential reputational damage this may bring to Nuffield Health I recommend a further meeting to discuss his ongoing employment”**.
83. The claimant was invited to a meeting with Mr Lamb and provided, with the invitation letter, of the notes of his meeting with Julie Campbell and the investigation report. He was also advised that the meeting with Mr Lamb **“may result in a decision being taken that may affect your continued employment”**.
84. The meeting with Mr Lamb took place on 14th March and the claimant was accompanied at that meeting by Elaine Kennedy. The notes show at page 61 that Mr Lamb told the claimant the meeting was not to discuss his guilt or innocence but it was relating to the reputation of the respondent and the

claimant's continued employment. The point about reputation was reiterated on page 66. As a result of what he had learnt Mr Lamb concluded that the charges brought against the claimant had the potential to adversely affect the reputation of Nuffield Health. He decided to dismiss the claimant with notice. He set out his decision in a letter of 15th March and advised the claimant of his right of appeal.

85. The claimant appealed against the decision and on 3 April his solicitors wrote to the respondent expanding upon the grounds of appeal.
86. The appeal hearing took place before Mr Lofthouse on 6th April and again the claimant was accompanied by Elaine Kennedy. Mr Lofthouse had before him all the information which had been presented to Mr Lamb together with the notes of that hearing and the letters of appeal. Mr Lofthouse upheld the decision to dismiss and confirmed his decision to the claimant in a letter of 10th April. In that letter he confirmed that he had considered alternatives to dismissal, including suspension without pay but felt the potential for serious reputational damage to the respondent posed too great a risk. He made it clear to the claimant that he sympathised with the situation and stated that in the event of the charges being dropped or the claimant being found not guilty after trial the respondent would be prepared to reinstate him in his previous position on the same terms and conditions of employment.
87. It was suggested by Mr McCusker that there was some confusion about the nature of the meetings as Mr Lofthouse had referred to the meeting with Mr Lamb as being a disciplinary meeting. I did not consider that that particular characterisation of that meeting made any difference. It was clearly not a meeting to consider dismissing the claimant because of any proven conduct in the usual way of a disciplinary hearing but it was by its very nature a meeting which resulted in the dismissal of the claimant. It therefore had the same effect as a disciplinary hearing.
88. It was also suggested that the appeal was not a rehearing as had been advised in the invitation letter of 27th March. At the appeal Mr Lofthouse had all the

information which had been before Mr Lamb and asked questions to clarify the position. I was satisfied that all the evidence which had been before Mr Lamb was considered at the appeal. McCusker also submitted that no risk assessment had been carried out by the respondent and that Mr Lamb and Mr Lofthouse and simply relied on their own skills. I was satisfied from the evidence that they did possess sufficient managerial skills to reach a reasonable conclusion relating to the matter of potential reputational damage to the respondent.

89. I was satisfied that the procedures followed by the respondent were fair. They had carried out an investigation with the claimant; they had invited him to a meeting to discuss the matter and advised his employment might be at risk. They had allowed an appeal. I concluded that the ACAS Code of Practice on Disciplinary and Grievance Procedures had been followed and the dismissal was procedurally fair.
90. The next question was whether the dismissal of the claimant was within the range of reasonable responses open to a reasonable employer in the circumstances of the case.
91. Both parties referred to the case of **Leach v The Office of Communications** (above). In that case Mummery J cited with approval at paragraph 42, the judgement of the EA T in that case which stated **"We are acutely aware, as was the tribunal, that to justify the claimant's dismissal on the basis of reputational risk in the absence of any established misconduct may involve a grave injustice to him. But it is essential to bear in mind that under section 98 the central question is what it was reasonable for the employer, in the relevant circumstances to do."**
92. That makes it clear that the legal point is that the question is not whether the employee has suffered injustice, but whether the employer has behaved reasonably in the circumstances.
93. Mr McCusker referred to the case of **Z V A** (above) where the EAT held an employment tribunal's decision that a school caretaker's dismissal, after

allegations were made against him of historical sex abuse, was not for some other substantial reason and nor was it fair. That case related to a dismissal due to a loss of trust and confidence and turns upon its own circumstances. At paragraph 24 of that case the EAT referred to paragraph 53 of **Leach** where it was stated “**The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the ET has to examine all the relevant circumstances.**”

94. In this case there was no knee jerk reaction by the respondent to the information given to them by the claimant and by the police. They sought clarification from the claimant as to what happened and when his trial might take place or whether the charges were likely to be dropped. It was only after the initial investigatory meeting that the respondent decided that there should be a further meeting to consider the question of the claimant’s future employment due to potential reputational damage.
95. The question to be considered is whether the dismissal of the claimant was within the range of reasonable responses open to a reasonable employer. In the case of **British Leyland v Swift [1981] IRLR 91** Lord Denning stated “**The correct test is: Was it reasonable for the employer to dismissive? If no reasonable employer would have dismissed him, then the dismissal is unfair. But if a reasonable employer might reasonably have dismissed, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view**” That test was applied in **Iceland Frozen Foods v Jones** (above).
96. It was suggested in submissions that the respondent could have kept the claimant in employment but removing the portering aspects of his duties from him. Unfortunately, that suggestion was not put to either of the respondent’s witnesses and as a result they had no opportunity of commenting on whether or not that was a feasible solution. It is however clear from Mr Lofthouse’s letter of 10th April that he did consider an alternative to dismissal namely suspension

without pay but in his view the potential for serious reputational damage to the respondent posed too great a risk in the current climate weather was increased and close scrutiny of the charitable/not for profit sector and its employees.

97. I was very conscious that Mr Lafferty may well be innocent of the charges against him and that he will have suffered injustice by reason of dismissal. However, as noted above, the question is not whether he suffered injustice but whether the employer has behaved reasonably in the circumstances. In my judgement the respondent did act reasonably in dismissing the claimant because of potential reputational damage which could be caused to them should he be found guilty of the charges. As I have said I was satisfied that the concerns which they held about reputational damage were not fanciful or trivial but were genuine. I did not consider that it could properly be said that in this case no reasonable employer would have dismissed the claimant and accordingly the claim is dismissed.

Employment Judge: IF Atack
Date of Judgment: 15 November 2018
Entered in register: 16 November 2018
and copied to parties