



EMPLOYMENT TRIBUNALS

Claimant: Mr C O Flynn

Respondent: Turning Point

Heard at: Nottingham **On:** Wednesday 18 September 2019

Before: Employment Judge Butler (sitting alone)

Representatives

Claimant: In Person

Respondent: Mr A Moore, Solicitor

JUDGMENT

The judgment of the Tribunal is that:-

1. The claim of unfair dismissal is not well founded and is dismissed.

REASONS

The Claim

1. By a claim form submitted on 31 December 2018 the Claimant brought a claim of unfair dismissal against the Respondent. He had commenced employment with the Respondent on 25 July 2016 and was summarily dismissed for gross misconduct on 11 October 2018. He had been employed as a Project Worker which involved working to a rota and occasionally sleeping in overnight. The Respondent resisted the claim on the grounds that the Claimant was fairly dismissed for gross misconduct with the principal reason for his dismissal being endangering the health and safety of his colleagues and the Respondent's service users.

The Issues

2. The major issue in this case is whether the decision to dismiss the Claimant summarily was for a reason falling within Section 98(2) of the Employment Rights Act 1996 ("ERA") and whether the Respondent acted reasonably in treating the reason for dismissal as a sufficient reason.

The Law

3. Section 98(1) ERA provides:

“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 subsection (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.”

4. Section 98(2) ERA provides:

“A reason falls within this subsection if it

(b) relates to the conduct of the employee.”

5. Section 98(4) ERA provides:

“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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 reasonably 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.”

6. In **British Home Stores Limited v Burchell** [1980] ICR 303 EAT, the Court laid down general principles of reasonableness in conduct dismissals. These are that the employer must have a genuine belief in the conduct complained of, that belief is sustained after a reasonable investigation and the dismissal is within the range of responses of a reasonable employer.

7. In **J Sainsbury Limited v Hitt** [2003] ICR 111 CA the Court of Appeal held that the range of reasonable responses test also applied to the procedure by which the decision to dismiss is reached.

The Evidence

8. The Claimant did not produce a written witness statement but sought to rely in the particulars of claim set out in his claim form. He gave oral evidence and was cross-examined. For the Respondent, I heard evidence from Mr R Stowe, Senior Manager North East, who was the dismissing officer and Mr J Jones, Regional Manager of the Respondent, who was the appeal officer. Both produced written statements and gave oral evidence which included cross-examination by the Claimant.

9. There was also a bundle of documents of 523 pages and references to page numbers in this judgment are to page numbers in the bundle.

10. I found the evidence of Mr Stowe to be given in a relatively straightforward manner. He answered questions promptly without hesitation and was clear about the reason he decided to summarily dismiss the Claimant. Whilst he did hesitate when asked to highlight the aggressive behaviour referred to in the dismissal letter, it is fair to say that dismissal took place almost a year ago and the alleged aggressive conduct of the Claimant was not the principal reason for his dismissal.

11. Similarly, the evidence of Mr Jones was given in a straightforward manner and he promptly answered questions. He was particularly clear in relation to the Claimant's attempts to record the appeal hearing and was robust in his decision not to allow the Claimant to do so.

12. The Claimant's evidence was less straightforward. Allowances were made because he was a litigant in person in that he was able, Mr Moore raising no objection, to consult his notes while giving evidence as he did not have a particularly good grasp of the documents in the bundle. Much of his particulars of claim and, hence, his statement was focussed on what he considered to be a breach of confidentiality in that senior management had discussed his suffering from impetigo with his work colleagues and, if I understand him correctly, NHS Direct. As I explained to the Claimant, this alleged breach of confidentiality had absolutely nothing to do with his dismissal and, in any event, I could not see that other people discussing it after he had disclosed the condition to management and co-workers could amount to a breach of confidentiality.

13. Throughout his evidence, the Claimant made reference to inconsistencies in the evidence given to investigating officer but he was unable to highlight these inconsistencies by reference to the bundle. He also attempted to rely on issues which were not central to his case. One such example is his allegation that a senior manager who was infected with impetigo said she had visited family in the north east notwithstanding her infection when, in fact, she did not do so.

14. The Claimant also went to great lengths to deny that his alleged aggressive conduct towards a senior manager and his colleagues was in any way aggressive. He admitted to being angry and frustrated but denied this manifested itself in any aggressive conduct.

15. Under cross-examination, the Claimant accepted that the safety of the residents at his place of work was a paramount consideration. He also agreed that he has to take responsibility for his actions at work. He agreed that one can be angry at work and demonstrate this to your colleagues and that it may be this should not be done. He accepted that he had read and received training on the Respondent's policy as relevant to reducing the risk of the spread of infections to control it (page 95). A major issue in relation to the Claimant's evidence was his account of his visit to his GP when the symptoms of impetigo first manifested themselves. His evidence was he was told it was highly contagious and this was disclosed to management and colleagues. He said he did not even discuss whether he should attend his place of work with his GP and received no guidance as to whether he should or should not attend work.

I had reason to doubt the accuracy of this evidence bearing in mind the Claimant was invited to produce his medical records (which would have decided the point one way or the other) but refused to do so.

16. The Claimant also appeared to display a somewhat cavalier attitude suffering from a highly contagious condition. For example, on the one hand he accepted it was highly contagious, necessitating the application or taking of antibiotic medication. On the other, he did not think it was poor judgment to allow a service user to put the sheets the Claimant had slept in the night before in the washing machine.

17. It seems to be agreed by both sides that the Claimant was told by his senior, Ms Butler, on 26 August 2018 not to attend his shift on the following Monday unless he produced a "fit to work" note from his doctor. Notwithstanding this, the Claimant went back into the workplace on the same day because he had forgotten to sign a medication form. His explanation for this was that supplying evidence from his doctor that he was fit to attend work on the following Monday did not mean he could not enter the workplace before then. I found this explanation to lack any credibility.

18. I stress at this point that the Claimant was able to highlight a few issues in relation to the investigation such as those giving statements being allowed to amend interview notes afterwards. Having said that, as in the case of the manager who did or did not go to the north east while suffering from impetigo, many of his accusations of foul play are found to be little more than conspiracy theories based on assumptions he had made and on which there was no documentary evidence.

19. I also point out that I advised the parties that I would concentrate on the relevant issues set out above which did not necessarily involve, and would mostly not involve, consideration of detail which was tangential to those relevant issues.

20. For the above reasons, in relation to the issues, where there was a dispute on the evidence, I preferred the evidence of the Respondent.

The Facts

21. In relation to the issues I find the facts as set out below.

22. The Respondent is a registered charity providing services to individuals with issues relating to substance abuse, learning disabilities and mental health. The Claimant was employed as a project worker based at a residential facility in Nottingham.

23. On 24 August 2018 the Claimant informed his line manager that he was suffering from impetigo. He did not at this stage mention it was contagious. On 26 August 2018 in a discussion with some of his colleagues, he told them he was suffering from impetigo and that it was highly contagious. Some of his colleagues then researched impetigo and advised management of their concerns for the health and safety of themselves and the Respondent's service users. The Claimant was subsequently advised by his line manager not to attend for his shift on the following Monday without a note from his doctor saying he was fit to work. Later that day, the Claimant returned to his workplace to sign a medication form.

24. At around the same time, the Claimant had a text message exchange with a colleague, conversations with two colleagues and a telephone conversation with a manager during which he appeared to be angry and frustrated largely because any further absence from work would mean he reached the trigger point set out in the Respondent's absence management policy which might mean he would lose wages.

25. The Respondent's instruction for him to obtain a fitness to work note came after consulting the NHS Direct website. As a result of what was considered to be aggressive conduct towards his fellow employees, the Claimant was suspended pending an investigation into his conduct. He attended an investigation meeting on 5 September 2018. Subsequently, the Claimant was notified that he would also face an allegation that he had failed to act responsibly to prevent the spread of a contagious infection.

26. The Respondent's investigation into the Claimant's conduct included taking statements and conducting interviews with relevant employees.

27. The Claimant was invited to a disciplinary hearing on 3 October 2018. This was chaired by Mr Stowe and the notes of the hearing are at pages 287 to 291.

28. By a letter dated 15 October 2018 (page 303) Mr Stowe wrote to the Claimant to advise him that his decision was he would be summarily dismissed for gross misconduct. The outcome letter noted that the Claimant would have been found to have committed acts of serious misconduct in relation to attending work with a contagious disease and acting aggressively towards his colleagues but the principal reason for his dismissal was attending the workplace having been advised by his line manager not to do so without a note that he was fit to work from his doctor.

29. The Claimant was notified of his right to appeal against his dismissal and he did appeal. The appeal hearing was arranged by Mr Jones to take place on 12 November 2018. The Claimant attempted to record the meeting which was then adjourned by Mr Jones who had already advised him he could not record it. The appeal hearing was rearranged for 3 December 2018 and the Claimant submitted a statement of the grounds of his appeal (page 363) but did not attend the hearing itself.

30. Mr Jones considered the Claimant's grounds of appeal but decided that the decision to summarily dismiss him should be upheld. He notified the Claimant of this by letter of 19 December 2018 (page 388).

Submissions

31. The Claimant said that everyone has a responsibility to control infection. In his case, however, he had notified his managers of his infection and they shifted the responsibility for handling the situation to him. He had produced his doctor's letter stating that impetigo was not notifiable. His case had been mishandled with poor documentation and the advice given to his managers from NHS Direct was wrong. There had been a false Police report made against him and the Respondent had forged documents. He said this would be cause of their downfall.

32. Mr Moore said this was a straightforward misconduct case and Burchell principles should be adopted. There had been sufficient evidence of the Claimant's aggression and that he had been angry, hostile and blaming in his approach to his colleagues. His line manager had said he had been very aggressive and had shouted angrily at her in the telephone conversation. The Respondent had a reasonable belief that the Claimant knew he should be at work and had given him an opportunity to produce his medical records but he had failed to do so. He had put his own interests in remaining at work so he would not lose money above the interests of others in relation to their safety. The Claimant had acted in a way which also puts service users at risk. In relation to any inconsistencies raised by the Claimant they did not go to the point of his dismissal which fell within the band of reasonable responses.

Conclusions

33. At the outset of the hearing, I clarified the issues in this case with the parties by reference to the **Burchell** case. I carefully explained this to the Claimant. During the hearing I also reminded them (and myself) that I must not fall into the trap of approaching this case from the point of view of what I would have done as the standard applicable to conduct dismissals was that of the reasonable employer.

34. The Respondent's policy (page 95) states that its aims are "to reduce the risk of infections being acquired and spread within Turning Point services". At page 99 the policy states that every employee has a duty "to ensure they take responsibility for acting to prevent themselves from acquiring infections and prevent the spread of infections from others" and "to act and carry out all work responsibly and accurately, reducing risks to infection where possible. To use all equipment, including infection prevention and control equipment correctly".

35. It is against this background that the Claimant notified his managers and colleagues he was suffering from impetigo and to his colleagues that it was highly contagious. I find it hardly surprising in these circumstances that his colleagues expressed concern for their own welfare and that of the Respondent's service users in the event they contracted impetigo from the Claimant. In fact, the evidence shows, and was not disputed by the Claimant, that three of his colleagues did subsequently contract the condition.

36. The standard of the reasonable employer permeates through every step and aspect of the Respondent's response to the Claimant's actions. The first question is, faced with an employee with a highly contagious condition, what would a reasonable employer have done? What this Respondent did was to consult the NHS Direct website. This guidance is at page 402 and at page 405 states that while it is still contagious sufferers should "stay away from school or work". Accordingly, it would be appropriate for a reasonable employer to want to take steps its employees and service users, many of whom are vulnerable, from becoming infected.

37. Whilst I accept the Claimant's evidence that there is no such thing as a fitness to work note, it would not have been difficult to obtain confirmation from his GP that he was fit to return to work in time for his allotted shift.

However, before he had an opportunity to do this and knowing he was suffering from a highly contagious condition, with total disregard for his manager's instructions, he went back to the workplace whilst suffering from a highly contagious condition thereby putting his colleagues and service users at further risk. I do acknowledge the Claimant's argument that his doctor had not even discussed whether he should absent himself from work but the Claimant's failure to produce medical records to support this does not give me any confidence that his account is accurate.

38. Following the **Sainsbury** case, an employer's investigation into alleged misconduct should also be reasonable. In fact, it is clear from the documents in the bundle that the investigation carried out by the Respondent was very thorough. All those involved were interviewed or made statements. I note the Claimant's allegation that some of those who were interviewed were allowed to amend the interview notes at a later date. He could not pin point any direct documentary evidence of this but, in any event, it is entirely appropriate and acceptable for the interviewer to prepare notes of interview and submit them to the interviewee with a request to check them for accuracy and to make any amendments necessary. There was no evidence before me that any of the witnesses colluded in amending their accounts to the detriment of the Claimant.

39. There was a dispute as to whether the Claimant behaved aggressively towards his colleagues. He accepts he was angry and frustrated. It is likely this was because he might have reached the trigger point in the Respondent's absence management policy and therefore get to the stage where further action might be taken resulting in the loss of earnings. I have to say, as I indicated during the hearing, that I did not find the text message exchanges to give the impression of aggression. Having said that, Mr Stowe the dismissing officer, had before him accounts from those who actually spoke to the Claimant and who said he was unnecessarily aggressive. Since there was a consistency in the evidence before him in relation to conversations between the Claimant and others a reasonable employer would have been entitled to conclude that in this regard the Claimant had behaved aggressively. But even if this was not the case, Mr Stowe makes clear that he considered this to "constitute serious misconduct" (page 305).

40. The Claimant also complains that he was treated differently from others who subsequently contracted impetigo. He complains that they were not, like him, forced to remain away from work. Mr Stowe addressed this issue in his evidence confirming that his information was that the other members of staff affected did not attend work for 48 hours after their antibiotic treatment started and he confirmed this in the dismissal letter (page 304).

41. But Mr Stowe goes further and addresses in detail the reason for the Claimant's dismissal. At page 305 he states that the Claimant's attendance at work whilst suffering from a very contagious condition would normally amount to gross misconduct but he would have "mitigated this back to serious misconduct because you did disclose your condition to the management". He goes on to explain the reason he did not mitigate this back to serious misconduct was because "you were asked to not attend work until further notice and you directly ignored this reasonable management instruction and returned to site, ignoring this request so I therefore consider this allegation to be upheld and constitute gross misconduct".

42. It is clear that there were other matters at play in connection with this claim. There had been issues with medication sign offs before. The Claimant had had a period of sickness absence after being involved in a road traffic accident whilst transporting a service user from one place to another. I do not find any evidence that these matters influenced the Respondent.

43. I also note the Claimant's apparent mistrust of the Respondent's policies and procedure to the extent that he engaged in covert recording of meetings and tried to prevail upon Mr Jones to allow recording of the appeal hearing. He wanted his solicitor to attend meetings despite properly being advised he could be accompanied by a colleague or trade union official. I do not know whether in relation to these matters the Claimant was acting on the advice of a solicitor. If he was, that advice was clearly wrong and misinformed.

44. In conclusion, I find that, in the light of the Claimant's conduct, he was dismissed for a potentially fair reason in accordance with Section 98 ERA. The Respondent had a genuine belief in the conduct complained of. That belief was sustained after a reasonable and thorough investigation. The decision to dismiss was for gross misconduct in attending the workplace whilst knowingly suffering from a highly contagious condition contrary to management instructions to stay away from the workplace. The decision to dismiss fell within the range of responses of a reasonable employer.

45. For the above reasons, the claim is dismissed.

Employment Judge Butler

Date 10 October 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE