



EMPLOYMENT TRIBUNALS

Claimant: Mr P Ogieriakhi

Respondent: Serco Limited

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 12th February 2021

Before: Employment Judge Reid

Representation

Claimant: In person

Respondent: Mr Moss

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video (V) (CVP) (partly remote). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the Tribunal were as set out below.

JUDGMENT (Reserved)

- 1. The Claimant was not unfairly dismissed by the Respondent. His claim for unfair dismissal is dismissed.**
- 2. The Claimant was not wrongfully dismissed by the Respondent. His claim for wrongful dismissal (notice pay) is dismissed.**

REASONS

Background and claim

1. The Claimant was employed by the Respondent as a cleaner at Whipps Cross Hospital from 4th April 2018 to 13th February 2020 when he was dismissed without notice for two incidents in August 2019 involving his behaviour towards other members of staff.

2. The Claimant's claim form was presented on 12th May 2020 having undertaken ACAS conciliation between 26th February 2020 and 6th March 2020.

3. The first incident leading to dismissal was when the Claimant invited a senior member of the nursing staff (RG) to a church event and gave her his phone number. The Claimant did not dispute he did this (though he later disputed some of the facts surrounding the circumstances). The second incident involved a claimed threat to a patient ambassador (BB) it being claimed that the Claimant had behaved in a threatening way towards her on the phone, which he disputed. He was dismissed for both incidents but his appeal against the RG incident was upheld it being concluded that that incident was not gross misconduct; the dismissal was however upheld as regards the BB incident.

4. The Claimant's claim form claimed his dismissal was unfair for the following reasons. Firstly he said that it had not been explained to him why his behaviour to RG had been considered intimidating or threatening; secondly he said that he had disputed the account of the phone call with BB saying he did not do it but that he was not told the date of the phone call or BB's name so he disputed it as he had never done anything like that; thirdly he said that no evidence was produced or investigations done to show the allegations were well founded. At the hearing the main argument advanced by the Claimant in relation to the RG incident was that it did not say in the handbook/code of conduct that you cannot invite another colleague to a church event.

5. The Respondent's defence was that he had been fairly dismissed for gross misconduct, a fair procedure having been followed. The Respondent pointed to its Code of Conduct and Disciplinary Procedure as justifying a dismissal in these circumstances in the light of the behaviour and the principles of conduct expected of employees. The Respondent said that even if there had been a procedural failing the Claimant would have been dismissed in any event and that the Claimant had contributed to his own dismissal.

6. The hearing was a hybrid CVP hearing. It had originally been arranged as a CVP hearing (wholly remote) but the Claimant attended the Tribunal building so arrangements were made at short notice to accommodate him attending the hearing from a Tribunal room (where he was on his own). The Respondent attended remotely. The Claimant was provided with a (paper) copy of the Respondent's witness statements and the bundle as he had not brought them with him.

7. The Claimant had made a postponement application on 8th February 2021 by his then solicitors on the basis they had been unable to obtain instructions and get the papers from his previous solicitors. (He had made two unsuccessful postponement applications before this one.) This was refused. His solicitors came off the record on 11th February 2021. He arrived at the Tribunal building by 7.30am on the day of the hearing and asked again for a postponement on the basis that he was unwell. That application was refused by the Regional Employment Judge and the CVP arrangements put in place so that he could attend from the Tribunal building. The Claimant made a further postponement application at the beginning of this hearing (which he then repeated at various stages) saying he needed legal representation. I refused that application but advised him that to the extent possible I could assist him at the hearing if he was unsure as to procedure or relevance. I explained the legal issues on the two claims to the Claimant (explaining how the tests for wrongful dismissal and unfair dismissal are different) and the *Burchell* test for a misconduct dismissal and the

band of reasonable responses test. I also explained the *Polkey* point and contribution point raised by the Respondent. I gave the Claimant considerable assistance in framing his questions for the Respondent's witnesses.

8. The Claimant had not prepared a witness statement for the hearing. He had sent in a copy of the disciplinary meeting notes dated 13th February 2020 calling it his witness statement. He said he did not understand what a witness statement was so I explained it to him. Before cross-examination I therefore asked the Claimant to tell me in his own words what happened in the two incidents and took him through his appeal letter and claim form.

9. The Respondent's witnesses were Mr Davidson (decision to dismiss) and Mr Lock (appeal) both of who had provided witness statements. There was an electronic bundle to page 183 (plus index).

10. I identified with the parties that due to the listing length the hearing would cover liability issues plus *Polkey* and contributory fault and explained what this meant to the Claimant and that if he won his claim he would have a separate hearing to decide any compensation.

11. At the end of the hearing I heard oral submissions both sides, having explained to the Claimant what submissions were and given him time to make some notes in a break beforehand. I asked the Respondent to make submissions first to make it easier for the Claimant so that he was responding to the Respondent's case.

12. I reserved my decision due to lack of time.

Findings of fact

13. The Respondent received a complaint from a member of the nursing staff in January 2019 about the Claimant making an unsolicited approach to her inviting her to a church party/event, causing her distress. The matter was investigated and no disciplinary action was taken though the Claimant was moved to another ward and was reminded about the standards of behaviour expected in the workplace. The Claimant professed at this hearing and at the disciplinary hearing (page 89) not to recall this previous incident but he had volunteered this information at the investigation meeting (page 76) saying it was strange because it was not this first time this had happened to him. I therefore find that the Claimant was aware at the time of the RG incident that it was not appropriate to make an unsolicited approach and that it could cause distress or anxiety, even if that was not what he intended.

14. The Respondent received two complaints about the Claimant on 8th August 2019. The first was from RG (who was employed separately by the NHS trust and not employed by the Respondent) and was that the Claimant had made an unsolicited approach to her on two occasions that day culminating in him inviting her to a church party by handing over a piece of paper with his number, a date and the words 'church party' on it.

15. The second complaint from BB was about what had happened on 2nd August 2019. BB said that the Claimant had telephoned her to ask about waste bags and she had directed him to get them from another ward at which point BB said that the Claimant said to her he would 'deal' with her and would do something to her throat.

16. The Claimant was suspended (page 69) and an investigation was commenced by Ms Zieja. She interviewed RG and BB (page 68C, 70) and the Claimant (page 71). There were no other witnesses to the BB incident for Ms Zieja to interview. Having initially said he did not recall who RG was he then recalled both her and the incident. The Claimant was clearly aware of who it was who had complained and recalled the day and how he had come to make the call to BB (page 77). I find that BB's recollection when her statement was taken was based on notes she took at the time (page 70). She said she had reported the matter to the police and had then taken some sick leave, saying she still felt unsafe at work if the Claimant was on site.

17. As regards the RG incident the Claimant accepted that he had approached RG twice on the day in question and had handed over the note to the colleague standing by her (pages 72-74) (though by the time of his appeal (see below) and at this hearing he was adamant it was only once). He said that the reason he had invited her was because she was a senior person and well off (page 74). It was reasonable not to investigate with any further witnesses given the Claimant accepted he had approached her twice and handed over the note.

18. The disciplinary hearing with Mr Davidson was held on 13th February 2020 (delayed from October 2019 due to the Claimant being off sick, yet not attending the Occupational Health appointment booked for him).

19. The Claimant recalled the RG incident (page 85) and then claimed he was not sure who Mr Davidson was referring to. He now gave a different account of the circumstances of the first conversation with RG saying that he had made a comment to her about his two daughters' names being called out (page 86) whereas at the investigation meeting he had said he had a son and a daughter (page 72-73) (though he had inexplicably struggled to recall his daughter's name, though then recalling it later page 79). His later explanation why he had got this wrong because referring to his brother (page 89-90) was not credible. He accepted he had met RG twice in the corridor (page 87) contrary to his assertion at his appeal (see below) and this hearing that he had only spoken to her once. He professed to not understand why his behaviour could be construed as inappropriate (page 87) but he already knew from the January 2019 incident that the Respondent considered it was inappropriate to make an unsolicited approach to a member of staff inviting them to a church event and it had been serious enough to suspend and then move him. He confirmed again that he invited RG because she was a senior person, to impress his pastor (page 88) despite accepting that he did not know if RG classed him as a friend. He initially professed not to know about the suspension over the January 2019 incident but then agreed he had been suspended (page 89,94). Mr Davidson explained to the Claimant that his behaviour had been intimidating and uncomfortable to RG based on her statement but the Claimant could not or would not understand that that had been the effect (page 90).

20. Having accepted there was only a phone call to BB at the investigation meeting the Claimant now said he had also gone to BB's office (page 91). He again denied BB's account (page 91) but accepted she was not a liar and could not explain why she would say the incident occurred if it had not (page 92).

21. Mr Davidson took the decision to dismiss the Claimant for both incidents, both being breaches of the Bullying and Harassment policy (page 97) amounting to gross misconduct. The Claimant appealed (page 98). He denied threatening BB and denied that inviting a colleague to church amounted to bullying.

22. Mr Lock heard the appeal on 20th February 2020 (page 103).

23. The Claimant now said he had only approached RG once not twice (page 103). The Claimant again said he had gone to BB's office after a phone call but denied making the claimed comments. He denied saying that he had said he would cut BB's throat but he was not accused of saying that, he was accused of saying he would do something to her throat.

24. Mr Lock upheld the Claimant's appeal as regards the RG allegation finding that it was not serious enough to amount to gross misconduct, taking into account RG's account that she felt uncomfortable. I find based on his oral evidence that he did not treat the RG incident as an aggravating factor in the BB incident when considering the BB incident but considered the BB incident separately on its own merits; he however did take into account credibility issues emerging from the Claimant's account of the RG incident when considering who to believe over the BB incident. This was reasonable given an overall assessment of credibility as between BB's account and the Claimant's account had to be made, given the Claimant disputed that he had made the comments to BB. Mr Lock reasonably took into account the Claimant's changing account in relation to both incidents in assessing his credibility over the BB incident.

25. Taking into account the above findings of fact and the credibility findings set out below I find that the Claimant approached RG twice on 8th August 2019 and on the second occasion handed a note (which she asked her colleague standing nearby to take from the Claimant) which had on it his telephone number and the words church party on it and a date. I find that RG asked the Claimant to give the piece of paper to her colleague standing nearby because she already felt very uncomfortable with the approaches. I find that they did not work together as colleagues though they knew each other to pass the time of day to. RG was not the Claimant's friend and they had had no prior discussions about any interest she had in his church activities and he had no knowledge of her faith or if she had any faith at all. Despite the previous suspension for a similar matter only some 8 months before, the Claimant did not appear to understand that this was inappropriate or if he did understand it, it did not stop him doing something again he had already been specifically advised not to do and which he had been suspended for. The fact the Claimant struck up a conversation with her twice when she had expressed no interest in his church activities and did not know him very well was intimidating and made RG feel uncomfortable. The Claimant breached the Respondent's Bullying and Harassment policy and Code of Conduct (page 122, 156) the actions towards RG amounting to harassment which offended or embarrassed her (point 14 an example of gross misconduct). She said she had been intimidated by it and given the previous incident I find that

the Claimant was aware she could be intimidated but went ahead anyway.

26. Taking into account the above findings of fact and the credibility findings set out below I find that the Claimant spoke to BB on the phone on 2nd August 2019 and made the comment about dealing with her and doing something to her throat. That was a very intimidating thing to do and involved a threat of violence, inexplicably emanating out of a discussion about waste bags. The Claimant breached the Respondent's Bullying and Harassment policy and Code of Conduct (page 122, 156) the actions towards BB amounting to a threat of violence to another employee (point 3, an example of gross misconduct).

27. I do not find the Claimant to be credible in his account of what happened. He has sought to change his account and was still changing it by the time of this hearing. He professed to not know about things he then accepted he did know about and professed to not have received documents during the disciplinary process he was clearly sent. He professed not to understand allegations when he had already discussed them. He claimed at this hearing to have forgotten the January 2019 suspension and that he did not understand why his behaviour to RG had been wrong and had upset her.

Relevant law

Unfair dismissal

28. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.

29. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsbury's v Hitt [2003] IRLR 23*.

30. It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.

31. In this claim as regards the unfair dismissal claim, the Claimant was only ultimately dismissed for the BB incident after his appeal was partly upheld.

Wrongful dismissal

32. The relevant law is the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which provides that a breach of contract claim can be brought if it arises or is outstanding on the termination of employment.

33. There is a right to terminate the employment without notice where an employee commits an act amounting to a repudiatory breach of contract or gross misconduct.

34. In this claim as regards the wrongful dismissal claim the Respondent could rely on both incidents as amounting to gross misconduct justifying dismissal; even though on appeal the dismissal was only upheld as regards the BB incident, the test on a wrongful dismissal claim is different and looks at what actually happened and whether that amounted to a repudiatory ie serious breach of contract by the employee.

Reasons

Unfair dismissal

35. Taking into account the above findings of fact the Respondent conducted a reasonable investigation and obtained evidence from the relevant people, namely RG, BB and the Claimant. That evidence was provided to the Claimant.

36. Taking into account the above findings of fact the Claimant was aware from the investigation stage that the allegation regarding the phone call was made by BB and was able to give his own account of what had happened as he recalled it.

37. The Respondent reasonably considered his behaviour towards RG to be intimidating at the dismissal stage and why that could be the case was explained to him. In any event the Claimant was ultimately not dismissed for the RG incident after that part of his appeal was upheld. This was not because the Respondent decided that his behaviour was acceptable but because Mr Lock took into account that RG had not felt threatened by the behaviour and that therefore whilst it was misconduct it was not gross misconduct. The Claimant's argument at the hearing that the handbook does not expressly state that someone cannot invite a work colleague to a church event missed the point firstly because a handbook or disciplinary policy or code of conduct cannot cover every type of situation and can only set out principles and give examples and secondly the Claimant knew he shouldn't be doing it from the previous January 2019 incident.

38. The Respondent reasonably accepted the account of BB over the account of the Claimant. He could not explain why she would make the allegation and Mr Lock reasonably took into account credibility issues when assessing whose account to believe.

39. Even if (which I do not find) the Claimant's dismissal was unfair, I also conclude that the Claimant would have been dismissed in any event even if a different procedure had been followed. I assess this as a 100% chance of dismissal.

40. I also assess that even if the dismissal was unfair there should be a 100% reduction for the Claimant's conduct under s122(2) Employment Rights Act 1996 (basic award) and s123(6) Employment Rights Act 1996.

Wrongful dismissal

41. Taking into account the above findings of fact at paras 25-27 above, I conclude that the Respondent was entitled to dismiss the Claimant without notice for the BB incident as amounting to gross misconduct. Whilst I find that the RG incident was misconduct I find it was not gross misconduct. This means that the Claimant was justifiably dismissed without notice for the BB incident was not entitled to be paid any notice money.

**Employment Judge Reid
Date: 22nd February 2021**