Case Number: 2204881/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F Freitas	**v**	**Sodexo Limited**

Heard at: London Central (by video) **On**: 29 – 30 April and 4 May 2021 and 6 May 2021 in Chambers

Before: Employment Judge E Burns
Ms L Moreton
Ms S Samek

Representation

For the Claimant: In person

For the Respondent: Mr Tom Perry, Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The claimant's claim that the respondent failed to comply with a duty to make reasonable adjustments is not upheld and is dismissed.

(2) The claimant was not wrongfully dismissed and this claim is also dismissed.

(3) The claimant was unfairly dismissed.

(4) The respondent would have been in a position to fairly dismiss the claimant a week after his actual dismissal.

(5) The claimant's basic award should not be reduced pursuant to section 122(2) of the Employment Rights Act 1996.

(6) The claimant's compensatory award should be reduced by 100% pursuant to section 123(6) of the Employment Rights Act 1996.

(7) The claimant's compensation should be increase by 15% to reflect the respondent's failure to comply fully with the requirements of the Acas Code of Practice on Disciplinary and Grievance procedures.

REASONS

INTRODUCTION

1. The claimant had worked for the respondent (and its predecessor organisations) since 1998. This is a claim arising from the claimant's dismissal for gross misconduct on 25 June 2019.

THE ISSUES

2. The issues to be determined were as follows:

Unfair Dismissal Claim

1.1 Did the Respondent believe that the Claimant was guilty of the misconduct alleged?

1.2 If so, was that belief based on an investigation that was reasonable in all the circumstances?

1.3 Was the Claimant's dismissal fair in all the circumstances? Including:

1.4 Did the Respondent follow a procedure that was fair in all the-circumstances?

1.5 Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason to dismiss the Claimant? In considering this question the Tribunal will ask, was the Claimant's dismissal within the range of reasonable responses open to a reasonable employer?

1.6 If the Tribunal finds that the Claimant's dismissal was unfair due to a failure of procedure, would the Claimant have been fairly dismissed if a fair procedure had been followed? If so when and / with what likelihood?

1.7 If the Tribunal finds that the Claimant's dismissal was unfair to what extent, if any, did the Claimant contribute to his dismissal, and what % reduction, if any, should be made to the Basic and Compensatory Awards? s. 122(2) and s. 123(6) ERA.

1.8 If the Tribunal finds that the Claimant's dismissal was unfair, should any compensation due to the Claimant be reduced, and if so by how much (up to a maximum of 25%), for his failure to follow the ACAS Code?

Wrongful Dismissal Claim

2.1 Was the Claimant's dismissal in breach of his contract of employment?

Failure to Make Reasonable Adjustments

3.1 Did the Respondent know that the Claimant was disabled by reason of depression?

3.2 If not, could the Respondent have been reasonably expected to know that the Claimant had the disability and was likely to be placed at the disadvantage relied on by the Claimant?

3.3 If so, did the Respondent operate the provision, criterion or practice of providing the Claimant with an excessive workload, requiring the Claimant to work in the main kitchen in order to us its cooking facilities and requiring the Claimant to use general pots and pans to cook with ("PCP")?

3.4 If so, did the PCP put the Claimant at a substantial disadvantage in relation to his employment in comparison with employees who did not have his disability? The substantial disadvantage on which the Claimant relies is being subject to disciplinary action and being issued with a written warning.

3.5 If so, did the Respondent know, or could the Respondent reasonably be expected to know that the Claimant was likely to be placed at that disadvantage?

3.6 If so, did the Respondent take such steps as it is reasonable to have to avoid the disadvantage? The reasonable steps on which the Claimant relied are:

3.6.1 Providing the Claimant with a functional kitchen with oven, stove and grill instead of the Claimant having to go to the main kitchen to use their facilities;

3.6.2 Providing the Claimant with separate pots and pans for patients with allergens so that the Claimant did not have to use general pots and pans and have to wash them for each patient's food preparation;

3.6.3 Providing the Claimant with a qualified assistant so that the Claimant did not have to cope with the volume of work on his own and be expected to deal with work even when he was away from work;

3.6.4 Addressing the issue of the incorrect and/or duplicated labels produced by the dieticians which the Claimant then had to singly and manually correct.

THE HEARING

3. The hearing was a remote hearing. The form of remote hearing was V: video fully (all remote). A face-to-face hearing was not held because it was not practicable due to the ongoing COVID – 19 pandemic and all issues could be determined in a remote hearing.

4. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net

5. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.

6. The claimant gave evidence and submitted a written witness statement from his ex-wife Ms Deolinda Martins Faria. The respondent did wish to cross examine her. The statement contained second-hand information that the claimant had told his ex-wife and the panel gave it little weight.

7. For the respondent we heard evidence from:

- Gareth Peter Evans, General Manager at Charing Cross Hospital
- April Harvey – Head of Safety and Risk
- Agostino Vargem – former Patients Dining and Retail Manager (in respect of whom a witness order was made)

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

9. There was an agreed trial bundle of 269 pages. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

10. We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the claimant was not legally disadvantaged because he was a litigant in person and English was not his first language. We regularly explained the process, visited the issues and explained the law when discussing the relevance of the evidence.

FINDINGS OF FACT

11. Having considered all the evidence, we find the following facts on a balance of probabilities.

12. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

13. The Respondent is a facilities management company, delivering a range of services to clients with whom it has secured trading agreements throughout the United Kingdom and Ireland. It is part of a global corporation which undertakes the same activities in 80 countries. The Respondent employs over 35,000 people in the UK and Ireland across 2,300 sites.

14. The Claimant was employed by the respondent as a Diet Chef at the Charing Cross Hospital London until his dismissal for gross misconduct on 25 June 2019.

15. The claimant's continuous service dated back to 20 April 1998. In October 2014, the claimant's employment transferred to the Respondent, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. The respondent had been awarded a five year contract to provide services to the Imperial College Health Care Trust. The services were taken back in-house in April 2020.

16. The claimant originally worked at the Hammersmith Hospital, but transferred to the Charing Cross Hospital at around the same his employment transferred to the respondent.

17. The claimant was line managed by Mr Vargem, Patients Dining and Retail Manager. He had responsibility for retail outlets on three large sites one of which was Charing Cross Hospital. He had also previously worked with the claimant at the Hammersmith Hospital.

Claimant's Disability

18. The claimant was diagnosed with Endogenous depression in June 2011. In July 2018 he was diagnosed with Depressive Disorder and prescribed medication.

19. The claimant did not tell his line manager that he had been diagnosed with depression or that he was taking medication for it. He told us, however, that he believed that Mr Vargem was aware of his condition.

20. The claimant had a good sickness record. He did not submit any medical certificates which gave these conditions as a reason for absence. The medical certificates contained in the bundle for the period 18 July to 2 August 2018 cited "stress" as the reason for absence (49 -50). This coincided with the time the claimant was given a first written warning for misconduct.

21. The claimant was also absent from around 5/6 May to 19 May 2019. The second week was covered by a medical certificate citing ""*malaise and fatigue*" (71). During the course of the hearing, it became apparent that the claimant had self-certified for the first week of this absence, but the self-certification had been lost. Our finding, on the balance of probabilities, is that the self-certification did not give depression as the reason for absence, but instead referred solely to stress.

22. The primary basis for the claimant believing his manager was aware of his depression was because the head dietician, Ms Hasina Aktar had once referred to a need to do something "*in order to protect the claimant's sanity*" in front of Mr Vargem.

23. In addition, according to the claimant Mr Vargem had once referred to the claimant having depression. Mr Vargem denied this and we accepted his

evidence on this point. Mr Vargem was aware that the claimant had experienced some difficulties in his personal life and may have referred to this in discussions with him.

Claimant's Terms and Conditions

24. The claimant's applicable statement of terms and conditions was signed by him on 8 December 2008 (108). He was given an Employee Handbook (111 – 125) which expanded on the Conditions of Service. The Handbook contains a set of Rules of Conduct and contains the following provisions about termination:

    "If the Company terminates your employment, other than for reasons of gross misconduct the following notice periods will apply:

    - *After 4 weeks service but under 2 years: 1 weeks notice*
    - *Over 2 years service: 1 week for each completed year up to a maximum of 12 weeks*

    In cases of summary dismissal relating to gross misconduct, the company reserves the right to withhold notice." (124)

25. The claimant was also provided with a job description which he also signed (109 – 110).

26. When the claimant's employment transferred to the Respondent, he became subject to the Respondent's Disciplinary and Performance Capability Policy (126 – 129) and Rules of Conduct (130 – 134).

Health and Safety Policies

27. The Claimant's role involved preparing food for vulnerable patients with particular dietary needs. He was the only Diet Chef employed at the Charing Cross Hospital.

28. According to his job description, the claimant was required to maintain a clean and safe environment and to prepare all meals in full compliance with food hygiene standards, health and safety legislation and the respondent's relevant policies (109).

29. The original Employee Handbook contains the following statement in the Rules of Conduct section:

    "*Employees must comply with the rules and requirements contained within the Employee Health and Safety handbook and any health and safety requirements relating to the premises on which they are working."* (119)

30. The Respondent's more recent Code of Conduct says the following:

    " Employees must be aware of and comply with all Company, Client and legislative health, safety and Hygiene rules and requirements*. (131)

And adds:

“ * A breach of any of these rules would be considered gross misconduct.” (133)

The Claimant’s Working Environment / Training and Supervision

31. The claimant is a trained chef. He has his level 3 Food Hygiene Accreditation which is the highest available.

32. The claimant did not work in the main kitchen of the hospital, but in an area called the Diet Bay.

33. The Diet Bay was not a fully stocked kitchen, but had limited equipment. When the claimant has first began working at Charing Cross Hospital, he identified a long list of equipment that he felt was missing from the Diet Bay which he gave to his manager and the head Dietician (page 93). The respondent considered the list, but decided that it was not necessary to prove the claimant with the equipment because of the limited amount of cooking involved in his role.

34. When having to prepare hot food, the claimant had access to the main kitchen. This was around 10 metres away, which we consider to be a short distance. There were occasions when the chefs based in the kitchen would be unhappy about the claimant’s presence there at particularly busy times. This was stressful for the claimant who is naturally conflict adverse. He preferred to work around this issue than confront it.

35. The position was similar in relation to the washing of items the claimant used. Although the respondent employed staff to do the washing up, the claimant would often rewash items that he considered had not been washed correctly rather than ask the staff to do their jobs properly.

36. The claimant worked alone in the Diet Bay. He worked five days a week. When he was not on shift, the work was performed by an unqualified colleague, A, that he initially trained. She also covered his shifts when he was absent on holiday or sick leave. A has subsequently taken over the claimant’s role. We note that she has a physical disability. We were told and accept as true, that A is well organised and there have been no issues with her capability in the role.

37. During the period that the claimant was employed, new products were introduced for the patients with special dietary requirements. These included Bento boxes and platters. This led to an increase in the claimant’s workload, but we do not find that his workload ever became excessive.

38. The claimant had to undertake a weekly stocktake which he did on a Sunday because he had to report the figures on a Monday morning. There were occasions when he needed assistance with this.

39. Because he started work after breakfast was served, the claimant would prepare breakfasts the day before.

40. One pinch point is his working day involved the ordering system in place for specific means from the Diet Bay. The responsibility for ordering food from the Diet Bay fell to the team of dieticians employed by the Hospital. They would place orders with the Diet Bay late in the afternoon, after the agreed time.

41. In addition, problems would arise with the production of labels to be placed on the special meals ordered. We note that even if the label came out late in any one afternoon, the food was not required to be delivered until mid-morning the following day so the impact was manageable. The tighter deadlines caused the claimant additional stress. There were ongoing discussions between the dieticians, the claimant and Mr Vargem about the labels and new arrangements were made to print the labels off on a more reliable printer.

42. When giving his evidence, the claimant sought to highlight that inaccuracies in his training records (143 – 152). Having reviewed the records, we consider that the inaccuracies are not material to our considerations in this case.

43. In addition to his training, the claimant was invited to attend regular staff meetings held by Mr Vargem for the members of the patient feeding department at which safety issues were discussed. We find that the claimant often did not attend these meetings.

44. The respondent did not have an effective performance management system in place for the claimant. There was no formal supervision or appraisal process for him. He had frequent informal conversations with his manager who visited him regularly, however.

45. Mr Vargem also told us that he visited the main kitchen and Diet Bay daily, usually before the claimant's arrival, and checked various health and safety issues including the fridge.

46. The respondent undertakes regular audits of health and safety. Some of these are planned, but others involve unannounced spot checks. The claimant told us that Mr Vargem would warn the patient feeding team members when an audit was planned to ensure that they passed. We find this to be true, but note that it would only be possible for him to do this ahead of planned audits.

Food Labelling

47. A key responsibility of the claimant was to ensure that he labelled food being stored correctly. Anyone with his level of accreditation should know the importance of using labels to identify use by dates on fresh food stored in refrigerators.

48. The labelling food procedures required the claimant to use a specific label saying when the food was produced, what it contains and a use by date. This was in place to ensure that patients did not receive food that was out

of date, had been incorrectly stored, or contained ingredients that could pose a specific risk, as this could have serious implications for patient safety.

49. Health and safety infractions in the Diet Bay were especially serious due to the vulnerability of the patients who were catered for there.

First Written Warning

50. The claimant was given a first written warning under the respondent's disciplinary policy on 9 July 2018.

51. The warning arose out of an inspection that was undertaken on 9 May 2018 in the Diet Bay by Kathleen Gallagher, Health, Safety and Compliance Manager. Her investigation report recorded three food hygiene issues found and was accompanied by photographs:

- a failure to correctly label food items
- a failure to correctly separate food items. Meat items were found mixed with dairy items.
- a failure to properly record the fridge temperature. There was no simulant in the fridge to record the temperature.

52. Ms Gallagher recommended that the claimant's case proceed to a disciplinary hearing, but did not categorise the misconduct as gross misconduct. She noted on her investigation report that "*The chef Francisco has on numerous occasions not followed the correct process and does not learn by his mistakes. He has been told by his manager previously that he is not supposed to use date or price labels for labelling food. All food should have a production date and the use by date*." (155)

53. The disciplinary hearing was conducted by Hasina Aktar, Dietician on 4 July 2018. She recorded the following in the outcome letter dated 9 July 2018:

"I am writing to confirm the decision taken that you have been issued with a first written warning in accordance with the Disciplinary and Capability Policy. This warning will be placed in your personnel file but will be disregarded for disciplinary purposes after a period of 12 months provided your conduct improves.

During the hearing photographic evidence was presented and shown to you as proof of what was seen during inspection in your diet bay fridge. This included different food items that had been put into one container including eggs (scrambled and omelette), sausages (two types), hash brown and bacon, all of which had no labels. You accepted and agreed this was not correct protocol.

The fridge is deemed unfit or safe to use and therefore should not have been used for any diet bay products which is used to feed sick/vulnerable patients as confirmed with temperature checks. This could have put patient's health at risk and should never have been compromised. You agreed and accepted that the fridge was not working and not safe to use and therefore you are

currently not using it. You highlighted several other issues which were not related to-these specific matters such as dietitian labels which are impacting your food safety compliance processes. I made it clear to you that processes for food safety must be adhered to at all times to ensure the safety of our patients and must not be compromised.

You agreed and apologised for your lack of care in compliance to such processes.

You are also aware that you have been picked up on doing food labels incorrectly previously by other staff members at Imperial. You are also aware of all sodexo standards and processes for food safety and the consequences of not following such processes.

In coming to this decision, I have taken into account the following points:

- *The evidence*
- *Your admittance of the allegations*
- *Your remorse regarding the allegations*
- *Your previous good service*

It is expected that there is an immediate and sustained improvement in your conduct

If there is any repetition of this behaviour, or any other type of misconduct, further disciplinary action may be taken against you." (198)

54. Although the claimant was advised that he could appeal against the warning, he did not submit an appeal.

Shadowing

55. During the claimant's investigation and disciplinary meetings, he said that the reasons he was failing to meet the required standards was because he had too much to do and not enough time to keep up with the required standards. He asked the respondent to arrange for someone to shadow him so that the respondent could measure this. The claimant did not say anything about at all about having depression at the meetings.

56. The claimant was shadowed shortly after this on 12 July 2018 by Joanna Soares, a member of dietician team.

57. Ms Soares prepared a report identifying a number of areas of improvement that could be made in the Diet Bay. Some of her recommendations related to changes that could be made elsewhere, but she also identified that one of the problems was the claimant's lack of organisation. The report contained the following summary *"Francisco has a lot to do in the time frame he has and encounters difficulties due to external factors and lack of organization.*" (199)

58. The final report was not shared with the claimant or with Mr Vargem. Mr Vargem cannot remember the shadowing taking place or meeting Ms Soares. We find that the claimant did mention the shadowing exercise to Mr Vargem and even introduced Ms Soares to him on the day of the shadowing. However, there was no follow-up at all to the exercise and nothing further was done either to address the external issues or to support the claimant in improving his organisation.

59. Mr Vargem was not tasked with following up on the claimant's warning to check that he was complying with the food labelling requirements.

Circumstances Leading to Dismissal

60. The claimant was absent due to illness from work for two weeks from 5/6 May to 19 May 2019. The second week was covered by a medical certificate citing "Malaise and fatigue" (71). The first week was covered by the self – certificate referred to above.

61. The claimant returned to work on Sunday 19 May 2019. On his return he found the fridge in the Diet Bay in disorder. He also took the decision to leave some of the mess untidied so that he could show his line manager. He also did not tidy the mess up on Monday 20 May 2019.

62. On Tuesday 21 May 2019, Ms Gallagher conducted a safety walk with April Harvey. Ms Harvey was more senior than Ms Gallagher. She had responsibility for ensuring general health and safety compliance across Sodexo Healthcare in the UK.

63. Ms Harvey's visit was unplanned. Ms Harvey had meant to visit a different location in the UK that day but had travel difficulties. As a Safeguard Audit was due at the Charing Cross Hospital, she used her available time to visit there instead.

64. Following the safety walk, Ms Gallagher emailed Mr Vargem at 13:59 to say:

"April Harvey came to CXH today as she was supposed to go to Roehampton and could not get there. We carried out a Safety walk due to an impending Safeguard Audit.

The issues that were picked up were as follows and very serious:

- *[the claimant] had cooked scrambled eggs and he is not keeping blast chilling records. He had a time of 12:00 and when we questioned him he said that is wrong and changed it to 11:00 am. No finish times recorded.*
- *Bulk cooked bacon in the fridge*
- *Unlabelled foods with unidentified sauce?*
- *Serious – using defrosted patient dining meals to send to wards i.e. hash browns, baked beans*
- *Opened frozen baked beans and a breakfast in fridge with no defrosting dates*

- *Cooked fish in cling film with no date or label*

These are serious issues that need address and I would even go as far to say he be suspended as he is a risk to the business?" (202)

65. The email was copied to Mr Evans who had very recently joined the respondent as the General Manager at Charing Cross Hospital. He took no action at that stage and was not involved.

Suspension and Investigation

66. The claimant was suspended on full pay and a formal investigation was initiated. It was conducted by Alan Brownlie, General Manager, at the Queens Hospital, Romford. The investigation consisted of:

    - The evidence collated by Ms Gallagher – she had taken photos (202 – 207) and a copy of the blast chiller record (211)
    - An investigation meeting with the claimant on 22 May which he attended alone

67. Handwritten notes were taken of the meeting which the claimant and Mr Brownlie signed and dated at the end of the meeting (212 – 215).

68. Mr Brownlie prepared an investigation report that same day which recommended the case proceed to a disciplinary hearing and be treated as Gross Misconduct (210).

69. The claimant's suspension was confirmed in writing to him in a letter dated 24 May 2019 (218 - 219).

Disciplinary Hearing and Decision to Dismiss

70. Mr Evans was asked to conduct the claimant's disciplinary hearing. Because he was so new in his role, he had had no prior involvement with the claimant. In his evidence to us be confirmed that he could not be sure that he had even met the claimant or had any knowledge of the Diet Bay set up at the Hospital. He had worked for the respondent previously however and had general knowledge of Diet Bays from that time.

71. The respondent wrote to the claimant on 18 June 2019 to invite him to attend a disciplinary hearing. The letter enclosed:

    - Disciplinary and Performance Capability Policy
    - Sodexo's Rules of Conduct
    - Investigation Report
    - Investigation notes dated 22 May 2019
    - Cooling temperature record sheet
    - Diet bay report email dated 21 May 2019
    - Photographic evidence

72. The letter warned the claimant that the outcome of the hearing could be a disciplinary sanction up to and including dismissal. It informed the claimant that a decision would not be made until he had had a full opportunity to out forward everything that he wished to be considered. The claimant was also advised that he had a right to be accompanied by a work colleague or trade union representative (220).

73. The disciplinary hearing was held on 25 June 2019. The claimant attended alone. He explained that he only got the letter and pack the previous day and so had not had time to organise anyone to attend with him. He confirmed he was happy to proceed on his own.

74. Handwritten minutes were taken of the discussion at the meeting. These were not signed by the claimant or Mr Evans. (224 – 229). The discussion at the meeting took around 20 minutes. Mr Evans went through each of the allegations set out in the investigation report.

75. The investigation had identified nine different faults as follows:

   1) *Blast chiller records were incorrect – he had the time of 12:00 and when questioned he changed it to 11:00 and no finish times were recorded*
   2) *Bulk cooked scrambled eggs in fridge with no blast chilling records*
   3) *Fish in fridge undated and unlabelled*
   4) *Out of date wipes found in use*
   5) *There was defrosted baked beans in the fridge available for use or service to vulnerable patients*
   6) *Unlabelled food for patients*
   7) *Unlabelled open bacon*
   8) *Defrosted baked beans unlabelled*
   9) *Patient meals defrosted with no label (208)*

76. The investigation report recorded that the claimant's explanation for the first two incidents (which are in fact the same incident) was that he had got the time wrong because the clock on the wall had said the wrong time. He had realised his mistake when Ms Gallagher and Ms Harvey asked him about it and corrected it by overwriting the correct time. When Mr Evans asked the claimant about these same allegations, at the disciplinary hearing, he gave the same explanation.

77. The claimant explained at both the investigation meeting and the disciplinary hearing that the reason for presence of the bulk cooked bacon was because he needed to cook it a day in advance for breakfast the following day, due to his start time. This was his regular practice.

78. The claimant acknowledged the need for the food labels at both the investigation meeting and the disciplinary hearing. He told Mr Brownlie that he had the labels ready to put on the food and was about to do this when Ms Gallagher and Ms Harvey arrived. Ms Harvey said she could not recall this when the claimant cross examined her on this point.

79. The investigation report records the claimant as saying that he felt the labels were unnecessary because he worked in the Diet Bay alone, but this does not reflect the minutes of the meeting. He appears to say that he works in the Diet Bay alone, but acknowledges the need for labels. In his evidence before us, the claimant denied saying that he thought the labelling was not necessary. He told is that he made the point about working alone in the Diet Bay only to demonstrate that no harm would come to any of the patients. He told us that the reason he had not done the labels was because he was too busy to do them

80. We note that the claimant told Mr Brownlie that he needed help and had asked the management for help when he was last investigated, but had received no such help. Mr Brownlie did not record this in the investigation report, but it was noted in the minutes of the meeting and noted by Mr Evans at the start of the disciplinary hearing.

81. Mr Brownlie did not ask the claimant any questions about the fish that was found in the Diet Bay fridge.

82. At the disciplinary hearing, Mr Evans established that the claimant was not responsible for putting the fish in the fridge, but had found it on return from his leave. The notes of the meeting refer to the claimant having taken annual leave although this was not correct. The claimant did not tell Mr Evans that he had been off with stress and depression, but told him that he had returned to find unlabelled food stuff in the fridge from when he was away which he had not removed.

83. The claimant told Mr Evans that he had been too busy to clear the fridge on his return to work, but if he had known about the inspection, he would have ensured this was done and the food was properly labelled. He reiterated that he needed help in the Diet Bay. The claimant reiterated this explanation when giving his evidence to the tribunal. However, he also said that he had deliberately left the fridge untidied so that he could show his line manager the mess he had found on his return from sick leave.

84. The claimant accepted that he should not have obtained the baked beans form a frozen meal and that the wipes he was using were out of date.

85. At the end of the discussions, Mr Evans adjourned the disciplinary hearing. He took some advice form the respondent's HR service and returned to deliver the outcome verbally. His decision was to summarily dismiss the claimant for gross misconduct (229).

86. Mr Evans prepared an outcome report setting out the rationale for his decision. It says:

"None of the photos and points to support the allegation were challenged as untrue or unfair. I admitted that as the wipes had a long shelf life that this may be a lesser charge but the others were all serious breaches of Food Hygiene legislation. The question of Francisco being busy was brought up in the investigation and he admitted he had asked for assistance a year ago

at his last investigation. Francisco has a level 3 Food Hygiene certification and has been working as a chef for 20 years and in this type of job for 15 years, he therefore is very experienced and would know what is required under Food Hygiene legislation and HACCP.

Not using the correct documentation to control the defrosting of foods and not labelling foods in our fridges leaves us at a risk of serving food that is not fit for human consumption. The fish may have been put in there before Francisco returned on Sunday however his first job should have been to check all items in the fridge and to dispose of anything that was not labelled. The fact that this was still in there on his 3rd day back is very serious breach of policy.

The seriousness of the allegation which were unchallenged is compounded by the fact that Francisco is currently under a disciplinary sanction for the same issue and as such it is clear that despite his previous warning he has continued to follow practises that are not only contrary to company policies and procedures but also to current food safety legislation." (230-231)

87. Mr Evans sent this to HR who used it to prepare a letter confirming the decision, which he signed off. The letter was dated 5 July and was sent to the claimant in the post (236 – 238). The letter confirmed that the claimant had a right of appeal against his dismissal.

Appeal

88. The claimant's trade union representative submitted an appeal within the time limit by email on behalf of the claimant. The appeal said:

"I am writing on behalf of Franchico (sic) Freitas to appeal against the Disciplinary hearing, held on Tuesday 25th June 2019 sanction Dismissal without Notice, on the grounds that the sanction was too harsh also the explanation given by Franchico (sic) at the hearing was not fully considered." (242)

89. On 18 July 2019, a member of staff in the respondent's HR service arranged for someone to hear the appeal and contacted the claimant's union representative to ask for the full grounds of the appeal. She instructed a colleague to draft an invite letter for an appeal hearing.

90. What was sent out however was a letter sent directly to the claimant by post rejecting the appeal saying:

"Please be aware that appeals should be made on one or more of the following grounds:

- *New evidence has become available which may affect the original decision made and you wish us to consider this;*
- *You feel the correct procedure was not followed;*
- *You feel the original decision was not in the band of reasonable responses;*

- *You feel the original decision was not consistent with sanctions for similar cases.*

Having reviewed the email from Nigel, this provides no details of your reason for appealing the decision which has been made. Therefore, it does not appear that you have presented valid grounds for your appeal based on one or more of the points above.

However, if you believe that you do have grounds to appeal based on one of the areas listed, please can I ask you to submit further details and clarification in writing to me by no later than Monday 22 July 2019.

If I do not hear from you by 22 July 2019, I will assume that you do not wish to appeal and will close the case accordingly." (243)

91. The claimant assumed that his trade union representative would respondent and so C did not send anything further. This led to the respondent sending him a final letter dated 2 August 2019 indicating that as the claimant had not sent anything further by 22 July 2019, the respondent assumed he did not wish to appeal. The letter confirmed the appeal had been closed (245).

92. The claimant commenced the Acas Early Conciliation process on 18 September 2019. It was completed on 18 October 2019 (5) and he presented his claim form to the tribunal on 13 November 2019 (6).

LAW

Reasonable Adjustments

93. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.

94. Section 20(3) provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

95. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

96. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

97. In *Environment Agency v Rowan* 2008 ICR 218 and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4* the EAT gave general guidance on the approach to be taken in reasonable adjustment claims.

Unfair Dismissal

98. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

99. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

100. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:

    (a) did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

    (b) did it hold that belief on reasonable grounds?

    (c) did it carry out a proper and adequate investigation?

101. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

102. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason in all the circumstances of the case.

103. We have reminded ourselves that our proper focus should be on the claimant's conduct in totality and its impact on the sustainability of the employment relationship, rather than an examination of the different individual allegations of misconduct involved (Ham v the Governing Body of Bearwood Humanities College [UKEAT/0397/13/MC]

104. We have also reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

105. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and

substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

106. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including any appeal stage (*Taylor v OCS Group Limited* [2006] EWCA Civ 702; *West Midlands Cooperative Society Ltd v Tipton [1986] ICR 192, HL.)* A procedural failing in the appeal process can, but will not necessarily, displace the fairness of the dismissal at the dismissal stage. Each case will turn on its own facts.

Wrongful Dismissal

107. When considering a claim for wrongful dismissal, the tribunal must ask itself was the claimant guilty of conduct so serious that it amounted to a repudiatory breach of the contract of employment entitling the respondent to summarily terminate that contract.

108. We must be satisfied, on the balance of probabilities, that there was an actual repudiatory breach by the claimant. It is not enough for the respondent to prove that it had a reasonable belief that the claimant was guilty of such serious misconduct.

Remedy Issues

Polkey

109. In accordance with the principle established in *Polkey v AE Dayton Services* Ltd [1988] ICR 142, if we decide the dismissal was unfair, we are required to consider the possibility that the respondent would have been in a position to fairly dismiss the claimant and reduce the compensatory award by an appropriate percentage accordingly. This includes considering when a fair dismissal would have been able to take place (*Mining Supplies (Longwall) Ltd v Baker* [1988] ICR 676 and *Robertson v Magnet Ltd (Retail Division*) [1993] IRLR 512).

Contributory Conduct

110. Section 122(2) of the Employment Rights Act 1996 says: "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*."

111. Section 123(6) of the same Act says: "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

ACAS Code of Practice.

112. In reaching our decision, we must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

113. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust any award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. The award can be increased or decreased by up to 25% if it is just and equitable in all the circumstances.

ANALYSIS AND CONCLUSIONS

Disability Discrimination

114. The claimant's claim of disability discrimination fails because the respondent did not know and, in our judgment, could not reasonably have known that the claimant was disabled by reason of his depression. This is an essential gateway test for a claim for reasonable adjustments which has not been met.

115. In our judgment, there was no evidence before us that the respondent had actual knowledge of his disability.

116. As explained above, the claimant did not tell the respondent that he had been diagnosed with depression or that he was taking medication for depression. None of his medical certificates referred to depression.

117. We do not consider the comment made by Ms Hussain to be sufficient evidence that the respondent had any awareness of the claimant's underlying condition. Ms Hussain was not called as a witness, but we infer her comment to be an informal comment about making work life easier, rather than demonstrating that the claimant was disabled by way of a diagnosis of depression.

118. Similarly, any reference that Mr Vargem may have made to the claimant seeming depressed or similar during a discussion about his personal difficulties would not be sufficient in our view to impute actual knowledge to the respondent. The term depression is used widely to refer to people appearing

119. In addition, the claimant's general sickness record was good. It was not the type of record that we consider ought to have altered the respondent to the possibility that he had a long term underlying medical condition. In addition, we were not presented with any evidence that the claimant had exhibited

behaviour in the workplace that could reasonably give the respondent constructive knowledge of his underlying condition.

Wrongful Dismissal

120. We consider that the claimant was guilty of gross misconduct by virtue of his failure to ensure that the food stored in the fridge in the Diet Bay was not properly labelled and his failure to remove the unlabelled fish form the fridge for two days.

121. The claimant knew, because of his training and previous disciplinary warning, that food stored in the Diet Bay fridge needed to be labelled for health and safety reasons. We are satisfied, based on the evidence we heard, that he knew omitting the labels on the food in the fridge created an unacceptable level of risk.

122. We do not accept that the claimant did not have time to prepare the labels because of amount of work he had to do. We consider the shadowing report to be good evidence of the amount of work he was required to do. Although the report confirms he was subject to a number of competing demands, it also identified ways in which he could have improved his organisation of the work and been more efficient. It is also relevant that his colleague A has now taken over his role full time and is managing well.

123. In addition, there was no excuse for his failure to immediately remove the fish from the fridge when he returned to work after leave.

124. The claimant's actions caused a repudiatory breach of his contract of employment entitling the respondent to terminate his employment summarily.

Unfair Dismissal

125. The reason for the claimant's dismissal was misconduct. This is a fair reason for dismissal.

126. For most of the process, the respondent followed its disciplinary procedure and complied with Acas Code on Disciplinary and Grievance procedures in that it did the following:

- Investigated the allegations before inviting the claimant to a disciplinary hearing
- Ensured that different people were involved in the investigatory and disciplinary stages
- Shared the investigation material with the claimant in advance
- Sent the claimant invitations to attend the meetings which clearly explained the purpose of the meetings and warned the claimant about the seriousness of the allegations
- Advised the claimant that he had a right to be accompanied.

127. The respondent also took into account the length of service of the claimant when making the decision to terminate his employment for gross misconduct.

128. However, we have reached the conclusion that the dismissal was unfair for two reasons.

129. The first reason was because we were not satisfied that the thoroughness of the investigation the respondent carried out fell within the range of reasonable responses. The claimant told both Mr Brownlie and Mr Evans that he needed help in the Diet bay and did not have time to put the labels on the food. He also told them both he had previously asked for help. Neither of them undertook any investigations into this claim, which we find was a genuine claim that the claimant believed to be true.

130. We consider this was a significant procedural flaw, particularly as Mr Brownlie was from a different site to the claimant and Mr Evans was very new in his role. At least one, and preferably both of them, should have taken the time to speak to the claimant's line manager and seek to understand the claimant's working environment and the level of supervision he had been given following the earlier warning.

131. The respondent genuinely believed the claimant was guilty of gross misconduct, but applying the three stage test from Burchell, we do not consider that it is possible to say that that belief was held on reasonable grounds as there had not been an adequate investigation.

132. The second reason for our decision is the approach taken to the claimant's appeal. We consider that the appeal submitted on behalf of the claimant by his trade union representative was sufficient to proceed with an appeal hearing. One of the permitted grounds of appeal was that the decision was outside the range of reasonable responses. The appeal included the statement that the sanction was considered too harsh. This did not require further explanation and should have stood as a legitimate appeal ground in its own right. The claimant was denied the opportunity to expand on this at an appeal hearing.

133. Although we find the dismissal to be unfair because of these procedural failings, we do not consider the further investigations would have made any difference to the actual outcome. Had the respondent undertaken the further investigations, which would have taken no more than a week, it would have been able to satisfy itself that there was no excuse for the claimant's conduct. In particular, it would have been able to establish that although the claimant had previously asked for help, many of the difficulties he experienced were due to his own lack of organisation rather than his workload being excessive.

Remedy Decisions

134. Having found that the claimant's dismissal was procedurally unfair we have considered what adjustments should be made to his compensation as a result of the *Polkey* principle, his conduct and the respondent's failure to

comply with the Acas Code of Practice on Disciplinary and Grievance Issues.

135. As stated above, we consider that the further investigations required to make the dismissal fair would have taken no more than one week. This immediately limits the compensation award to one week's net pay. However, we consider, it is just and equitable to reduce by 100% to zero to take account of the claimant's contributory conduct pursuant to section 123(6) of the Employment Rights Act 1996.

136. We make no similar reduction to the claimant's basic award, pursuant to section 122(2) of the Employment Rights Act 1996, however. This leaves the claimant with a full basic award.

137. In addition, we have considered whether it would be just and equitable to increase the claimant's compensation to reflect the failure of the respondent to conduct an appeal. We have decided it would be and our decision is that an uplift of 15% should be applied. This will effectively be made to the basic award only because the compensatory award is zero.

Employment Judge E Burns
8 July 2021

Sent to the parties on: 15th July 2021

For the Tribunals Office