



EMPLOYMENT TRIBUNALS

Claimant: Mr I Carslake

Respondent: Acorn Recovery Projects

HELD AT: Manchester

ON: 17 May 2017
& 15 June 2017 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Mr I Proctor, Solicitor

Respondent: Mr I Hartley, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well founded.
2. The remedy hearing provisionally arranged for 19 July 2017 is cancelled.

REASONS

Claims and Issues

1. The claimant claimed unfair dismissal. The issues were agreed to be as follows:

- (i) what was the reason or principal reason for dismissal;

- (ii) the respondent contends that the reason for dismissal was the claimant's conduct in that he breached the claimant's contract of employment by starting to drink alcohol;
- (iii) was the claimant in breach of a fundamental term of his contract of employment;
- (iv) alternatively the respondent contends that the reason for dismissal was because of some other substantial reason;
- (v) the respondent contends that the claimant's decision to resume drinking alcohol ran counter to the central principle of the respondent's approach to treating addiction;
- (vi) were these potentially fair reasons having regard to the Employment Rights Act 1996, Sections 98(1) and (2)(b).
- (vii) did the respondent act reasonably by dismissing the claimant having regard to all the circumstances including the size and administrative resources of the respondent's undertaking and in accordance with the equity and the substantial merits of the case (Section 98(4) ERA).
- (viii) did the respondent follow a fair procedure overall;
- (ix) did the respondent's decision to dismiss the claimant fall within the range of reasonable responses by a reasonable employer acting reasonably in the circumstances of the case? (Iceland Frozen Food -v- Jones 1982 IRLR 439 EAT).
- (x) in coming to its decision was the procedure followed by the respondent within the range of reasonable responses of a reasonable employer acting reasonably (Sainsburys Supermarket -v- Hitt 2003).
- (xi) if the Tribunal finds that the dismissal was procedurally unfair what reduction in compensation should be made to the compensatory award to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome (Polkey -v- A E Dayton Services Limited 1987 IRLR 503).
- (xii) if the Tribunal finds that the dismissal was to any extent caused by or contributed to by any action of the complainant what reduction of the compensatory award would be made (Section 123 (6) Employment Rights Act 1996).
- (xiii) if the Tribunal finds that the dismissal was to any extent caused by or contributed to by any action of the complainant what reduction in the basic award should be made (Section 122(2) Employment Rights Act 1996).

The Facts

2. The respondent is a charity which operates a recovery service to assist individuals to break free from drug, alcohol and other addictions. It was common ground that the respondent promotes abstinence from all substances during the recovery period from various types of addiction. There is, however, a dispute as to whether the respondent's ethos involves abstinence from all substances after the recovery programme, i.e. whether someone who was drug dependent should continue to abstain from alcohol once recovered from drug dependency.

3. The respondent employs many staff who have recovered from drug and alcohol addictions; currently around 80% of their employees fall into this category.

4. The claimant first became involved with the respondent as a client. It is common ground that the claimant was drug dependent at that time. There is a dispute as to whether the claimant told Sarah Hanson, the Managing Director, and Anthony Duerden, Chief Executive of the Calico Group, at various times that he had also had problems with alcohol. I find that the claimant was open about his past history and told his story both informally and in more formal settings such as a presentation to the Board of Calico which was attended by Mr Duerden. I find, on a balance of probabilities, that the claimant did mention some problems with alcohol, although not to the extent of his drug dependency, to Ms Hanson and Mr Duerden. I find that Ms Hanson and Mr Duerden genuinely believed, based on what the claimant had said, that the claimant had had some issues with alcohol in the past as well as his drug dependency. I am supported in this finding by what the claimant wrote on the national drug treatment monitoring service monitoring form when he was a client of the respondent. The claimant identified his main problem system as heroin/crack. In the section entitled "second most problematic substance (if any)" the claimant wrote "alcohol". The claimant wrote on the form that he had consumed alcohol on 6 of the past 30 days (in contrast to drugs which he stated he used daily). He left the section on number of units consumed on a typical drinking day in the last 30 days blank. The claimant sought to explain the entry on the form, saying he had been told he had to put a second substance down whereas he did not in reality have any issues with alcohol. Given that the form gave an option not to enter anything in the section on second most problematic substance, I reject this explanation. Although Ms Hanson did not have this form before her when she made the decision to dismiss the claimant, the claimant's entries on the form assist my finding that it was more likely than not that the claimant did talk of a problem with alcohol as well as heroin to Ms Hanson and Ms Duerden.

5. The claimant successfully completed the respondent's programme. Ms Hanson understood that the claimant had been completely abstinent from drugs and alcohol for eight years prior to the events leading to his dismissal. After completing the respondent's recovery programme, the claimant initially worked as a volunteer with the respondent. On 7th December 2009, the claimant began working with the respondent as a Facilitator on their Reduction and Motivation Programme.

6. Around 2013, the respondent became part of Calico Group.

7. In 2014, new contracts were issued to the respondent's employees which included a new clause which read as follows:

"It is a condition of your employment that, if you have previously been drug or alcohol dependent, appointment to a post which involves supporting clients with their emotional and psychological wellbeing, requires you to be abstinent and in active recovery. Successful candidates may be required to provide evidence of this and submit to a test if so requested. You should also be aware that during your employment you must remain abstinent. Should you suffer a relapse you will be removed from your role and efforts will be made to seek alternative duties which do not involve Acorn clients in accordance with the company's redeployment policy".

8. The claimant gave evidence that there was no consultation about these new terms. However, he signed a copy of a contract containing this term on 13th June 2014.

9. On 27th April 2015, the claimant was promoted to the position of Operations Manager for the Residential Rehabilitation Services. This service deals with the most complex clients who cannot undertake Acorn's programmes whilst living in the community. The claimant was issued with a new contract of employment for the new post which contained an identical clause to that contained in his previous contract about abstinence if previously drug or alcohol dependent.

10. There has been no evidence of any guidance having been given to staff as to which jobs with the respondent are regarded as being ones where the job holder supports clients with their emotional and psychological well being. Neither has there been any guidance as to the meaning of remaining abstinent in the clause in the contract e.g. whether this means abstinence from the substance on which the employee was previously dependent or means abstinence from a wider variety of substances, whether or not the employee had previously been dependent on all those substances.

11. There is a dispute as to the extent to which the claimant's job as Operations Manager involved him in direct contact with clients and whether it could be said that his job involved emotional and psychological support to service users.

12. I accept the evidence of the respondent that they regarded the claimant as good at his job and he was a well thought of employee. There is no evidence to suggest that anyone at the respondent was seeking to find a reason to dismiss the claimant prior to the events which led to his dismissal.

13. On 11th July 2016, the claimant was seen by a colleague drinking alcohol in a public house close to his place of work outside of working hours. The colleague spoke to the claimant, asking if he was all right when she noticed a pint of lager he was drinking with a meal. The claimant realised that the colleague was feeling uncomfortable. He told her that she had nothing to be concerned about, he had never been alcohol dependent and did not have a problem with alcohol or anything else but he would ask Nicola, his line manager, to speak to her.

14. There is no suggestion that the claimant ever attended work prior to his suspension under the influence of alcohol. Ms Hanson gave oral evidence that she could smell alcohol on the claimant's breath when he attended a disciplinary hearing. However, she made no reference to this in her witness statement and there is no evidence that she or the appeal officer relied on this at all in reaching their decisions. I make no finding as to whether the claimant had been drinking alcohol prior to attending the disciplinary hearing.

15. On the evening of 11th July 2016, the claimant rang his line manager, Nicola Crompton Hill. The claimant gave evidence that Ms Crompton Hill said not to worry about it when the claimant told her what had happened. I did not hear evidence from Ms Crompton Hill but she did not refer to such a comment in her investigation report. It is not necessary for me to decide whether this was said. The claimant agrees that Ms Crompton Hill said that she would need to seek advice from Ms Hanson and would ring him back.

16. Ms Crompton Hill rang the claimant on 12th July to say she had spoken to Ms Hanson and Carmel Roberts from HR and asked the claimant to attend Calico Head Office for a discussion with Ms Hanson and Ms Roberts about the situation. The claimant attended that meeting. There are no minutes of the meeting. However, an account of the meeting was included in the investigation report. It appears that Ms Crompton Hill, Ms Hanson, Ms Roberts and the claimant were present at this meeting. At the meeting, the claimant said that he had decided in the past few months to have a drink of alcohol. He said he felt this should have no bearing on his role or should in any way be an issue. He said his addiction was with heroin and he, therefore, did not see alcohol as an issue. The investigation report recorded a reference to the claimant having previously told Ms Crompton Hill that he had drunk "neat" alcohol as a coping mechanism when heroin was not available. The claimant, at the disciplinary hearing, disputed that there was any mention of "neat" alcohol or that the term "coping mechanism" was used. At the end of the meeting, Ms Hanson informed the claimant that he would be suspended from duty pending an investigation due to the serious nature of the issue.

17. By a letter from Carmel Roberts dated 12th July 2016, the claimant was asked to attend an investigatory interview on 19th July. The letter inviting him to that interview stated that the purpose of the interview was to establish the facts concerning the following allegations:

- "* You have breached your contract of employment by drinking alcohol;
- * Your senior role means that you are in a position of influence to other Acorn staff and this alleged breach of contract has a negative effect on Acorn staff;
- * Your actions, in drinking alcohol may go against the ethos of Acorn Recovery Projects;
- * As you are a Senior Manager. your influence and communication with external and/or partner agencies may damage the reputation of Acorn Recovery Projects".

18. Ms Roberts wrote that there was no legal requirement for the claimant to bring a companion to an investigative interview but they would allow him to do so on the proviso that it must not delay the investigation. She wrote that she understood that the claimant had already spoken with Shana Hindle, Chair of Staff Panel, and that she had agreed to accompany the claimant.

19. The investigatory meeting took place on 19th June with Ms Crompton Hill as Investigating Manager and Carmel Roberts, HR Business Partner to advise. The claimant was accompanied by Shana Hindle and another employee took notes of the meeting. The notes record Ms Crompton Hill as saying "in the previous conversations last week we had around using drugs and alcohol as coping mechanisms, you explained that you used alcohol as a coping mechanism in addition to your drug issue?" The claimant is recorded as replying "yes it was heroin. I have never been treated for problematic alcohol use. The only time I would drink was if I couldn't get heroin". There was a discussion about the clause in the contract around abstinence. The claimant was asked for his interpretation of the clause. He asserted that his role was not to provide support with emotional well being and said that he was abstinent from heroin, which is what he received treatment for. He said he had not relapsed because he was not taking heroin. It was suggested to the claimant that there were examples where they had had problems with a client and the claimant had gone and defused the situation. Ms Crompton Hill asked whether that was not supporting with emotional well being. The claimant disagreed, saying that, in that situation, he was supporting the member of staff rather than the client; he was not going in as a counsellor, he was going in to make sure the situation was manageable. He agreed that he managed staff who provided support with emotional wellbeing but on an operational level. He was asked whether he provided support with emotional wellbeing when on call and said he did not; his role was to go out and contain the situation until a member of staff who could pick up that support was available.

20. Ms Crompton Hill asked the claimant whether the respondent advocated total abstinence. The claimant replied "yes at the start of treatment whilst clients get their lives in order it is essential. They then decide what to do". He disagreed that staff who had completed the programme should be abstinent. Ms Roberts asked whether this was not the Acorn ethos. The claimant said no "I don't see how an ethos can dictate someone's personal life". Ms Roberts said that when Acorn submits bids it is noted as an abstinence based service. The claimant agreed that was the case with clients but said they did not say that about all staff. The claimant is recorded as saying "there are staff who are drink who are in recovery. Total abstinence is needed when treatment is undertaken and some people will need to spend their whole lives abstinent whilst others don't. I am in recovery from heroin addiction and I have changed my life and conduct myself in a way that reflects Acorn's values".

21. The claimant said he saw his role as a senior member of the respondent and agreed that he represented Acorn at a senior level, for example with commissioners and GPs. The claimant expressed the view that his decision to drink would not have any bearing on his ability in the role and no impact on the reputation of the respondent or himself. He was asked how he thought staff would feel about this personal choice and replied that, if handled sensitively, it would be OK. He thought

the majority of staff would be all right about his decision but some would not because "some have a dogmatic opinion about total abstinence and this comes down to opinion". The claimant said he thought he should be judged on how he conducted himself; he was not late to work and was not having problems. He referred to another member of staff, MS, alleging that she drinks and supervises volunteers who are in recovery and that Sarah Tattersall and Nicola Crompton Hill were aware of this. He said that MS was supporting clients with their emotional wellbeing. He also referred to another employee, D, but said she was on a TUPE contract so the clause was not in her contract.

22. The claimant provided a written statement which was read at the interview. In this, he denied that he had breached his contract and wrote that he had never been alcohol dependent or been treated for problematic or dependent alcohol use. He had issues with heroin for which he was successfully treated over eight years previously. He said he was in a role which did not see him providing support to clients with their emotional and psychological well being. He wrote: "Furthermore were I in such a role I would not have breached my contract due to still remaining abstinent. I have not nor do I intend to return to the use of heroin".

23. The claimant's companion asked why, if it was known that others who were in recovery are drinking, had the claimant been suspended. Ms Roberts said she could not talk about specifics but others had been suspended for this. The claimant asserted that in those situations it wasn't just the fact that they drank or took drugs; they had fully relapsed and their behaviours were really bad, e.g. in one case they were not turning up to work and were smoking heroin with clients under a bridge; they all fell under relapse because they had returned to a previous state and he had not. The claimant and his companion said that the claimant's drinking was social drinking, for example over a meal and with groups of friends. The claimant said "I am not disorderly and have not been late for work or worse for wear when I am here. I still conduct myself in line with Acorn's values".

24. Following the meeting, Nicola Crompton Hill produced an investigation report. The report included an account of the telephone conversation of 11th July, writing that the claimant had told her that he had recently taken the personal decision to start to drink alcohol (three months ago). She wrote that he had said that he had felt he had, for about a year, been questioning recovery and that he had taken this decision in line with other major changes in his life.

25. Ms Crompton Hill summarised the investigation and made findings including the following "IC has taken the personal decision to start to drink alcohol after eight years of total abstinence and feels this decision should be acceptable within Acorn and his current role as Operations Manager within Tier 4". She wrote that the claimant did not see his role as being one that provided "emotional and psychological wellbeing". She wrote that the claimant did not feel that Acorn promoted a total abstinence based approach in its programmes and ethos and this had never been the case; he felt the programmes were purely based around behaviours. She wrote

"IC currently holds a role of significant influence and seniority within Acorn. IC is seen as an advocate and inspiration to recovery through his current work

and in his previous roles as volunteer and RAMP facilitator/coordinator within Acorn. IC has always been a role model and advocate of Acorn ethos and values and demonstrated this well with clients he has supported over the years".

Ms Crompton Hill concluded:

"Given the above points, I feel IC's personal views/opinions and choices on the above points are in direct conflict with those of Acorn Recovery Projects.

IC holds a senior role that has significant responsibility and direct influence over internal and external reputation. The issue in question poses significant risk to Acorn Recovery Projects reputation with clients/commissioners.

My personal view, from being closely involved with operational staff in IC's absence is that this situation will need exceedingly careful and sensitive management moving forward due to the potential breakdown in trust with staff and others, specifically around IC's change in view on recovery and abstinence.

Giving full consideration to the content of this report, I feel this need to be dealt with through a formal disciplinary process due to the seriousness and potential impact this issue could have".

26. The report is dated 5th August 2016. The claimant has suggested that Ms Crompton Hill has been motivated to take action against him because he brought a grievance against her. However, it appears the grievance post dated the investigation report. Ms Hanson's recollection was that the claimant's grievance against Ms Crompton Hill was submitted some time after the disciplinary hearing. In the claimant's letter to Mr Duerden following the appeal hearing on 19 September 2016, the claimant referred to his grievance, writing that it was then going into the sixth week since he had submitted a formal grievance. If the claimant was accurate, this would place the grievance no earlier than 8 August 2016 i.e. after Ms Crompton Hill's report. I also note that the claimant made no reference in the disciplinary proceedings to an allegation that Ms Crompton Hill had been motivated to take action against him because he had brought a grievance against her. I find that Ms Crompton Hill was not motivated to take action against the claimant because he had brought a grievance against her.

27. A disciplinary hearing was held on 12th August 2016. Ms Hanson chaired the hearing. The claimant was again accompanied by Shana Hindle. Ms Crompton Hill presented her report. The claimant was then given an opportunity to ask her questions. The claimant challenged the part of the record which referred to him having drunk neat alcohol, saying he did not recall that being said. Ms Hanson said that she recalled that being said in the initial meeting. The claimant said he had never drunk neat alcohol in his life. The claimant said he was drug dependent but he was not alcohol dependent. He challenged the accuracy of the note in which he was recorded as saying he had used alcohol as a coping mechanism; he said the term "coping mechanism" was not used.

28. The claimant said that his views on recovery and abstinence had not changed; total abstinence was absolutely necessary whilst the clients were in treatment, he said after that we make them aware of the risks and it is their decision.

29. In relation to the part around supporting clients, the claimant said he was confused because, for the past eighteen months, they had been talking him moving away from clients but now they were saying that he supported them with emotional and psychological wellbeing. He said that in his role he was looking at things from an operational point of view. The claimant was asked whether he got involved with the clients now as part of his current role. He replied "yes but only in the way that we all do". He was asked if he got involved with supporting clients and said "yes but it depends on what you class as "support"". He clarified that he provided support to clients indirectly. It was put to him that he picked clients up and Ms Crompton Hill said that she did this herself recently and definitely felt that she was providing emotional support. The claimant replied that that was more of a glorified taxi service because he was not doing work with them. He said that he thought that the roles which fitted with the clause were mainly the counsellors.

30. Ms Roberts said that they had suspended people who had started taking substances again and she said that the person she had in mind had not had relapses and was drinking occasionally; it was not somebody who had TUPE'd in.

31. The claimant stated that, in his opinion, he was still abstinent. He thought the clause was about relapses. The claimant said he was abstinent from heroin and had never had a problem with alcohol. He asserted that abstinence and total abstinence were not the same.

32. There was some discussion about MS. Ms Crompton Hill said she felt that MS was a very different example; MS had never been abstinent and had had not received treatment from Acorn, Ms Crompton Hill said that MS was an Office Supervisor. The claimant said that there was someone who had presented at graduation who drinks and was out of addiction. Ms Hanson said that the difference was in their roles.

33. Ms Hanson concluded by asking if anyone had any further questions or points to raise; no one did. Ms Hanson then adjourned to make a decision.

34. Following an adjournment of thirty five minutes, Ms Hanson informed the claimant of her decision to dismiss him. She told the claimant that her decision was based on three factors

"Firstly, the fact that you were previously drug dependent; secondly - and you disagree with this - that your role fits into the clause. To clarify I think there are equally roles that don't, for example finance, admin, office manager and data and performance roles. Thirdly, I think that as an organisation we have a real risk to manage if the contract clause were not enforced. For example dealing with clients in the day to day, relationships with commissioners, managing complaints and effectively supporting staff".

35. Ms Hanson said "I am not saying that you can't carry out the role but the role is in direct conflict with your personal decision to drink. There could be other roles where the clause does not apply and we will look to redeploy you in a different role within the Group".

36. Ms Roberts informed the claimant of his right of appeal. She also informed him that he would have a notice period of three months; during that period he would be added to the re-deployment list and would receive all job vacancies before they were sent out to the rest of the group. He would have 48 hours to express an interest and be considered. Ms Roberts confirmed that the claimant was not expected to attend work during the three month period and would be paid.

37. By letter dated 16th August 2016, Ms Hanson confirmed her decision to dismiss the claimant from his post of Operations Manager and enclosed a copy of the notes of the hearing. She wrote that Acorn's ethos was about being an organisation that promoted total abstinence within the service which they promoted to their clients, the commissioners that they worked with and staff who delivered their programmes. She wrote that it was clear that the claimant fully understood the paragraph within his contract of employment. She wrote that she believed it applied to the claimant for the following reasons:-

"(1) You have previously been drug or alcohol dependent.

(2) Your role as Operations Manager for Acorn's Residential and Rehabilitation Service fits into the category of a role that provides support to clients with emotional or psychological well being.

(3) You must remain abstinent".

38. In clarification of point two, she wrote that roles she would not see fitting into the category were non front line service such as finance Manager, Administration Staff, Office Manager, Data and Performance Manager, Cameraman. She wrote that she believed the claimant's role fitted into the category of providing support to clients with emotional or psychological wellbeing for the following reasons:

"* You are directly responsible at an operational level for one of Acorn's main frontline services. Within this service we heavily promote directly and indirectly our ethos of total abstinence (whilst within treatment and beyond). This ethos is key to our reputation and also impact upon our success and viability as an organisation.

* Your role requires you to have contact with clients, promoting our services to them and to provide support to clients with emotional or psychological wellbeing whilst they are considering treatment and/or whilst they are undergoing treatment.

* You supervise and manage staff who do the same including Counselling staff".

39. She wrote that, if Acorn allowed the claimant to continue in his role as Operations Manager whilst openly continuing to drink alcohol whilst in recovery, she felt that there would be significant risks which they would not be able to manage in relation to what she expressed to be a non-exhaustive list:

"* Our ability to effectively manage complaints from clients, commissioners or staff in relation to not upholding our organisational ethos of total abstinence;

* Effectively dealing with day to day issues around clients recovery whether in treatment or living in our housing.

* Supportive and effective line management of staff who equally provide support to clients whether emotional or psychological well being, some of which are in recovery themselves and follow Acorn's ethos of total abstinence;

* enforcement of this clause in relation to other members of staff when necessary".

40. Ms Hanson informed the claimant that the final date of his employment would be 11th November 2016. She confirmed that they would seek alternative suitable employment for the claimant within the respondent or elsewhere in the wider group of companies in a role which did not require the clause to be active within his contract of employment. She confirmed the claimant's right of appeal.

41. I accept that the reasons given by Ms Hanson at the disciplinary hearing and in the subsequent letter were the reasons she dismissed the claimant. Ms Hanson held the view, based on her own knowledge of the claimant's role, that he did have contact with clients, providing support to clients with emotional or psychological wellbeing, albeit not on an everyday basis. Ms Hanson was very familiar with the requirements of the claimant's role; she had restructured the organisation and the claimant's role was one of those she created. Ms Hanson took a wide view of the roles where she considered that the job holders provide such support to clients. She estimated in oral evidence that there were only around 5 in 90 roles where the clause would not apply.

42. During the notice period, the respondent did inform the claimant of vacancies which arose with the respondent and within the group. The claimant was informed of all vacancies; these were not filtered so that he was only notified of jobs which would not involve emotional and psychological support to service users. It appears that there were no suitable jobs with the respondent. The claimant did not express interest in any of the roles notified to him.

43. The claimant appealed against his dismissal in writing. The letter of appeal included an assertion that he was abstinent. He also wrote that there was not a culture of total abstinence or even abstinence within Acorn as they employed several people who drink (including some he said were in recovery from addiction). He wrote "I felt that during the investigation and disciplinary there were obvious steps to stretch and interpret any type of interaction with clients to fit the terms "emotional and psychological support". I feel that this either shows a clear misunderstanding

within the SLT around what constitutes this support and an obvious failure in communicating their understanding to staff (me) or more worryingly I feel this shows a clear and definite attempt to orchestrate my dismissal". He wrote that his understanding from conversations with his manager was that his role was one which should not see him having the type of involvement with clients which the clause applied. He asserted that Acorn did not have an organisational ethos of abstinence. He summarised that he felt that he had been unfairly dismissed because he was abstinent, he did not support clients with emotional and psychological well being and he had not relapsed; he commented that the term "supporting psychological and emotional well being" was too loosely defined and unclear.

44. The claimant appealed against his dismissal by a 7 page letter dated 19 August 2016. The claimant summarised at the end of the letter that he felt he had been unfairly dismissed because he was abstinent, he did not support clients with their emotional and psychological wellbeing and he had not relapsed. He suggested that he had been dismissed on unfounded fear of risks. The claimant made no allegation in the letter that Ms Crompton Hill had been motivated to take action against him because he had brought a grievance against her.

45. The appeal was heard by Anthony Duerden, Chief Executive of Calico Group with HR support from Kay Atwood, Group Head of HR. The appeal hearing began on 19th September 2016. The claimant attended without a companion. He was asked if he wished to proceed on that basis and confirmed that he did.

46. The claimant argued that the contract clause was "vague and ambiguous" and asserted that he was not in a role that involved providing support with emotional and psychological wellbeing to clients. Mr Duerden stated that it had been clear since before the disciplinary hearing that Acorn took a different view. The claimant said that the option to stop drinking or revise his role was not discussed. Mr Duerden asked what his view would be on that now. The claimant said he felt that the way the investigation and disciplinary had been handled had had an adverse impact on the respect of staff for him. He thought that, if the question had been posed at the initial meeting, it would have been different but said they were months down the line now. The claimant said he would like the respondent to acknowledge that his dismissal was unfair.

47. Ms Hanson attended the hearing to explain her decision. Ms Hanson said that the claimant had had his notice period to apply for other roles in the company that did not have the clause but there weren't any roles that did not have the clause with Acorn which were vacant. She said that she would not be able to take the operational remit out of the claimant's role because it was central to it. She said there would be points when the claimant was required to provide support to clients even though he did not do this every day. She asserted that the clause did not say that, if someone was addicted to a particular substance, then they should remain abstinent from that substance; she said it was around alcohol, drugs and total abstinence. Mr Duerden asked Ms Hanson questions. One question he asked was what would be Ms Hanson's response if the claimant said he would stop drinking. Ms Hanson said that would be fine but the claimant had said he would continue with the choice he made. She said from the outset the claimant had been vocal about the fact that he had made a choice, that he wanted to live a normal life and it was a personal

decision. She said she had not got the impression that he was willing to think about not drinking. The claimant had an opportunity to question Ms Hanson and a full opportunity to make all the points he wished to make. The claimant referred to his grievance so it is apparent that the grievance had been submitted before 19 September 2016. The claimant questioned how he could go back to Acorn, asserting that he had been treated horrendously.

48. Mr Duerden informed the claimant that he would not be making a decision that day because he needed more time to consider the points that had been made. He also said that he wanted to give the claimant the opportunity to reflect on his options. Mr Duerden said he wanted to know if the claimant would be prepared to stop drinking. If the claimant decided that was not an option for him, then Mr Duerden said he would make his decision on the basis of what he had heard that day.

49. The claimant sent Mr Duerden an undated letter following the hearing on 19 September. The claimant made it clear in this letter that he did not consider there to be sound reasoning for him to be required to be abstinent from alcohol. He reiterated his view that he had not breached his contract. The claimant referred to his grievance. He wrote that this was a separate issue but, due to the proposal Mr Duerden had put forward, he felt that the actions of members of the SLT and the subsequent grievance now required consideration as part of the process. He summarised his grievance which included an allegation that Ms Crompton Hill had belittled and mocked him following serious threats to his life. He wrote that it was going into the sixth week since he had submitted a formal grievance and had not, at that stage, even received a letter of acknowledgement. The claimant wrote that he did not feel he could return to work for the respondent and be secure in the knowledge that his rights or safety as an employee would be protected or valued.

50. Mr Duerden received advice from HR that the grievance did not have any bearing on the appeal.

51. The appeal hearing reconvened on 27th September 2016. Mr Duerden informed the claimant that he was dismissing the appeal. He told the claimant that he agreed with the original findings that there was a breach of contract and that the clause was applicable to the claimant in his role. Mr Duerden referred to job opportunities in the wider Calico Group. The claimant said he had been sent some job opportunities but there was nothing. Mr Duerden informed the claimant that his grievance was being dealt with; it had not been dealt with up until that point because it had to be Ms Hanson dealing with it and she had not been in work due to unforeseen circumstances but was now back.

52. By letter dated 3rd October 2016, the appeal outcome was confirmed. Mr Duerden wrote that his findings were:

- “That you were clear that Acorn’s ethos is one that promotes ‘total abstinence’ and that you are currently drinking alcohol.
- It was clear that you were aware of the paragraph in the employment contract.

- I believe that the clause applies to you because you were drug or alcohol dependent and your role fits the category of a role that provides support to clients with emotional or psychological wellbeing.”

Mr Duerden wrote that he also found that, even if there was doubt whether the clause applied to the claimant, he was:

- “Aware enough that it was an issue to inform us as soon as you were seen by a colleague.
- That since the disciplinary process has started there has been no doubt you were fully aware. There has been no suggestion by yourself that were willing to stop drinking and return to your role.”

53. Mr Duerden wrote that he had offered the claimant the opportunity to stop drinking and return to work but the claimant had refused this and asked that the respondent remove the clause from his contract. Mr Duerden wrote that this was not possible as it was not Acorn’s ethos. Mr Duerden also wrote that he had considered whether they could amend the claimant’s role so he did not provide emotional support but found this was not possible due to the nature of the role.

54. I accept Mr Duerden’s evidence that he considered that the claimant was abstinent from drugs but alcohol had been part of the problems which had brought the claimant to the respondent as a client. As recorded above, I have found that the claimant had informed Mr Duerden that he had had a problem with alcohol as well as heroin, although to a much lesser extent than with heroin.

55. I accept that the understanding of both Ms Hanson and Mr Duerden was that the respondent’s ethos was that, for the best chance of not relapsing into dependency, after being treated for drug and/or alcohol addiction, the client should remain totally abstinent from drugs and alcohol for life i.e. someone treated for drug dependency should remain abstinent not only from the drug to which they had been addicted but all other drugs and alcohol after treatment. The claimant accepted that some people in the organisation held this view but said it was not a view held universally by those working for the respondent. Materials produced by the respondent are consistent with the understanding of Ms Hanson and Mr Duerden that abstinence should be lifelong. The respondent’s mission statement states:

“Acorn Treatment’s primary purpose is to help our clients achieve abstinence through tailored and innovative recovery programmes, flexible housing and sustainable employment opportunities. By inspiring useful and purposeful lives, recover continues to grow and deepens reuniting families and communities.”

Whilst this mission statement does not expressly refer to lifelong abstinence, sections of the respondent’s leaflet “What can I expect from treatment with Acorn?” make it apparent that the expectation is that abstinence is to be maintained long term after completion of the treatment programme. In the section “After treatment” the leaflet states: “You will be in recovery for your entire life...” In the section “Why do I have to attend recovery groups?” it states: “Attending recovery groups will complement the day treatment programme you will be receiving and continued

attendance enables you to build a solid support network ensuring your long term abstinence and recovery.”

56. The material I have seen does not clearly state that abstinence after treatment should be life long in respect of all drugs and alcohol, regardless of the substance to which the individual was addicted. However, the material is not inconsistent with such a view and I have no reason to doubt the evidence of Ms Hanson and Mr Duerden that this was and remains their understanding of the respondent’s ethos.

57. The respondent’s special arrangements appendix to the contract provides that an employee who has been drug or alcohol dependent and suffers a relapse will be immediately removed from their work and relieved of all duties, a reference made to occupational health and the employee supported and advised throughout the process. The employee will be granted time off required for treatment and the case treated in the same way as any other illness in accordance with the sickness absence procedure. I accept the evidence of Ms Hanson that staff members who relapse are offered support. She gave an example of a staff member who had relapsed and was given sick leave. I accept that support was not offered to the claimant and no reference made to occupational health because he told the respondent he had not relapsed and it was clear he did not want support.

58. I heard some evidence about other employees: MS and TL. The claimant did not satisfy me on the evidence that they were in a comparable position to the claimant in terms of their contact with clients, previous addiction and seniority within the organisation.

59. The claimant’s employment ended on 11th November 2016.

Submissions

60. In summary, the submissions on behalf of the claimant were that the evidence showed that the claimant’s role did not involve supporting the emotional and psychological wellbeing of clients. Ms Hanson’s decision was taken without any real investigation other than that done by Ms Crompton Hill, which was questionable. Mr Duerden made no enquiries and took his information from Ms Hanson, whose judgment was the subject of the appeal. The source of Ms Hanson’s information was the subject of the claimant’s grievance. Abstinence in the contract clearly meant abstinence from what there had been dependence upon; this was the only sensible interpretation. There was no evidence the claimant had ever been addicted to alcohol; witnesses’ recollection should be treated with caution. The claimant did not breach the contract. There was no good reason for departing from the procedure for reference to occupational health. The decision to dismiss was made without fair or proper enquiry into either the claimant’s past addiction or the actual role he was performing. No one made reasonable enquiries into precisely what the claimant’s role was.

61. In summary, the submissions on behalf of the respondent were that the reason for dismissal was conduct, being a breach of the claimant’s contract, or some other substantial reason, being that the claimant’s conduct was contrary to the respondent’s ethos in relation to its stance on recovery from addiction. The

investigation and the investigation report could not be tainted by a grievance which had not yet been made. There was no other potential reason for dismissal. It was clear from the evidence that Ms Hanson and Mr Duerden had heard the claimant describe his history of drug and alcohol problems. The claimant made a choice to start drinking again. This might work for the claimant personally but is not the basis on which the respondent operates. The clause is unusual but is there because of the nature of what the respondent does. The claimant did not have direct day to day contact with clients but the evidence of Ms Hanson was that all of the respondent's managers have contact with clients. In those circumstances, the clause applied to the claimant. He was in breach of the clause. Ms Hanson knew what the claimant did. Based on conduct, this was a fair dismissal. It was within the band of reasonable responses for both procedure and the decision to dismiss. Given admissions made by the claimant any criticisms which could be made of the investigation were not fatal.

62. In relation to the respondent's alternative argument that the dismissal was for some other substantial reason, this was an organisation which placed abstinence at the centre of what they did. Abstinence was not just to be followed when someone was in the programme but was for the rest of the person's life. When the claimant changed his view, he was undermining the respondent's ethos. The claimant was in a position of authority over staff and clients. The decision to dismiss was fair.

The Law

63. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

64. Section 98(4) provides that 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 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

65. In relation to a conduct dismissal, the Tribunal is guided by the authority of *British Home Stores v Burchell* [1979] IRLR 379. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In

considering the fairness or otherwise of the dismissal, the tribunal must consider the other parts of the *Burchell* test: was this belief based on reasonable grounds and formed after a reasonable investigation?

Conclusions

66. I conclude that the claimant was dismissed because he started drinking alcohol again and Ms Hanson and then Mr Duerden genuinely formed the view that this was in breach of the clause in the claimant's contract which stated:

"It is a condition of your employment that, if you have previously been drug or alcohol dependent, appointment to a post which involves supporting clients with their emotional and psychological wellbeing, requires you to be abstinent and in active recovery. Successful candidates may be required to provide evidence of this and submit to a test if so requested. You should also be aware that during your employment you must remain abstinent. Should you suffer a relapse you will be removed from your role and efforts will be made to seek alternative duties which do not involve Acorn clients in accordance with the company's redeployment policy".

67. I have accepted that the notes of the disciplinary and appeal hearings and the outcome letters set out the reasons which Ms Hanson and Mr Duerden had for their decisions. They considered the claimant to be a good employee. No reason has been suggested as to why they would have wished to dismiss the claimant, other than for their belief that he had breached this clause of the contract and that this was a serious matter, given their understanding that the respondent's ethos was to promote life long abstinence as the best means to sustain recovery from drug or alcohol dependency. Indeed, Mr Duerden offered the claimant the opportunity, at the appeal stage, to reconsider his decision to continue drinking alcohol, before he made his decision on the appeal. The clear implication is that the respondent might have reinstated the claimant had he committed to future abstinence from alcohol as well as drugs. It is unlikely that Mr Duerden would have done this had there been some other reason for the claimant's dismissal. Some suggestion has been made at this tribunal hearing, although not during the internal disciplinary and appeal process, that Ms Crompton Hill had a motive for recommending disciplinary action other than the claimant's conduct in drinking alcohol, this being because the claimant had brought a grievance against her. However, the grievance was not submitted until after she had concluded her investigation and completed the investigation report. In any event, the decision makers were Ms Hanson and Mr Duerden and, even if there had been some nefarious motive on the part of Ms Crompton Hill (of which I find no evidence), this would not have affected the genuineness of the belief of Ms Hanson and Mr Duerden in the claimant's guilt.

68. I conclude, therefore, that the respondent has shown a potentially fair reason for dismissal, being conduct.

69. I turn, then, to the reasonableness or otherwise of the decision to dismiss. It was common ground throughout the disciplinary proceedings that the claimant had previously been drug dependent. It was also common ground that the claimant had

begun to drink alcohol again after a lengthy period of abstinence. It was not suggested that the claimant's drinking of alcohol was other than light or moderate.

70. It was a matter of dispute as to whether the claimant had been alcohol dependent. I found, for the reasons given in paragraph 4 of these reasons, that Ms Hanson and Mr Duerden believed, based on what the claimant had told them previously, that he had also had a problem with alcohol, although not to the extent of his dependency on heroin. This was a reasonable belief, based on what the claimant had told them.

71. It is not entirely clear to what extent, if any, Ms Hanson and Mr Duerden based their decision on their belief that the claimant had been alcohol and drug dependent, rather than just drug dependent. The outcome letters refer to the claimant having previously been drug or alcohol dependent. However, the notes of the disciplinary hearing record Ms Hanson having referred, when giving her decision, to drug dependency only. If they did take into account that the claimant had been previously alcohol as well as drug dependent, this was based on reasonable grounds, given the information the claimant had given to them previously. It was not in dispute that the claimant had been previously drug dependent. I have found that Ms Hanson and Mr Duerden both believed that the respondent's ethos was that, when someone had been dependant on drugs or alcohol, lifelong abstinence from both drugs and alcohol was the best route to sustained recovery. I conclude that it was reasonable for them to have this belief. Given their positions with the respondent and the wider group, I would expect that they would understand the ethos of the respondent. Their understanding is supported in part, and not inconsistent with, the material produced to the tribunal, in particular, the parts of the document "What can I expect from treatment with Acorn" to which I referred at paragraph 54 of these reasons.

72. The clause in the claimant's contract could have made it clearer that "abstinent" meant abstinent from both alcohol and drugs, even when the job holder had been dependent on one but not the other. It may be advisable for the respondent to review this to make it clearer for the future. Viewed in isolation, there is ambiguity in the clause. Ambiguity will normally be resolved against the person seeking to rely on this which, in this case, is the respondent. However, I conclude that, given the context of the respondent's ethos, it was within the band of reasonable responses for Ms Hanson and Mr Duerden to form the view that the claimant, by drinking ceasing to be abstinent from alcohol, was in breach of the clause even if he had been drug dependent and not alcohol dependent in the past, if the claimant's job role was one to which the clause applied.

73. I found that Ms Hanson and Mr Duerden both concluded that the claimant's job involved supporting clients with their emotional and psychological well being, albeit not on a day to day basis. Ms Hanson had personal knowledge of the claimant's role, having been responsible for its creation as part of a restructure of the organisation. She, therefore, had reasonable grounds for her belief. Mr Duerden did not have personal knowledge of the claimant's role but reached his view on the basis of the investigation report and the information from Ms Hanson, after considering the evidence given by the claimant. I conclude that he had reasonable grounds for his belief. The claimant's role was clearly not primarily directed at providing such support

to clients on a day to day basis. There could have been more clarity in the claimant's contract or by guidance issued by the respondent to help the claimant understand that the respondent considered his role (and the majority of other roles at the respondent) to be one to which the clause applied. It may be advisable for the respondent to review its contracts and/or issue guidance to ensure in future that there can be no doubt for employees as to whether the clause applies to their role. However, I conclude it was within the range of reasonable responses for Ms Hanson and Mr Duerden to form the view that the claimant's role was one to which the clause applied. In any event, as Mr Duerden noted, even if the claimant was in any doubt prior to the disciplinary proceedings, he was in no doubt of the respondent's view once proceedings started. Had the claimant at that point accepted that the clause applied to him and committed to not drinking alcohol from that point on, it is highly unlikely that he would have been dismissed.

74. I conclude that the investigation was within the band of reasonable procedure, having regard to the facts which were not in dispute. I conclude that the beliefs of Ms Hanson and Mr Duerden were based on reasonable grounds after a reasonable investigation.

75. I conclude that it was within the band of reasonable responses for Ms Hanson and Mr Duerden to reach the conclusion that the claimant was in breach of his contract of employment.

76. The claimant held a senior role in the organisation. It was particularly important that his conduct should be consistent with the ethos of the organisation. It was reasonable for Ms Hanson to conclude that failure to enforce the contract clause in relation to the claimant could cause problems with clients, commissioners and other staff. It was reasonable for the respondent to conclude that the claimant's job could not be altered so the clause would not apply to him. The respondent alerted the claimant to other opportunities with the respondent and the wider group. It appears there were no suitable alternatives with the respondent and the claimant did not express interest in any opportunities in the wider group. Given the claimant's stance, where he was not accepting that he had done anything wrong and was not committing to cease drinking alcohol in future, it was reasonable for the respondent to conclude that dismissal was an appropriate sanction. I conclude that the penalty of dismissal was within the band of reasonable responses.

77. I conclude, for these reasons, that the complaint of unfair dismissal is not well founded.

Employment Judge Slater

Date: 16 June 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 June 2017

FOR THE TRIBUNAL OFFICE