



EMPLOYMENT TRIBUNALS

Claimant: Mrs Veronica Linley
Respondent: East Yorkshire Housing Association Ltd
Heard at: Hull **On:** Friday 14 December 2018
Before: Employment Judge R S Drake

Representation
Claimant: Mr D Vulliamy (Hull & East Riding CAB)
Respondent: Mr J Green (of Counsel)

JUDGMENT

- 1 The Claimant's complaint of unfair dismissal fails and is dismissed
- 2 The Claimant's complaint of breach of contract fails and is dismissed.
- 3 Because this decision was reserved and concluded after deliberation and is now promulgated in the absence of the parties, and pursuant to their request, I have decided to exercise my power under Rule 62 to set out reasons in full as below

REASONS

Issues

1. I determine that the issues to be examined were as follows: -
 - 1.1 Can the Respondents show what their reason was for dismissal of the Claimant?
 - 1.2 Can the Respondents show they entertained a reasonable suspicion amounting, on the specific facts as found in this case, to belief in the guilt of the Claimant of gross misconduct; thus, can they establish the fact of their

belief, that they had in mind reasonable grounds upon which to sustain that belief, and that at the stage they formed that belief they had carried out as much investigation into the matter as was reasonable in all the circumstances of the case? In this case, the Claimant admitted her actions as found below.

- 1.3 Can the Respondents show that the reason relied upon was a potentially fair reason for the purposes of Section 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)?
- 1.4 Is the Tribunal satisfied that the Respondents acted reasonably in all the circumstances relying upon the reason demonstrated, if so proved, as being a sufficient reason in all the circumstances of such conclusion, taking into account their size and administrative resources having regard to the equity and substantial merits of the case for the purposes of Section 98(4) ERA?
2. If the Tribunal were satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason the Tribunal but is satisfied the dismissal was nonetheless unfair, it would have to determine whether the Claimant had contributed to any, and if so to what extent to her dismissal, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119 and 123 ERA. Though this was a live issue at the start of the hearing, I determined it ceased to be live once I reached the conclusions as set out below.
3. The standard of proof required is the usual civil law standard, and thus that of a balance of probabilities.

The Law – Unfair Dismissal

4. The law applicable to the unfair dismissal claim in this case is set out principally in Section 98 of the ERA as follows:

“(1) In determining for the purposes of this Part whether dismissal of an employee is fair or unfair it is for the employer to show –

 - (a) The reason (or if more than one, the principal reason) for the dismissal and
 - (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee....”

(2) A reason falls within this subsection if it

 - (a)
 - (b) Relates to the conduct of the employee.”

5. If the Respondent satisfies the test set out in Section 98(1) and (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

“Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

- (a) Depends whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) Shall be determined in accordance with equity and the substantial merits of the case.”
6. I did not have to consider the law on compensation under Sections 119 to 123 ERA.
7. The Tribunal also takes into account the effects of the House of Lords decision in the case of **Polkey –v- A E Dayton Services Limited [1988]** confirming that where the sole question for the Tribunal was whether the employer acted reasonably at the time of dismissal, the Tribunal can take into account whether had the employer acted reasonably at the time it would have dismissed in any event, then this should be reflected in the level of compensation awarded if at all.
8. The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office and HSBC Bank –v- Madden [2000]**) which is to consider whether the employer’s actions, including its decision to dismiss, fell within the band of responses which a reasonable employer could adopt in the same circumstances, but not substituting the Tribunal’s view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. one other literally) reasonable employer to act. Ultimately, the severity of summary dismissal as a sanction for misconduct on the facts of this particular case became the only real issue to be determined despite the duration of the hearing being day-long.

The Law – Breach of Contract

9. The Tribunal had to consider the common law basis of the breach of contract claim and determine whether the Respondent could show that the Claimant’s actions (as she admitted them to be) did amount to breach of contract by her of such fundamental nature as to justify termination of her contract of employment without notice had

The Facts and Reasons for the findings thereof

10. The Tribunal made the following findings of fact based upon oral and written testimony that it heard from the Respondents' General Manager Mrs Christine Lessinton (the dismissing officer) who was the only relevant witness since the Claimant failed to take up her right to appeal dismissal and the basic facts of the basis of dismissal were largely unchallenged. The Tribunal noted that Mrs Lessinton was extensively cross examined and faced further questions from the Judge. The Claimant also gave oral testimony and was cross examined herself. The Tribunal's attention was drawn to a large body of documentary evidence but noted that largely the facts became agreed on testing under cross examination. The findings of fact relevant to the Tribunal's decision are as follows: -
 - 10.1 The Claimant was employed by the Respondents at a Day Centre they run for vulnerable people near Bridlington, East Yorkshire. At the time of the termination of her employment the Claimant had been employed since 2007 and latterly as Centre Manager at Bridlington.
 - 10.2 This was a post of seniority and considerable responsibility involving management of other employees and acting as an example of best practice, and thus being a role model. It carried with it express (as set out in several written Policies and Procedures) legitimate expectations as to behaviours and performance management of and at group and personal level
 - 10.3 The Respondents are a Housing Association as their name suggests and in addition to providing domiciliary care for clients in their own homes, they also run and administer centres for adults regarded as being vulnerable because of learning or other similar difficulties. They provide care for 33 resident and non-resident adults in their Care Homes and Centres, and they employ over 60 Carers and manage them via such persons as the Claimant.
 - 10.4 At the Bridlington Day Centre where the Claimant worked, the Respondents provided partially residential and day care for 15 clients with varying needs and requirements and varying degrees of capability and comprehension.
 - 10.5 There are few evidential conflicts, but one about the extent to which the Claimant had relevant training on the needs of and duties to Vulnerable Adults was resolved on admission that the Claimant had achieved a level of externally recognised qualification for her job and its role. At most if not all points of potential conflict in the evidence, under cross examination the Claimant accepted the content and effect of the evidence relied upon by the Respondents.
 - 10.6 This comprised inter alia evidence of her awareness of the importance of "privacy, dignity, independence, choice, rights, and fulfilment of service users" as set out in the Respondent's Code of Conduct, policies and the Claimant's terms.
 - 10.7 I did not need to prefer the accounts of what happened as corroborated by witnesses, as the Claimant accepted the facts of what happened during an incident observed by third parties from the local authority Social Services

Department (one being a Social Worker and the other significantly being an Independent Mental Capacity Advocate) on 9 January 2018.

- 10.8 On that date, the third parties when visiting the Bridlington Day Centre managed by the Claimant observed her condone and even encourage an act of inappropriate physical contact to be made by an elderly female service user patting the behind of a much younger male service user, both being categorised as vulnerable adults, but the situation being described and classified by the Claimant as mere banter. Indeed, throughout the lead up to her dismissal and since, she has regarded the act as mere banter and objectively acceptable in the circumstances prevailing upto the date of this hearing.
- 10.9 Perhaps surprisingly but not relevantly, the third parties didn't report the matter to the Respondents until a meeting several weeks later when Mrs Lessinton was appraised of what had been observed. In particular, it was noted that the Claimant had not only actively encouraged the female service user's actions and thus more than condoned them, but also allowed others under her supervision (and for whose behaviours she was responsible) to act similarly, despite awareness of overriding duties to vulnerable service users.
- 10.10 The Respondents acted immediately on learning of this and suspended the Claimant following initial investigation and pending any potential disciplinary hearing.
- 10.11 The Claimant was called to and attended an investigative discussion on 28 February 2018 but was not advised to have a friend present, though she admitted what had happened. She was then suspended on 5 March 2018 and later advised by letter dated 14 March to attend a disciplinary hearing on 21 March 2018. This time also she was advised that she could have a friend present. The testimony of the third parties was again put to her and her explanation sought.
- 10.12 The Claimant accepted the facts of what had happened but sought to down play the seriousness of her actions by describing it as banter, with which view the third-party witnesses did not agree, and by suggesting that the two vulnerable adults had not complained. She relied solely on her past good character and absence of any blemish on her record.
- 10.13 Mrs Lessinton of the Respondents undertook and managed the disciplinary hearing and deliberated afterwards in order to reach a conclusion which she later confirmed by letter dated 26 March 2018 to the effect that the Claimant was summarily dismissed for what Mrs Lessinton concluded was gross misconduct at various levels both personal and representative/vicarious in terms of her management of the situation observed by the third parties. Mrs Lessinton had considered all the relevant Codes of Conduct and Policies applied by the Respondents as evidenced in the documents put before me which the Claimant didn't challenge.

- 10.14 Mrs Lessinton concluded that the Claimant's actions and behaviours were thus proved and constituted gross misconduct meriting summary dismissal because in her considered opinion they outweighed the Claimant's previous good record in her judgment. Bearing in mind the Claimant's position of authority, her awareness of her duties and the sensitivity necessary in managing the welfare of vulnerable service users, Mrs Lessinton concluded she had no other viable reasonable option but to dismiss.
- 10.15 The Claimant was dismissed, confirmation of which was set out in the letter dated 26 March 2018 against which she decided not to appeal.

Conclusions on Application of Law to Facts

11. The Tribunal finds that the Respondents have easily shown that the Claimant's conduct was the reason they had in mind for dismissal. They have also shown that they conducted fair and reasonable procedures in leading up to and reaching a conclusion as to misconduct and the outcome. They satisfactorily establish the tests set out in **Burchell**.
12. The real issue in this case is whether their conclusions are reasonable in characterising the Claimant's behaviours and actions as gross misconduct and therefore whether the dismissal reason shown is a sufficient reason for dismissal pursuant to S98(4) ERA.
13. Particular seriousness was attached by the Respondents to the situation because they are a regulated provider of services to vulnerable adults and as such can legitimately be expected to ensure their staff comply with reasonable obligations and apply reasonable means to protect the safety and dignity of such service users.
14. The Tribunal concludes it was reasonable for them to do so particularly as the Claimant herself admitted this in cross examination. They were aware of the Claimant's position of seniority and that as she is clearly a sophisticated and intellectually reasonably well-versed individual, she could reasonably be expected to lead by good example, and that failure to do so would reasonably be regarded as more serious than if she were in a more junior position.
15. The Tribunal further finds that the Respondents had established that they believed that the Claimant had committed an act of gross misconduct. Before the disciplinary hearing they had carried out investigation into it leading to the Claimant's full admission of her acts and that there was no other investigation necessary other than to ascertain reasons for the Claimant's actions or any mitigation. The Tribunal finds that in this respect the Respondents carried out as much investigation as would be carried out by another reasonable employer in the same circumstances and that therefore their conclusions as to the facts and the weight to attach to them were procedurally safe, and the reasons for their findings of fact which this Tribunal shares were equally sound and safe.

16. The potential blemish in the Respondent's case of failing to advise the Claimant she could be accompanied at the investigative discussion is outweighed by the fact she admitted her actions then and throughout, thus obviating the need to regard such failure as capable of impeaching the totality of the procedure then and subsequently undertaken.
17. The Tribunal carefully considered whether the mitigation offered by the Claimant that the actions of the female service user were normal banter was in any way persuasive of the proposition that dismissal was too severe an option to adopt. However, the Tribunal judges that another reasonable care provider would be cognisant of the Claimant's seniority and all that comes with such, that the mitigation offered shows a clear avoidance of recognising the failure of judgment shown by her and/or that it shows a deliberate disregard for matters of dignity in such an environment, which any other reasonable employer would, regard as unacceptable as an explanation justifying the commuting of potential outcome such as dismissal.
18. The Tribunal finds that given the seriousness of the Claimant's actions and behaviours as found by the Respondents and shared by this Tribunal, the Respondents did attach as much weight as would be attached by another reasonable employer to the situation. They did consider whether a lesser sanction was appropriate but concluded it was not and the Tribunal finds that was a conclusion which another reasonable employer could safely and reasonably reach in the same circumstances even if there may be some employers who might not.
19. The test is as set out in **Iceland** and is based on what another (i.e. an other) reasonable employer might do, not what the Tribunal might not do. The sanction of dismissal was not one which potentially fell outside the bounds of what an other reasonable employer would do in the same circumstances. The dismissal was thus fair.
20. However, if the Tribunal had found that the Claimant had been unfairly dismissed, because of her admitted and proved actions and behaviours she had contributed to her own dismissal completely by a factor of 100%. it would thus not be just and equitable to award compensation in such circumstances.
21. Therefore, the Tribunal concluded that the Claimant had been dismissed fairly on the basis that dismissal was not too severe a sanction outside a band of reasonable responses, but that had that not been the case she had nonetheless contributed to her own dismissal by a factor of 100% and that in any event it was not just and equitable to award compensation given the degree of contributory responsibility.
22. Given that thus the Tribunal finds that the Claimant had indulged in behaviour which she knew or ought to know was unacceptable and that she did commit the act of condoning or encouraging the inappropriate acts of service users, her acts amount to gross misconduct at common law. Thus,

her claim for wrongful dismissal (i.e. in breach of contract) also fails and is dismissed.

Employment Judge R S Drake

Date: 21 December 2018