



EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Dickens

Respondent: Nottinghamshire County Council

Record of an attended Hearing at the Employment Tribunal Audio Recorded by CVP

Heard at: Nottingham

Heard on: 27 and 28 August 2024

Before: Employment Judge M Butler (sitting alone)

Appearances:

Claimant: In person

Respondents: Ms S Harty, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Judge is that the claim of unfair dismissal is not well founded and is dismissed.

REASONS

Background

1. The Claimant presented his claim to the Tribunal on 21 April 2024 following a period of Early Conciliation between 14 February and 26 March 2024. He was employed by the Respondent from 28 May 1999 until his dismissal for gross misconduct on 11 December 2023. At the time of his dismissal, he was a Team Manager in the Respondent's Children and Families Department. He was based at Clayfields House, a Secure Centre divided into three units providing care to young persons aged between 10 and 18 years old who are remanded in

custody, serving a sentence or given secure accommodation for welfare reasons.

2. The Claimant managed a team of Senior and Assistant Practitioners and was a designated Safeguarding Officer. As such, he had received training in safeguarding matters. The circumstances giving rise to his claim concern an inappropriate relationship between an Assistant Practitioner, who is referred to as Adult 'R', and a 15 year old boy in care at Clayfields House, who is referred to as Child 'A'. Child 'A' was resident in Scarlet Unit within Clayfields House.

3. The reasons for the Claimant's dismissal for gross misconduct related to his failure to take action in relation to a safeguarding issue involving Adult 'R' and Child 'A' which led to further serious incidents involving physical contact between them. The grounds of his complaint are, briefly, that his dismissal was unfair since others involved as managers and other practitioners were not dismissed and he should not have been dismissed applying the principles of double jeopardy as he had already been given final written warning in respect of the same allegations for which he was ultimately dismissed. The details of the complaint and response are set out below in my findings of fact.

4. Although the Claimant states in his evidence that Adult 'R' had all charges against her dropped by the Police, she was in fact convicted in connection with her relationship with Child 'A' and received a suspended custodial sentence.

The Issues

5. There was no list of issues agreed by the parties before the hearing. Indeed, there seems to have been no attempt to agree the issues although this would have presented difficulties for the Claimant who acts as a litigant in person. In relation to the claim of unfair dismissal, the issues are:

- i. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was a reason relating to the Claimant's conduct.
- ii. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the Respondent in all respects act within the so called "band of reasonable responses"?
- iii. If the Claimant was unfairly dismissed and the remedy is compensation:
 - a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility of that the Claimant would still have been dismissed had a fair and reasonable procedure been followed?
 - b. Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) ERA and, if so, to what extent?

- c. Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award pursuant to section 123(6) ERA.
- iv. To what extent, if at all, was the dismissal unfair under the principle of double jeopardy/res judicata?

The Evidence

6. I heard evidence from the Claimant and for the Respondent from Ms J Whiston, Group Manager for Fostering, Residential Care and Secure Accommodation and Mr P Thomas, Service Manager (Secure Accommodation).

7. All witnesses produced witness statements, gave oral evidence and were cross examined.

8. There was a bundle of documents comprising 359 pages and references to page numbers in this Judgment are to page numbers in that bundle.

The Facts

9. In relation to the issues, I find the following facts of on the balance of probabilities:

1. The Claimant was a Team Manager with the Respondent and a designated Safeguarding Officer. On 17 May 2022, the Claimant sent an email to a number of senior staff and copying in his Line Manager raising concerns about the relationship between Adult 'R' and Child 'A'. The email states:

"There appears to be an emerging pattern of Child 'A' asking for Adult 'R' to work on shift with him and/or complete key work session (all night) with her.

I have informed Adult 'R' she WILL NOT be working on Scarlet (unless the rota is dire) and will complete WEEKLY co-work sessions of no more than 40 minutes (1 hr tops) to safeguard her.

Please ensure you implement this when Green Team work on long weekends with Yellow Team.

Thanks in advance

Paul Dickens

Team Manager"

The Claimant then took no further action.

2. On 6 July 2022, Mr P Baird, Senior Practitioner, emailed the Claimant to express concern about Adult 'R' and Child 'A's relationship (page 179). The email begins:

"Hi Paul, as requested here is my recollection of the conversation I had with (Adult 'R') about (Child 'A')."

This clearly indicates that there had been a previous conversation with the Claimant about this.

3. On 22 July 2022, the Claimant emailed Senior Practitioners to advise that:

“Adult ‘R’ will not be working on Scarlet Unit, attending alarms or completing key or co-work sessions there until further notice”.

He goes on to say:

“That Adult ‘R’ “is not on this weekend... I will speak to her immediately on her return”.

The email was copied into Ms Evans, the Claimant’s Line Manager (page 180).

4. In fact, on 22 July 2022, the Claimant was working from 8.00am to 3.00pm and Adult ‘R’ from 9.00am to 3.00pm during which time he could have met with her but did not do so.

5. The Claimant did not meet with Adult ‘R’ until 26 July 2022 after which he emailed her confirming she was instructed not to complete shifts on Scarlet Unit and other restrictions to safeguard herself and Child ‘A’ *“after several complaints had been made about perceptions of inappropriate behaviours”* towards Child ‘A’ by her (page 181). Adult ‘R’ ignored this instruction.

6. On 12 August 2022, the Claimant was instructed by Ms Evans not to allow Adult ‘R’ to undertake any further work at Clayfields House. The Claimant disregarded this instruction.

7. On 15 August 2022, Adult ‘R’ and Child ‘A’ were seen on CCTV when Adult ‘R’ was in the Scarlet Unit. They were variously noted to be over playful with each other and hugging each other several times during the day. Adult ‘R’ is seen to be crying several times (page 190-191).

8. On 16 August 2022, when Adult ‘R’ was not meant to be on shift, she was seen in and around Child ‘A’s room and later in a prolonged hug with him before he was being transferred out of Clayfields House. The Claimant was at Scarlet Unit for a brief period on this day and was aware Adult ‘R’ was there but took no further action.

9. Adult ‘R’ was the subject of a number of complaints by staff at Clayfields House regarding her conduct. She was described as disruptive, disrespectful, had poor attendance and often disappeared to take calls in the reception area which was the only area where there was a good mobile signal. She was also noted to often be talking about confidential information. The Claimant also became aware that there were safeguarding concerns made about Adult ‘R’ when she worked at Derbyshire County Council although no further action was taken against her.

10. The Claimant was asked to prepare a report in relation to Adult ‘R’ and Child ‘A’. It is dated “July 2022”. The report is at pages 177 to 187 and lacks any real conclusions. Despite Mr Baird’s email of concern and the Claimant’s from 17 May 2022, the Claimant reached no conclusions in respect of any safeguarding issues. In his evidence to the Tribunal, he repeatedly said his understanding was that he was only required to consider her conduct and not any safeguarding issues.

11. The Claimant had failed to enforce his management instruction to Adult 'R' that she should not work in Scarlet Unit and should not go in there at all.

12. In relation to meeting with Adult 'R' after Mr Baird's email of concern about her relationship with Child 'A', the Claimant said in evidence he had met with her informally. He said his usual practice for meetings with staff was to make written notes which he then typed up on his computer. He was unable to provide this evidence prior to his meeting with Adult 'R' on 26 July 2022. I find that before that date, he had not in fact met with her.

13. By 21 August 2022, the Claimant had still not carried out Ms Evan's instruction to cease using Adult 'R' at Clayfields House. In response to an enquiry about this from another Practitioner he said he had (on 21 August 2022) to leave soon, that it was not a quick conversation and he needed some time to have a sit down with Adult 'R' and would do so at his next opportunity.

14. After the safeguarding concerns following the incidents on 15 and 16 August 2022, Mr Thomas instructed the Claimant not to undertake operational duties at Clayfields House. The Claimant ignored this by accepting a call from Adult 'R' wherein he shared confidential information regarding safeguarding concerns.

15. The Respondent's Disciplinary Procedure provides at paragraph 3.63 (page 52):

"Where there is clear evidence and an employee fully admits to the alleged misconduct, it may be deemed appropriate by the Commissioning Manager that the matter could be concluded without the need for a full disciplinary hearing. In these circumstances an employee will be invited to attend a formal meeting, where the highest sanction that may be issued is a written warning. An employee is required to understand that a full hearing would give them an opportunity to present their response to the alleged misconduct and their right to appeal against the outcome. Through acceptance of responsibility an employee relinquishes their right of appeal and an employee is informed that any further misconduct is liable to result in further disciplinary action".

This procedure was suggested to the Claimant by Ms S Eadsforth, a Group Manager, on 24 August 2022. The Claimant duly accepted responsibility for his failure to act to prevent the safeguarding issue arising from Adult 'R's relationship with Child 'A'. He received a final written warning on 31 August 2022.

16. As he was obliged to do, Mr Thomas notified the Local Authority Designated Officer (LADO), Ofsted, The Ministry of Justice and The Department of Education of the safeguarding issues which had arisen with Adult 'R' and Child 'A'. The LADO referred the matter to Nottinghamshire Police for investigation.

17. The Claimant was interviewed by the Police under caution on 23 January 2023 in connection with a possible misconduct in public office offence. During that interview, the Claimant commented that as part of his role at the

Respondent he was not being “on the floor” at Clayfields Units and other Senior Practitioners had not raised any concerns about Adult ‘R’. He added that he was being used “as a scapegoat as someone to blame when the whole system failed”.

18. The Claimant’s Police interview was reported to Senior Management on 24 January 2023 and it was noted that the Claimant’s comments represented a complete change from the account he gave when agreeing to the final written warning he accepted in relation to Adult ‘R’ when he accepted full responsibility for his lack of action in relation to her conduct and the safeguarding issues which arose.

19. As a result, Senior Management decided to conduct a formal disciplinary investigation into the Claimant’s conduct but pursuant to paragraph 4.1 of the Respondent’s Disciplinary Procedure (page 53). This provides:

“There will be occasions when employees may be subject to investigation by other outside agencies eg Police, Protection Agencies, Registration Bodies. Such investigations may be connected to alleged criminal activity with a right in such circumstances, wherever it seems appropriate, to suspend the employees concerned and to conduct further investigation. Such further investigation shall be undertaken either in NCC’s own right or in conjunction with the outside investigating agency concerned. NCC also reserves the right to hold a formal disciplinary hearing, prior to any criminal investigation or criminal charges being brought, or heard and to deal with the resulting consequences on an employees contract of employment arising from events described above”.

The Claimant was suspended on 25 January 2023 and remained suspended until his dismissal.

20. The Police did not charge the Claimant with an offence but Adult ‘R’ was charged for inciting a child into sexual activity and abuse of power and received a custodial sentence suspended for 18 months.

21. The Respondent instructed Dr John Bradley, a Retired Senior Officer of the Respondent, to conduct the investigation into the Claimant’s conduct. His report is dated 29 September 2023 (page 100). The allegations to be investigated were:

- i. Failure to follow appropriate safeguarding procedures by taking immediate corrective safeguarding steps to safeguard a young person in his care (Child ‘A’);
- ii. Disobeying a direct line management instruction on 12 August 2022 given by his Line Manager after safeguarding concerns around Adult ‘R’ were raised to not allow Adult ‘R’ to continue to work as an Assistant Practitioner and to cease the use of her services at Clayfields House;
- iii. Disobeying a direct line management instruction on 22 August 2022 after the safeguarding concerns were raised not to have any operational responsibilities at Clayfields House (page 102).

22. Dr Bradley interviewed the Claimant and Mr Thomas. He also reviewed the personal files of a significant number of staff members. The Claimant's previous disciplinary history at the Respondent was highlighted which includes three final written warnings in 2010, 2018 and 2019 and a conviction for conspiring to obtain money by deception in 2006 which he did not declare to the Respondent and was only discovered by a CRB check in 2012 (page 142).

23. Dr Bradley submitted his report on 29 September 2023 in which he recommended the allegations against the Claimant should be put before a disciplinary panel. By letter dated 13 October 2023, the Claimant was invited to a disciplinary hearing to be held on 7 and 8 November 2023 (page 219).

24. The Claimant attended the disciplinary hearing accompanied by his union representative. The hearing was recorded and the transcript begins at page 221. In the hearing, the Claimant maintained that he did not consider Adult 'R's actions were of safeguarding concern but conduct matters and it was noted that this was inconsistent with his email of 17 May 2022 wherein he referred to the concern about Adult 'R's relationship with Child 'A'. His union representative also suggested that this was a case of double jeopardy and the Claimant should not face any further sanction as this amounted to double jeopardy in that he had already be given a final written warning for the same conduct issue. The panel, however, concluded that the allegations against the Claimant were well founded and he was summarily dismissed for gross misconduct. The dismissal letter is dated 11 December 2023 (page 283).

25. The Claimant appealed against his dismissal on 20 December 2023. The hearing was held on 15 March 2024 and his appeal was dismissed (page 355).

Submissions

10. Both parties made oral submissions.

11. In his submissions, the Claimant alleged that the Respondent had failed to follow its own policies and manipulated them and the investigation in order to achieve their own desired outcome. He said he was subjected to bullying and harassment by the Respondent. He also alleged that other breaches of safeguarding resulted in no action being taken by other staff members and he was the only one to be dismissed. He also questioned the fact that it took Dr Bradley some months to investigate and provide the same allegations that were made when he accepted the final written warning. He said there was no evidence to substantiate his conduct other than the email of 17 May 2022.

12. For the Respondent, Ms Harty addressed the issue of double jeopardy/res judicata. She discussed some of the case law and, in particular, submitted that the doctrine of res judicata did not apply none judicial proceedings and the Court of Appeal has held that disciplinary procedures operated by an employer did not constitute judicial proceedings.

13. She went on to question the Claimant's credibility alleging that he had been "*slippery and evasive*" in giving evidence. On the one hand he had

accepted his guilt and in the next breath tried to deny it. She said that the Respondent's witnesses had been honest and credible.

14. The above comments on the submissions are a brief summary but I confirm I took the entirety of the submissions into account in reaching my decision.

The Law

15. Section 98 of the Employment Rights Act 1996 provides:

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) A reason falls within this subsection if it—*
- (a) ...*
 - (b) relates to the conduct of the employee,*
 - (c) ...*
 - (d) ...*
- (3) ...*
- 4) 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)—*
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - (b) shall be determined in accordance with equity and the substantial merits of the case.*
- (5) ...”*

16. I have had regard to the EAT Judgment in ***British Home Stores Limited v Burchell [1980] ICR 303, EAT*** and to other cases referred to me in submissions.

Discussion and Conclusions

17. I first comment on the witness evidence. Ms Harty suggested that the Claimant's evidence was unreliable due to him being “*slippery and evasive*” under cross examination. Regrettably, I consider there were elements of both in the Claimant's evidence. I give examples in the following paragraphs.

18. The Claimant's evidence was often inconsistent. The most glaring example is perhaps his admission that he accepted his “guilt” on all three allegations against him before agreeing to accept a final written warning but under Police caution changed his narrative to one of having been made a scapegoat for the failings of others. Even then, his evidence as to the “scapegoat” issue was inconsistent. Under cross examination he initially said he

could not remember whether when being interviewed under caution at the Police Station he said he had been made a scapegoat. Within seconds, however, being faced with the Police update sent to the Respondent (page 203) he accepted he had said it.

19. In relation to his interpretation of Adult 'R's relationship with Child 'A', I bear in mind that the Claimant was a Safeguarding Officer of the Respondent. He said in evidence that his email of 17 May 2022, where he talked about an "emerging pattern" of their relationship, that it was clear Adult 'R' had got close to Child 'A' but it wasn't really serious at this point. When he completed his report, he completely failed to mention his email of 17 May 2022. Of this email, his evidence was that an emerging pattern is not a safeguarding issue and Child 'A' was just asking to spend more time with an adult he trusts. He then said:

"It is my role to monitor things that maybe a safeguarding issue. You could say it looked like a safeguarding issue. If I saw something I would act immediately".

Of course, this is all very well but it is quite clear from the facts that the Claimant failed to take immediate action and after Mr Baird's email to him following their conversation on the point he was dilatory in the extreme in failing to take positive action.

20. The Claimant was also prone to making statements which were inaccurate but which could have been checked very easily indeed. For example, he said in evidence that only one junior colleague had been dismissed as a result of the safeguarding issue involving Adult 'R' and Child 'A'. The Respondent's evidence showed this to be patently inaccurate. Further, he said that no charges were brought against Adult 'R' when she was actually given a custodial sentence suspended for 18 months. I found these statements to be nothing more than a rather forlorn attempt to bolster his argument that he was made a scapegoat who was singled out by the Respondent for dismissal.

21. It would be clear to most right thinking people that an Adult Assistant Practitioner spending so much time with a child in a custodial environment and to be seen hugging him would prompt a safeguarding red flag. Of Adult 'R' having a food fight with Child 'A' and wearing his shirt, the Claimant said that "*maybe*" illustrative of a pattern emerging.

22. In relation to his notes he said he made after meeting with Adult 'R' informally in July 2022, I found the Claimant's evidence unreliable. He said it was his practice to make handwritten notes and then type them up to be stored on his computer. He said he had done this on this occasion but when asked for them he could not find them. I did not accept that evidence. The Claimant himself under cross examination said that Dr Bradley's conclusion that these notes did not exist could be reasonable.

23. Although there were many examples of the lack of credibility and reliability in the Claimant's evidence, as mentioned above, one final matter of inconsistent evidence I refer to is the Claimant's statement under cross examination that for the final written warning he accepted in August 2022, he accepted he got it wrong and accepted responsibility but now he said: "*I am changing my tune as I am saying there was no evidence*".

24. As far as the evidence of the Respondent's witnesses is concerned, I found them to be credible and honest witnesses. It is true that they were not unduly challenged by the Claimant's cross examination and I take into the account the fact that he is a litigant in person. Having said that, there was no hint at all in their evidence to substantiate the Claimant's allegation that he had been made a scapegoat.

25. Before I can make my final conclusions in relation to the fairness or otherwise of the Claimant's dismissal, I must address the issue raised by him of double jeopardy/res judicata. It is the Claimant's case that from a having received the sanction of a final written warning after accepting responsibility for his lack of action in relation to Adult 'R' and Child 'A' the Respondent was effectively estopped from reopening the allegations against him and imposing the sanction of summary dismissal for gross misconduct.

26. If I understand the Claimant's argument before me correctly, he relies on the case of **Christou & another v London Borough of Haringey [2013] EWCA Civ 178** which is the well known and tragic case involving Baby 'P'. The Claimant I understand relies on this case to illustrate that disciplinary proceedings can only be taken again, as they were in this case, when a failure to take appropriate safeguarding steps resulted in a tragedy such as Baby 'P's death. His case, he submits, can be distinguished because the safeguarding issue was not as serious as this.

27. I do not accept this submission. In the Christou case, The Court of Appeal discussed the doctrine of estoppel. It held that if an issue has been decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties. It was held that it was wrong to describe the exercise of a disciplinary power by an employer as a form of adjudication. The decision in **Mattu v University Hospitals of Coventry and Warwickshire NHS Trust [2012] EWCA Civ 641** is noted where Lord Justice Elias said:

"The decision to dismiss pursuant to a disciplinary process involves a claim by the employer that he is lawfully exercising a contractual right. He is not purporting to act like a Judge; he is protecting his own interests under the contract, albeit that this necessarily involves finding facts and interpreting the scope of the contract. He is asserting a right rather than determining it".

In Mattu, the Court of Appeal held that disciplinary procedures operated by an employer were not "Judicial Proceedings" for the purposes of the doctrine of res judicata.

28. It follows that the first disciplinary procedure at which the final written warning was given to the Claimant under the Respondent's simplified procedure was not an adjudication between the parties which engaged the res judicata doctrine. The second disciplinary procedure as a result of which the Claimant was dismissed was not an abuse of process because it was not litigation for the purposes of that doctrine. There were cogent reasons in this case why it was fair in the particular circumstances of this case to reopen matters. Essentially, those reasons were the Claimant's complete change of narrative from totally accepting his lack of action in relation to Adult 'R' to saying he was not responsible but had

been made a scapegoat. Further, the Claimant deliberately omitted to mention in his report on Adult 'R' that he had had his own concerns in May 2022 as evidenced by his email to others on 7 May. These matters alone, in my view, justified the Respondent in carrying out a further investigation and taking further disciplinary action. In conclusion, therefore, whether one refers to double jeopardy, res judicata or estoppel, it did not apply to the circumstances of this case.

29. This leads the way clear to examine the fairness of the dismissal under section 98 of the Employment Rights Act 1996. I must also bear in mind the Judgment in *British Homes Stores v Burchell* the essential elements of which are that the employer must have a genuine belief in the conduct of the employee which is complained of, that belief must be maintained following a reasonable investigation and the decision to dismiss must fall within the range of responses of a reasonable employer.

30. It is important to recognise that the issue of reasonableness also applies to the investigation (***Sainsbury's Supermarkets Limited v Hitt [2002] EWCA Civ 1588***). In relation to the investigation by Dr Bradley, the Claimant admitted in evidence that it had been very thorough. Whilst the Claimant complained it was not reasonable to have taken some 7 months, it is clear from the content of the report that all relevant parties were interviewed and Dr Bradley spent some time considering the personal files of a significant number of employees who were involved in the case.

31. I find that the Respondent had a genuine belief that the Claimant had failed in his duty as a Safeguarding Officer to take immediate and appropriate measures to prevent the escalation of the relationship between Adult 'R' and Child 'A'. The fact that the Claimant also changed his narrative from acceptance of his failure to act to blaming the Respondent for making him a scapegoat for what happened suggested that he was unreliable. It seems there was also a genuine belief in the fact that the Claimant had been untruthful about speaking to Adult 'R' after he had received Mr Baird's email. It must also be acknowledged that the Claimant twice failed to comply with a management instruction in relation to ensuring that Adult 'R' had no contact with Child 'A'.

32. The notes of the disciplinary hearing and the appeal hearing show nothing to dissuade the Respondent from the genuine belief in misconduct by the Claimant. He was a Safeguarding Officer and had become concerned himself at the emerging pattern of Adult 'R's relationship with Child 'A'. His insistence that he was only ever required to deal with Adult 'R' as a conduct issue lacks credibility.

33. Child 'A' was a vulnerable child in a custodial environment. It was alleged that she was effectively grooming him. She was seen hugging Child 'A' and she became distressed when it was announced that he was being transferred to another establishment. She was seen wearing his shirt and going into his bedroom alone with him. Any reasonable employer would see this as a safeguarding concern perpetuated for some time by the Claimant's lack of action.

34. I remind myself that I must not approach this case with any thought of what I would have considered an appropriate course of action. It is the standard

of the reasonable employer which applies in this case. The consequences for the Respondent in the light of further investigations by the Police and others are significant as they would be for Child 'A'. A reasonable employer would have considered the lack of appropriate and timely action being taken by an experienced Team Manager with the responsibility of being a designated Safeguarding Officer to be matter of gross misconduct for which summary dismissal was entirely justified.

35. For the above reasons the claim is dismissed.

Employment Judge M Butler

Date: 27 September 2024

JUDGMENT SENT TO THE PARTIES ON

.....01 October 2024.....

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FOR THE TRIBUNAL OFFICE

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