



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms J Oforiwaa

v

Quantum Care Limited

Heard at: Cambridge

On: 4, 5 & 6 October 2017

Before: Employment Judge R Cassel

Appearances:

For the Claimant: Ms Kemish, Counsel.

For the Respondent: Mr McHugh, Counsel.

JUDGMENT

1. The claimant was not unfairly dismissed and her claim fails.

REASONS

1. The claimant, Ms Juliana Oforiwaa, worked as a care worker for the respondent from 7 September 2012 until her dismissal on 16 March 2016.
2. The respondent operates 26 care homes, caring for more than 3,000 older people throughout Hertfordshire, Bedfordshire and Essex and employs more than 2,000 staff.
3. The claimant was employed at Jubilee Court which comprises 6 units including one called Holly Walk.
4. On the night of 15 January 2016 the claimant was allocated to Holly Walk and was responsible for the care of 15 residents including an older man who was referred to throughout as 'GT'. GT suffered from terminal cancer but was of sound mind, did not suffer from dementia. He was generally independent and able to see but had what was described as an issue with his right eye.

5. On Friday 15 January 2016 GT made a complaint that a member of staff had been rough with him, although he didn't mention the name of the staff member. Reports of the complaint were made to two staff members who then relayed those complaints to Mrs Julie Oakley-Reid, the home manager, who initiated an investigation.
6. Mrs Oakley-Reid contacted Hertfordshire Safeguarding team and submitted the CQC statutory notification.
7. The claimant was suspended, GT was interviewed as were other members of staff, and statements were produced. Mrs Oakley-Reid prepared a report and recommended disciplinary action.
8. Ms Karen Pay, one of three regional managers, was appointed to deal with the disciplinary hearing which subsequently took place on 16 March 2016 when she reached a decision to dismiss the claimant summarily for gross misconduct.
9. An appeal was initiated and Miss Wanda Spooner was appointed. She heard the appeal on 13 June 2016 and dismissed it.

Preliminary Issue

10. The claimant then submitted a claim form which is dated 19 January 2017 stating among other things that her employment ended on 16 March 2016. There is a box in the body of the claim form indicating that she was claiming unfair dismissal and in box 8.2 of the form she described what she was required to do for the respondent, and stated "the investigation process was totally flawed" and gave various reasons why she considered her dismissal to be unfair.
11. The respondent submitted a response resisting the claim and at box 4.1 accepted that there had been a dismissal accepting the dates of employment were correct, resisting the claim and in a detailed response at paragraph 50 stated the reasons for the claimant's dismissal are potentially fair under s.98 of the Employment Rights Act 1996 being that it was a reason that relates to the conduct of the claimant and/or some other substantial reason.
12. There was a case management discussion, or rather a closed preliminary hearing, in front of Judge D Moore on 17 November 2016 and orders were made. There was a preliminary hearing on 19 January 2017 in front of Judge Warren. Whatever else happened during those proceedings, and in particular the preliminary hearing on 19 January 2017, paragraph 19 of Judge Warren's discussion and conclusion is the following:-

"..... she plainly intended to bring a claim of unfair dismissal and race discrimination."

At various stages in the proceedings all the claims, save that of unfair dismissal, were withdrawn and the trial was listed before me starting on 4 October 2017. Preceding the hearing of 4 October 2017 was a letter from Mr McHugh's instructing solicitor dated 2 October 2017. At the hearing Mr McHugh, who appeared for the respondent, submitted that the tribunal had no jurisdiction to hear a complaint of unfair dismissal and ran through the history of the claim. Ms Kemish, who appeared for the claimant, resisted the application. Having heard those submissions I decided that the claim form that had been submitted, although poorly drafted, made it clear that the claimant was alleging unfair dismissal and the respondent understood that at the time by drafting paragraph 50 in resisting the claim. There was an agenda produced for the case management hearing and issues were raised including the nature of the dismissal and on 17 November 2016, at the preliminary hearing, there was no mention of the lack of jurisdiction for a claim of unfair dismissal. Further and better particulars, or further information, were provided in relation to those claims and additional claims. In any event the basis of the employment tribunal's jurisdiction is under statute and more particularly under the Employment Rights Act 1996. Under s.98 of the Employment Rights Act, to which I will refer again shortly, it is clear that when dismissal is admitted it is for the respondent to show the reason or principal reason for the dismissal, and that reason has to be a fair one.

13. I directed that the trial proceed and evidence be taken. I reminded the parties on several occasions that there is a single claim of unfair dismissal. There is no claim of breach of contract before me. I pointed out again on a number of occasions that my role is not to determine whether the claimant is guilty or not guilty of the alleged misconduct. To do so would fall into error referred to commonly as a substitution mind set. My role is to consider the evidence available at the time the decision was made against the statutory provisions of s.98 of the Employment Rights Act 1996 and to determine the facts on the balance of probabilities.

Evidence

14. There were three witnesses for the respondent, all of whom had produced statements. The claimant produced a statement and there was a bundle of documents comprising 259 pages. I will deal with the evidence as follows:-

- 14.1 Mrs Oakley-Reid was called to give evidence. She dealt with the investigation. She produced a lengthy statement of 12 pages and was extensively cross examined. She gave a consistent, coherent and entirely plausible account of the way in which she approached the investigation. She was the home manager and it is apparent that it is a difficult and demanding role. With the benefit of hindsight one can almost always see improvements in an investigation. I have to look at the investigation at the time it was undertaken and determine whether it was a reasonable one. She looked at the set of circumstances objectively and dispassionately, and given the

allegation that was made, looking at the facts sensibly and reasonably it was thorough, and I find it was a reasonable investigation. There were inconsistencies in the evidence and these were examined at the disciplinary hearing. That was not the role of the investigator who recommended that the matter proceed to a hearing.

- 14.2 Ms Karen Pay gave evidence. She is an experienced manager having conducted around 40 disciplinary hearings – she was an impressive witness. At paragraph 38 of her statement she gave a detailed analysis of the way in which she considered the evidence. She took into account the claimant’s comments on the evidence that was presented to her. It was a balanced and open approach to the allegation and I find the process of analysis careful and reasonable. Her evidence that she found the claimant guilty of misconduct and that she should be dismissed was also consistent, entirely credible and plausible.
- 14.3 Miss Wanda Spooner gave evidence as well. She is a woman of thirty-five years of HR experience, eleven of which is with the respondent. She is clearly very experienced. She showed flexibility in the manner in which she handled the appeal. Grounds of appeal were submitted late. She adjourned the hearing and considered them. She made further enquiries following the hearing. She reached conclusions which she dealt with at paragraph 30 of her statement. Everything points to a thorough and reasonable appeal and she was an entirely credible witness who gave sound reasons for dismissing the appeal..
- 14.4 The claimant gave evidence. Much of her statement focussed on matters which weren’t immediately necessary to the issue before me, but she gave important evidence in that she confirmed that the documents upon which the respondent relied had been provided to her. She was accompanied by a friend at both stages, both at the disciplinary hearing and the appeal. The friend was neither a work colleague nor a Trade Union representative. The claimant was able to question those witnesses who attended and to make representations. Although she still believes that the decision to find her guilty was wrong and I am sure will continue to believe that, that is not the issue before me and the subject of these proceedings.

The Law

15. The principal statutory provision is that which is contained within section 98 of the Employment Rights Act 1996. I have referred to it before in this decision but what I will do is read it as it is recorded:-

“(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 reasons 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 -
- ...
 - (b) relates to the conduct of the employee,
 -
- ...
- (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."

One of the leading cases in conduct dismissals, with importance in other dismissals, is British Homes Stores Ltd v Burchell [1980] ICR 303. In a very helpful judgment by HH Judge Peter Clarke in Sheffield Health and Social Care NHS Foundation Trust v Crabtree[2009] UKEAT 0331 the learned judge corrects many commonly held mistakes at paragraphs 14 and 15:-

"It might be thought that the Burchell test as stated by Arnold J must be literally applied in conduct unfair dismissal cases that would be a misunderstanding, the first question raised by Arnold J 'Did the employer have a genuine belief in the misconduct alleged?' goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However the second and third questions, reasonable grounds for the belief based on reasonable investigation go to the question of reasonableness under s.98(4) and there the burden is neutral. To combine all three questions is going to the reason for dismissal as did the EAT judgment in Madden is wrong."

16. So I will deal with each of those questions individually. In answer to the first question, I have no doubt that the employer had a genuine belief in the misconduct alleged. They have satisfied the burden of showing a potentially fair reason. As far as the second question, whether there were reasonable grounds for the belief based on a reasonable investigation I find that there were. The third question is whether the investigation was a reasonable one. I find that it was.
17. As far as sanction is concerned, again I remind myself I must not fall into the substitution mindset. What I would do in these circumstances is entirely irrelevant. There is a range of reasonable responses and the often quoted case of Iceland Frozen Foods Ltd v Jones [1982] ICR 17 deals with

the range of reasonable responses (although that was in relation to another issue it is equally relevant to the consideration in this case).

18. As far as dismissal is concerned, one employer may dismiss given the finding of gross misconduct, one employer may not given the set of circumstances that were presented. I have no doubt however that dismissal fell within a reasonable range of responses. Therefore I find that the claimant was not unfairly dismissed and her claim fails.

Employment Judge R Cassel

Date: 11 October 2017

Sent to the parties on:

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For the Tribunal Office