



EMPLOYMENT TRIBUNALS

Claimant: Ms A Horton

Respondent: Direct Care Tameside Limited

HELD AT: Manchester

ON: 22 and 23 May 2017

BEFORE: Employment Judge Howard

REPRESENTATION:

Claimant: Ms S Quinn, Friend

Respondent: Mr B Hendley, Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant's claims of unfair dismissal pursuant to the provisions of Part 10 of the Employment Rights Act 1996 and of a breach of contract, being unpaid notice pay, are not well founded and are dismissed.

The claimant's claims of unlawful deduction from wages pursuant to the provisions of Part II of the Employment Rights Act 1996, being unpaid accrued holiday and unpaid wages, is well founded.

The respondent is ordered to pay to the claimant the total sum of £579.27.

REASONS

1. The Employment Judge heard evidence from Paul Duffy, Manager at the respondent company and from Francesca Duffy, HR Manager and from the claimant, Ms Horton. During the hearing, the Employment Judge was referred to documents contain in an agreed bundle and additional documents provided by the parties.

2. Both parties relied upon witness statements that had not been exchanged in their final versions. Both parties agreed to deal with any issues arising by putting

additional questions to the witnesses and confirmed that they were able to proceed on that basis.

The Issues

3. At a Preliminary Hearing held by Employment Judge Howard on 21 April 2017 the issues had been identified and agreed with the parties as: -

(i) Unfair Dismissal

Can the respondent establish a potentially fair reason for dismissal falling within Section 98(1) or (2) of the Employment Rights Act 1996? The respondent relies on the claimant's conduct;

(ii) If so whether the decision to dismiss was fair in all the circumstances applying Section 98(4) of the Employment Rights Act 1996;

(iii) if the claimant has been unfairly dismissed whether she had contributed to her dismissal to any extent and/or whether the 'Polkey' principles apply;

(iv) Breach of Contract

Whether the respondent breached the claimant's contractual entitlement to notice of termination of employment. The claimant believed that she was entitled to twelve weeks' notice, based on her length of service.

(v) Holiday Pay

The claimant said that she took no holiday in the last holiday year of her employment, the respondent said that she was entitled to and was paid for three days.

(vi) Unpaid Wages

The claimant believes that she is owed £82.70, plus bank charges which the respondent disputes.

4. At the preliminary hearing the claimant's representative, Ms Quinn, had explained that she had Addison's Disease and restricted mobility. It was agreed by the Employment Judge that she might tire easily and need additional time to put questions to the respondent's witnesses and that none of the parties or witnesses would be required to stand up during the hearing. No other adjustments were needed.

5. At the outset of the full hearing, Ms Quinn explained that she was on painkillers; because of Addison's Disease she was currently suffering from a brain tumour but had the necessary equipment to inject herself if a crisis arose. Ms Quinn confirmed that she was able and fit to proceed but that she would tell the Employment Judge if her condition deteriorated and she needed to stop. The Employment Judge arranged for a first aider from the administration to speak to Ms

Quinn and ensure that she could be in attendance as required. During the proceedings, the Employment Judge rose regularly both at Ms Quinn's request and when it appeared to the Employment Judge that Ms Quinn was tiring.

6. On the second day of the proceedings the respondent's representative explained that he had a pre-op appointment that afternoon for a major back operation scheduled to be carried out the following day. The Employment Judge agreed to accommodate his appointment if possible. In fact, all the evidence had been heard by 11.15am on the second day, the respondent's submission was concluded by 11.45am, the claimant's submission by 12pm and the Employment Judge gave judgment at 12.45pm and Mr Hendley could attend his appointment.

The findings of fact relevant to the issues

Notice pay - length of service

7. The claimant commenced employment with Direct Care Limited in January 2002 and subsequently transferred to Direct Care (North West) Limited. On 2 July 2011, Direct Care (NW) Limited lost its contract to provide care for Tameside MBC and the contract was awarded to another provider. Mr Duffy understood that the TUPE provisions had applied to transfer care workers to the new provider and some staff transferred, but he accepted that the claimant was not one of them. Mr Duffy said that there was a six-week gap before Direct Care (NW) Limited could obtain clients again and that the claimant was not employed during that period. However, Mr Duffy produced no evidence of any communications with the claimant at that time informing her that her employment had been terminated, or of re-engagement and no other evidence such as a P45; he simply pointing to empty rotas for the period. The Employment Judge found that those rotas simply showed that there were no clients for the claimant to attend during those six weeks, not that her employment had been terminated.

8. The claimant was adamant that she remained in the employ of DC (NW) Limited and the Employment Judge accepted her evidence that she was not made aware of any possible TUPE transfer, change of employer or termination in 2011. The Employment Judge was satisfied that the claimant remained continuously employed by DC (NW) Limited during 2011. In 2014 the claimant's employment transferred to the respondent and so, by virtue of the TUPE regulations the claimant had been employed continuously by the respondent from 2002 until her dismissal.

9. The claimant was dismissed on 5 weeks' notice of dismissal; whereas her statutory entitlement was to 12 weeks. However, the claimant chose not to work her notice and left her employment within the first week of her notice period. Having heard evidence from both the parties about the conditions imposed upon her during the notice period the Employment Judge was satisfied that they did not amount to a breach of any contractual term, express or implied, by the respondent.

10. The claimant chose to waive her entitlement to notice by leaving and so she has no entitlement to any further notice pay and her claim for breach of contract was dismissed.

Unfair Dismissal

11. The claimant's role was to provide domiciliary care. On 27 May 2016, she attended a client's home. The following day the Police telephoned the respondent to say that the client had been overheard by neighbours shouting for help. A neighbour had entered the client's bungalow and had found her on the bedroom floor. The client said that she had fallen by her bed, that she had heard the claimant come into her bungalow and leave before she had chance to call out for help. The client was adamant that the claimant had not checked her bedroom.

12. The claimant had telephoned the respondent's on call service after leaving the bungalow and reported that she had checked the property, the client was not at home and so she had left. The claimant had not made any entry in the care provision log book at the bungalow.

13. Mr Duffy held an investigatory meeting with the claimant on 31 May, during which the claimant said that she had checked every room in the bungalow, including the bedroom, was certain that the client had not been there and so she had left.

14. A safeguarding meeting took place the following day between Tameside MBC and Mr Duffy to discuss the incident. TMBC explained that the client had been found following the claimant's visit by a neighbour on the floor in her bedroom having sustained a fall and had been admitted to hospital. The client herself had told TMBC that the claimant had not checked all the rooms and had left the property before she could call out for help.

15. Mr Duffy held a further investigatory meeting with the claimant on 7th June to discuss TMBC's report and the claimant repeated her insistence that she had checked all the rooms and that the client had not been there.

16. By a letter of 15 June 2016, the claimant was invited to a disciplinary hearing to consider allegations of misconduct as follows: -

"(1) It is alleged that on Friday 27 May 2016 you failed to do a thorough check of a client's home when attending a client call which in turn meant that the client who had fallen in her bedroom was left unaided by yourself and resulted in being hospitalised.

(2) It is further alleged that during the investigation meeting you falsified your actions during the visit specifically when you state that you checked every room in the house before leaving.

(3) It is also alleged that you refused to re-visit the claimant's home on 27 May 2016 when a colleague asked you to return to gain access for the claimant's next of kin phone number.

(4) It is lastly alleged that you failed to complete the carer log book on your departure"

17. The claimant was provided with a copy of the minutes of the investigatory meeting held with her on 7 June 2016, a copy of her own signed statement and one from Nicola Callaghan, the 'on call' person who had received her call. Minutes of the safeguarding meeting held on the 1st June were shown to her before the meeting.

18. The disciplinary hearing was held by Francesca Duffy on 17 June. Ms Duffy found that the claimant had failed to do a thorough check of the client's home when attending the client call, which in turn meant that the client, who had fallen in her bedroom was left unaided by the claimant and resulted in being hospitalised. Ms Duffy also found that, during the investigation meeting on 7 June, the claimant had falsified her actions during the visit, specifically when she stated that she had checked every room in the house before leaving and that she had failed to complete the care record book on her departure. Ms Duffy rejected the further allegation that the claimant had refused to re-visit the client's home but considered the fact that the claimant had recently received a final written warning for conduct issues. In evidence, Ms Duffy explained that, given the severity of the misconduct, even had the claimant not been subject to a final written warning, the sanction of dismissal would have been the same as she had lost all trust and confidence in the claimant. The claimant was dismissed by letter of 21 June 2016 on five weeks' notice and advised of her right to appeal.

19. The claimant appealed against her dismissal by letter of 28 June 2016. The hearing was held on 12 July 2016 by Mr Duffy. Following the hearing, Mr Duffy wrote to the claimant seeking clarification of several matters that she had raised during the appeal and, having taken account of her replies, advised the claimant by letter of 5 September 2016 that her appeal had been rejected and the dismissal would be upheld.

20. During her notice period the claimant had been asked to work in a different geographical area and under supervision. The claimant felt that this was unfair and put her under undue stress and refused to do so and challenged this instruction during the appeal. Mr Duffy was satisfied that the area was within reasonable travelling distance and that working under supervision was standard practice and not an unreasonable requirement to impose on the claimant.

The Law

21. S98 ERA 1996 provides as follows;

(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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

.....

(4) In any other case 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.

22. The Employment Judge was guided by the EAT judgment in *British Homes Stores v Burchell* 1978 IRLR 379 EAT, being mindful that the employer must show that he had a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation. The Employment Judge was also guided by the Court of Appeal in *Sainsbury's Supermarket Ltd v Hitt* 2003 IRLR 23 CA that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

23. In accordance with the Employment Appeal Tribunal's guidance in *Iceland Frozen Foods Ltd v Jones* 1982 IRLR 439, the Employment Judge was mindful, in reaching her conclusions, not to substitute her own view of what the appropriate sanction should have been for that of the respondent's, but that she should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case.

The Tribunal's conclusions

24. Applying the 'Burchell' principles, the Employment Judge found that the respondent had formed a genuine and reasonable belief that the claimant had committed the acts of misconduct laid out in a letter of 21 June, at points (1), (2) and (4), based upon a reasonable investigation. Mr Duffy had carried out a thorough investigation; he had met with TMBC and had been provided with a full account of the incident and the client's recollection; he had interviewed Ms Callaghan and had provided the claimant with two opportunities to give her account of events at investigatory meetings. The claimant was provided with all the relevant documentation in advance of the disciplinary hearing and this provided a further opportunity for her to explain what had happened. She could understand the charges against her, provide her explanation and challenge the evidence against her at both the disciplinary and appeal hearings

25. Ms Duffy's conclusion that the claimant had failed to perform her duties and that she had falsified her account of events was reasonable in the light of all the information available to her. Ms Duffy had clear and compelling evidence gathered by TMBC directly from the client and from the Police that the claimant had not carried out her duties by looking in the rooms for the client, that the claimant had given a false account by insisting that she had searched the bungalow and the claimant had accepted that she had not completed the required entry in the log book. Whilst Ms Duffy took the previous warning into account, as she confirmed in evidence, the incident alone was sufficient to warrant dismissal.

26. The Employment Judge was satisfied that the disciplinary process was conducted in a procedurally fair manner. The decision to dismiss the claimant as the relationship of trust and confidence between them had been destroyed by the claimant's conduct, fell within the range of reasonable responses open to the respondent in the circumstances and the claimant's claim of unfair dismissal was not well founded and was dismissed.

Unlawful deductions from wages and holiday pay

27. The respondent had conceded that the claimant was owed wages and holiday pay in the total sum of £579.27 which it was ordered to pay.

Employment Judge Howard

Date 18th September 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 September 2017

FOR THE TRIBUNAL OFFICE