



EMPLOYMENT TRIBUNALS

Claimant: Ms T Wilkinson

Respondents: 1. J S Parker Ltd
2. Luke Warren – acting via his deputy Irwin Mitchell Trust Corporation Ltd
3. Irwin Mitchell Trust Corporation Ltd

Heard at: Lincoln

On: 6 and 7 September 2017

Before: Employment Judge Blackwell (sitting alone)

Representation

For the Claimant: In person
For the First & Second Respondent: Mr R Chaudhry, Consultant
For the Third Respondent: Mr P Wilson of Counsel

REASONS

1. Ms Wilkinson represented herself, gave evidence on her own behalf, and called Mrs Carla Thein to give evidence. Mr Chaudhry represented the first and second respondents, and he called Miss Dewick and Miss Warren who respectively conducted the disciplinary and appeal hearings.
2. Mr Wilson of Counsel represented the third respondent, and he called Ms Perry, a Solicitor with Irwin Mitchell.
3. There was an agreed bundle of documents and references are to page numbers in that bundle.

ISSUES

4. There is a preliminary issue to determine, and that is, who was Ms Wilkinson's employer? It is necessary to do so because one cannot properly consider whether Ms Wilkinson was fairly dismissed without knowing by whom she was dismissed.
5. Mr Chaudhry, for the first and second respondents', maintains that Luke Warren, acting via his Deputy Irwin Mitchell Trust Corporation Ltd, is the correct employer, and that is also the position that Mr Wilson took. Against that, Ms Wilkinson's case is that, the reality is that the first respondent, JSP

Ltd were her employer, because that's how her day-to-day business was carried out. It is common ground, as a matter of Law, that notwithstanding that Mr Warren lacks the mental capacity to manage his own affairs, he can, by acting through a Deputy, be an employer.

6. The second issue, once that preliminary issue has been determined, is whether Ms Wilkinson's claim that she was unfairly dismissed, can be upheld or dismissed? As a matter of Law, in accordance to Section 98, Sub-Sections 1 and 2 of the Employment Rights Act 1996, it is for the employer to prove a potentially fair reason for dismissal. In this case, Mr Chaudhry advances the reason of some others substantial reason, based upon the wording of the Court Order, which we see at page 159, and which reads as follows:

"The care will be provided by a recruited care team and LW will be permitted to participate in the selection process to the extent that he wishes to be involved. JS Parker and Carla Thein and Tracey Wilkinson, will not be engaged and paid to work as Case Manager and/or Carers for LW."

7. If that reason is made out, it is then for me to apply the Statutory Test Fairness set out in Sub-Section 4 of Section 98, which reads:

"Where the Employer has fulfilled the requirements of Sub-Section 1, the determination of the question whether the dismissal is fair or unfair, having regard to the reasons shown by the Employer – (a) depends on whether in the circumstances including the size and administrative resources, it is a sufficient reason for dismissing the Employee; and (b) shall be determined in accordance with equity and the substantial merits of the case."

FINDINGS OF FACT

8. Ms Wilkinson was employed as a Support Worker to provide care alongside Mrs Thein, then Mrs Smith, to provide care for Luke Warren.
9. Luke Warren, has since his birth, lacked the capacity to manage his own affairs - see the medical report and the conclusions at page 151. From the 14th August 1997 to 24th May 2015 Niall David Baker of Irwin Mitchell Solicitors, was appointed to act as Deputy for Mr Warren to manage his property and affairs. On that date of 24th May 2015, Mr Baker was succeeded by the third respondent.
10. In 2012 Mr Baker, acting as Deputy, had appointed JSP to provide a care package for Luke Warren. After a tender process Mrs Smith was the first supplier of care engaged to assist Mr Warren.
11. In June 2013 Ms Wilkinson began a period of shadowing Mrs Smith, with a view to being engaged as a second support worker. After a probationary period, Ms Wilkinson began full time work, working at that time 17 hours per week with effect from 19th August 2013.
12. Miss Dewick was the care manager within JSP responsible for the care of Mr Warren, and she gave evidence that she sent to Ms Wilkinson, the contract of employment which we see at the beginning of page 35. She further gave evidence that it was returned by post, and that it bore the signature that we see at page 50.

13. On the other-hand Ms Wilkinson's evidence is, that until the commencement of these proceedings, she had not seen that document, and it therefore follows that she had also not signed it. Upon the second day of the hearing, a contract was supplied to Mrs Thein, which also had a signature thereon. She gave evidence that she too had never seen the contract, and that the signature was not hers. I accept that evidence.
14. I therefore find as fact that Ms Wilkinson had never been supplied with a written contract. I note that the covering letter, and the contract itself, bore an address which Ms Wilkinson had not lived at. On the balance of probabilities, it was sent out, but to the wrong address.
15. I accept Ms Wilkinson's evidence that all matters concerning Luke Warrant's care, the hours she worked, when she worked, where she worked, all came from Miss Dewick. I also accept that on a number of documents, Ms Wilkinson was held out, as an employee of JSP.
16. Miss Dewick maintains that she told Ms Wilkinson throughout her employment, that her employer was Luke Warren. Ms Wilkinson denies that that is the case. I will return to that conflict of evidence in my conclusions.
17. All went well with the care of Mr Warren until 4th January 2016, when there was an alleged assault on Mr Warren by both Miss Thein and Ms Wilkinson. As-a-consequence, both were suspended, and a safeguarding report was carried out by Rachael Pudoe, a principal practitioner of the safeguarding team. Her report is at pages 88 to 92. She records in her conclusion as follows:

"There is no independent evidence with which to corroborate the allegation that Luke may have been the subject of physical abuse on the part of his private support workers. The outcome remains inconclusive. It is evident that Luke's communication difficulties inhibit his ability to provide reliable account of events and potential disclosure, is heavily influenced by the interpretation of the recipient. This inevitably renders him extremely vulnerable, and he will continue to require close monitoring and support. It is apparent that Carla Thein and Tracey Wilkinson have supported Luke for considerable period-of-time, and there have been no previous concerns raised about their conduct towards him. In the absence of any corroborative evidence, it is my recommendation that no further action is taken."
18. At page 93, on 23rd February, Ms Wilkinson complains, in effect, of intimidation by Luke Warran's family. As-a-consequence, Miss Dewick said that the allegations against Ms Wilkinson, and the second respondent's family, together with the issue raised by the safeguarding team into the second respondents, that Mr Warren's capacity were to be determined by way of welfare proceedings. That resulted in Court Protection proceedings, and Ms Wilkinson was required to provide evidence in relation to the allegations against her, and we see that at pages 106 to 115.
19. It is also common ground that at about that time, a medical expert had confirmed that Luke Warren did not have the capacity to make a decision into who continued to care for him.

20. Also at about the same time, although the note is undated, on behalf of the third respondent, it was made clear to Miss Dewick, that Ms Wilkinson would not be engaged and paid to work as carers for Luke Warren. On the 21st June 2016, Ms Wilkinson was invited to a formal meeting, and at page 118 we see that letter. One paragraph reads:

“Please be aware that any termination of your employment would not be for your conduct or capability, but would be for some other substantial reason, because of the breakdown in your relationship which will be discussed during the meeting.”

21. That led to a formal meeting held on the 24th June, and we see the notes for that meeting from pages 119 to 122. I accept these minutes as an accurate record. It is clear that, at that time, JSP had not seen the Court Order, and were therefore unable to show it to Ms Wilkinson. Both care workers made it clear, that they did not believe that there had been a breakdown in the relationship with Mr Warren, and it is also clear that both wanted to get back to work as soon as they could. Both complained about the delay in returning to work.

22. As a consequence of that meeting, Miss Dewick wrote to Ms Wilkinson on the 29th June. She stated that the reason for the termination of Ms Wilkinson’s employment was not the allegations made against her in respect of the 4th January. What she did say is as follows:

“Under the circumstances of the personal nature of your work with Luke, and our inability to find acceptable alternatives, I must regretfully inform you that your employment is being terminated for some other substantial reason, mainly that the relationship between you and Luke has irretrievably broken down, and that he no longer wishes to receive personal care from you.”

23. The letter also makes clear that Ms Wilkinson was entitled to appeal, which she duly did by letter – which we see on 126 and 127. It is noteworthy that at the end of the appeal letter, Ms Wilkinson says as follows:

“JS Parker has always stated that Luke Warren is my boss, and that we are only ‘managed’ by JS Parker, so how can JS Parker terminate my employment? Surely only my boss, my employer Luke Warren can terminate my employment, and then he has to have grounds to do it.”

24. At page 129 Ms Wilkinson is invited to attend an appeal hearing by Ms Warren. That appeal was duly heard on the 14th July, and the notes are at pages 131 to 133. Again, I accept them as an accurate record of that hearing. By letter of 22nd July, at page 134 A, Ms Warren dismissed the appeal. She concluded, having given the matter full consideration, I am now writing to confirm that the original decision taken following the meeting on the 24th June 2016, stands for the following reasons:

- “Third party pressure is the reason for the termination of contract and we are unable to overturn or go against the ruling of the Judge.

- Furthermore, the frustration of contract imposed by the Judgement of the Court Order has resulted in JS Parker Limited and yourself being restricted from any access with LW. Any appeals you may want to make personally, in regard to access to LW, would have to be made directly to the Court”

CONCLUSIONS

Who was Ms Wilkinson’s Employer

25. The purported contract of employment at page 35, I have found was never received or seen by Ms Wilkinson until after these proceedings began. It therefore follows that it cannot be the Contract of Employment between the parties. I also accept Mr Wilson’s submission that, given that Irwin Mitchell Trust Corporation Limited did not become deputy for Mr Warren until 2015. They cannot have been a party to the contract, although the contract is in those terms.
26. I therefore find that that document can have no effect. Therefore, the choice is between the first and second respondents. As I have said above, I accept the day-to-day management of Ms Wilkinson was carried out by Miss Dewick of JSP. I further accept to the outside world that Ms Wilkinson would have appeared to be an employee of JSP. I also accept that Ms Wilkinson has, throughout, genuinely and reasonably believed that Luke Warrant could not be her employer because of his lack of capacity.
27. Unfortunately, it is a matter of law that is not necessarily so. I do accept Miss Dewick’s evidence that she did make it clear to Ms Wilkinson that Luke Warren, acting through his deputy, was her employer. I conclude so, in the face of Ms Wilkinson’s evidence to the contrary because there is documentary evidence in support of Miss Dewick’s contention.
28. Firstly, there is Ms Wilkinson’s own email of the 26th June 2014, at 164, in which she says:
“Hi, could you send me my contract for 21 hours that I worked for Mr Luke Warren, please, as I still don’t have one. Thank you. Tracey Wilkinson”.
29. At page 99 is an email from Miss Dewick, which again makes it clear that Mr Warren is the employer.
30. I accept, Ms Wilkinson’s evidence that the letter of suspension was not received until the 27th January (see page 70), because it had been sent to the wrong address. Nonetheless she did receive it and that letter in part states:

“the duration of the suspension will only be for as long as it takes to complete the investigation. During the suspension you remain an employee of Luke Warren and continue to be bound by your terms and conditions of employment”.
31. I have quoted from page 127 above (see paragraph 23), which are Ms Wilkinson’s own words, and they are to the effect that she accepted that Luke Warren was her boss. I therefore conclude notwithstanding the confusion that’s been brought about by maladministration on the part of both JS Parker and, in particular, Irwin Mitchell, that the employer was at all relevant times the second respondent.

32. I turn now to determine whether Ms Wilkinson was unfairly dismissed. In my view the employer has made out a potentially fair reason. It is some other substantial reason within the meaning of Section 98, 1 and 2, and that reason is the quotation from page 159, namely, the prohibition upon the further employment of Ms Wilkinson.
33. I then have to apply statutory test fairness. Again, I can see no other conclusion but that of the decision to dismiss was both fair and inevitable on an application of that statutory test. It seems to me that there was no alternative, but dismissal. This employer had no alternative employment to offer. The only employment involved was as Mr Warren's care workers, and the Court Order expressly forbade Ms Wilkinson from being employed in that capacity. I note that, had I found JSP to have been the employer, that would have made no difference because I would have accepted Miss Dewick's evidence, that there was no alternative employment available at the relevant time, within the travelling distance that would have been reasonable for Ms Wilkinson. I therefore find the substance of the dismissal was fair.
34. Turning now to the Procedure. The employer, at the time of the dismissal, believed that the contract of employment (at page 35 and onwards) was the effective contract of employment. However, the employer did not proceed in accordance with that document. Effectively what it did was to wash its hands of the matter, and instruct JSP to get on with it, following the advice of Peninsula. In my Judgement the employer knew, or ought to have known, that such a course of action was in breach of the contract of employment, and I find for that reason that the dismissal was procedurally unfair.
35. However, I accept Mr Chaudhry's submission that, that procedural unfairness makes no difference to the outcome. I have carefully considered and read the documentary evidence of the process undertaken by JSP. I accept Ms Wilkinson's submissions that there are differences between the reasons for dismissal advanced by Miss Dewick, the reasons why Ms Warren dismissed the appeal and upheld the decision, and indeed Mr Chaudhry's submissions. However, I am in no doubt that Ms Wilkinson understood, throughout, that the reason why her employment was terminated, was the Court Order.
36. For that reason, I find that Ms Wilkinson is only entitled to a basic award calculated as I have indicated above. It would not be just as equitable to make a compensatory award because a fair process was followed, albeit by the wrong person.

Employment Judge Blackwell
Date 27 February 2018

JUDGMENT SENT TO THE PARTIES ON

10 March 2018

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FOR THE TRIBUNAL OFFICE