



EMPLOYMENT TRIBUNALS

Claimant: Mr S Wilson

Respondent: Care4Children Residential Services Limited

Heard at: Manchester

On: 12 and 13 June 2018
6 and 9 August 2018
27 September 2018
(in chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mrs E Bradley, relative

Respondent: Mrs C Moolenschot, Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant was unfairly dismissed

REASONS

1. The claimant brings a claim of unfair dismissal following his dismissal on 2 August 2017 by the respondent.

The Issues

2. The issues for the Tribunal to decide are:

- (1) Was the claimant dismissed for a potentially fair reason under section 94 of the Employment Rights Act 1996? In this case the respondent says the claimant was dismissed for misconduct.
- (2) Did the respondent meet the test set down in **BHS v Burchell** relating to a misconduct dismissal i.e. did they form a genuine belief on reasonable grounds after a reasonable investigation into the claimant's misconduct?
- (3) Did the respondent follow a fair procedure in dismissing the claimant?

- (4) Was it within the range of reasonable responses of a reasonable employer to dismiss for misconduct in the circumstances of the case?

Witnesses

3. For the claimant the Tribunal heard from the claimant himself. For the respondent the Tribunal heard from Katie Sammonds, Finance Director and Kamran Abassi, Managing Director. Where individuals not before the tribunal have been referred to or young people initials have been used. However in relation to the claimant's two colleagues who were suspended with him due to redactions it is not wholly possible to distinguish between them therefore at times they are referred to as "X/Y". There was an agreed bundle.

Findings of Fact

The Tribunal's findings of fact are as follows:

4. The claimant began working for the respondent as a residential care worker in 2014 with an organisation called Trax Care. This company was subsequently acquired by Care4Children Residential Services Limited. The claimant, from time to time, acted as temporary team leader but he was never permanently promoted.

5. On the evening of Tuesday 25 April 2017 the claimant was rung by KM. He was on a day off after having worked two days. He was asked to come in as three young people ("YP") at the Home had been arrested and they needed someone extra to attend the police station. He agreed to come in at 8.00pm and was picked up by X. By this stage there was no manager on the premises as she had gone home. The claimant attended Blackpool Police Station arriving there at around 9.00pm. Three YPs were involved: BPB, DB and KDE.

6. There were a number of incidents during the evening. The claimant worked overnight. He stated that he written a handwritten account of what had happened and left a photocopy of this on his manager's desk; however, this has never been found. The manager DS has since left the respondent's company.

7. At 1.30pm on 26 April 2017 the claimant was suspended by DS, the manager, following the receipt of an allegation against him. The claimant said he advised DS he had left a copy of his report on her desk as he had not had time to enter the details into the respondent's computer programme, Clear Care. Two of the claimant's colleagues X and Y were also suspended.

8. The respondent had received a whistle-blowing report following the events of the night of 25 April going into the morning of 26 April. It appears that the whistle-blower rang another manager, CN, who asked the whistle-blower to put the details in writing which the whistle-blower then did. (In order not to further identify the individual I will describe the whistle-blower as WB1).

9. There were two reports from WB1 and then a further one from WB2 received by Ofsted on 28 April 2017, however this was after three members of staff had been suspended.

10. The whistle-blowing report made specific allegations against the claimant, SW, as follows: "X and SW began to antagonise KDE". She also referred to "staff" –

it was not clear whether SW was included in this but from later on it appeared that when referring to individuals she would say "staff" and then their initials, so where it was redacted it is to be assumed that the reference to "staff" is to another member of staff as if it had been the claimant it would have not been redacted and would have said "staff" and "SW". She then went on to say, "staff (SW) immediately stepped into KDE's bedroom to guide KDE away from the door".

11. She continued:

"Staff X and Y ran into the room and immediately grabbed KDE and took him to the floor with SW with force. This caused KDE's bed to move across the floor. X remained by KDE's bedroom door while monitoring the door of the other YPs...Staff X held KDE on the floor using his knee to keep KDE on the floor while SW had hold of KDE's legs. SW had one of KDE's legs twisted through his arm and resting on the back of his neck. SW and X locked the door to prevent DB from leaving through the night. SW and X stated that they would be sleeping there...X and SW could be heard being purposefully loud and shouting up the stairs, 'come on then', 'pussy', 'ginger'. In my opinion this was to antagonise the young people. X, Y and SW advised me not to write it up. SW also stated he had 'kicked KDE in his balls' and when KDE complained of pain SW laughed. I did not witness this incident so I am unsure when this happened."

12. In a second report WB1 headed each one up with allegations regarding each of the three YPs. Re BPB and SW, WB1 stated:

"BPB told me SW says he will do things to BPB like 'put a finger up my bum hole'. That X and SW all called BPB 'ginger' and asked if they could 'dye his hair for him'. Plus BPB has complained to me on several occasions that the staff make him uncomfortable when they tell homosexual/homophobic jokes."

13. Re DB there was nothing involving SW.

14. Re KDE:

"Last shift with SW, KDE claimed SW 'grabbed his balls' on three occasions. KDE went on further and described how SW did it. SW denied this claim."

15. WB1 then made a number of observations that were redacted. WB1 alleged that she had been excluded from activities as staff did not want her to see what was going on, and she also said that everyone who has worked on certain teams, including SW, are involved, and witnesses to such events may not have reported these incidents to management. The claimant would later state that WB1 due to her asthma and the fact she had had a panic attack previously, was on restricted duties and could not take part in, for example, restraints. Where restraints had to take place they had to be MAPP (multi-agency public protection arrangements) compliant.

16. The respondent did not begin a disciplinary process until after a multi agency team (Safeguarding Children's Board) had investigated the matter. The involved the Local Authority, relevant health service personnel and the police. The claimant was interviewed by the police but no criminal charges were brought.

17. The minutes of the meetings of the Safeguarding Children's Board were available at the tribunal hearing. The first meeting was on 2 May 2017. This stated at the top:

"This meeting is being held in relation to SW, X and Y, all of whom are care workers at Lowther Lodge Care Home working for Care4Children."

18. The minutes were then redacted; where they were redacted this would be because the references were to other individual members of staff, not SW. It was recorded that CM (a manager with the Respondent) had received a phone call from a member of staff who had concerns of a whistle-blowing nature and referred to their whistle-blowing procedure. She was advised to write her complaints down, she stated that there was bullying, unnecessary restraint and unnecessary force being used, particularly on the evening of 25 April.

19. The minutes then recorded that:

"Two social workers and two police officers went to visit the Home to speak to the boys involved about the members of staff and the events of that evening. KDE stated that X/Y would wind him up and make him kick off and would clothesline him. BPB stated X/Y would swear at him and he is uncomfortable with X/Y. DB stated that X/Y winds him up and uses the wrong restraints. Photographs were shown of DB with bruises where X/Y had kneed him in the back of the leg and whilst driving the car he opened the door to try and hurt DB...It was noted that BPB had also marks on his cheek...This account was part of the overall submission by the whistle-blower. Ofsted had provided the whistle-blower's account they had received in addition to the one CM had received and the narrative was similar."

20. Tuesday 25 April:

"All three young people had been arrested on the day of the main incident: two for damage to property at Lowther Lodge, and on 24 April 2017 DB was found sleeping in the toilets on Central Drive, Blackpool, as he was fearful of returning to his home. DB was arrested separately during the course of the day. In the evening after the arrests when the young people returned home there was difficulty in the house, and it appears especially at bedtime. All three young people were moved from downstairs to upstairs one at a time using unnecessary and disproportionate physical restraint. It was alleged the young people were then threatened in words: firstly physically removed and confined to their rooms, thrown onto beds, and in at least one instance a boy's head banged on a wall. It is believed staff at Lowther Lodge were trying to establish control and dominance over the young people and their actions can be seen as punitive. There were no written records on any of this activity and X/Y is believed to have given advice it should not be written up. It is further alleged they would continually taunt the people and invite them to come out of their rooms and shout what would happen to them if they did."

21. A further meeting on 17 May recorded that:

"SM stated the children minimised what they had experienced at the Home. They were taking it as a matter of course. This had raised concerns as it was

argued that these boys may have come to accept the abuse by staff as in some way normal for their placement. KG stated that photographs of the injuries of the YPs were taken by a paediatrician but could not make a diagnosis at this time and a further update from health as the children were not assessed as planned. PC stated there was substance to the allegations raised by the children in the Local Authority statutory enquiries' redaction. Consequently these findings of substance would be recorded on Lado and held securely by Blackpool Council."

22. The report from the meeting on 30 May was mainly redacted.

23. A further meeting on 14 June recorded that PC reported the section 44 investigation found there was substance to the allegation and what is believed to have happened in the 24 hour period under discussion, but the rest was completely redacted.

24. The investigation was concluded at this point.

25. On 13 July the claimant was invited to a meeting on 17 July to investigate the allegations. The allegation was:

"It is alleged that during your employment with Care4Children and specifically on 25 and 26 April 2017 you failed to take protective steps to ensure the safety of the young people within your care at Lowther Lodge, and furthermore may have knowingly caused harm to them. We have been notified that you were witness to and have engaged in incidents of physical and verbal assault, bullying, unnecessary restraints and force and additional inappropriate and unprofessional conduct with regards to the young people residing at Lowther Lodge, and that you did not report or act upon these in accordance with our safeguarding and/or whistle-blowing policy. In addition it is alleged that you advised other staff members not to record such incidents."

26. It then set out the provisions of the disciplinary policy relating to gross misconduct which could apply, namely:

- (1) Serious negligence by the employee in the performance of his or her duties;
- (2) Any serious breach of work procedures which could lead to probable or actual damage to customer relations or goodwill or a serious failure to observe quality control procedures;
- (3) Serious breach of work procedures or rules including quality in health and safety or repeated failure to follow procedures or rules in the case of less serious breaches;
- (4) Failure to disclose to the company anything relevant to safeguarding and/or promoting the welfare of young people in the company's care;
- (5) Bullying, harassment, threats of violence, abusive behaviour, fighting, intimidation.

27. The investigation meeting finally took place on 17 July and was headed by AS, a Divisional Director, Forensic Services. The claimant was unable to find anybody to attend the meeting with him and so agreed to go ahead without any additional support.

28. The notes of the meeting were not helpful in that at some points the claimant's answers to questions were recorded but not the actual questions.

29. In relation to DB, the claimant said DB came at X with a punch and Y put his hand out to block it. He came in with another punch so Y and the claimant took hold of DB then let go of him. The claimant said DB kicked his wardrobe and sat down on the bed. Y went downstairs and, the claimant says, wedged the door open. There was a lot of shouting. The claimant said he went and got some food for him and he shut the door behind him.

30. Meanwhile, KDE was shouting at X on the landing:

"X and Y were at the top of the stairs. KM (WB1) was just outside the staff bedroom. I am talking to KDE and DB at his door asking for his supper. Aim: to get them settled. X said to KM to go downstairs and do the paperwork. She went downstairs. I asked KDE several times to go into his room. KDE told me X and Y had got him arrested and that is why he was kicking off. I explained it was because of the criminal damage and it was a manager and staff decision. KDE said he would knock him [X] out. I was telling him to calm down to prevent a further arrest. He then started kicking his door. Y asked him to calm down. He said, 'go fuck yourself'. He asked for a cigarette and Y said 'no'. I stood at the side and said, 'please stop kicking the door'. He then started going for X. I got past and said we weren't having this tonight. He kept going for X for some reason. He said, 'I'll show you fucking damage'. He went into his bedroom. We could hear really loud banging. I went in and Y was behind me at the door. He kicked me and caught me with a punch. It's part of the job. The whole house has laminate floor. The room was a mess, the floor was wet, clothes and wardrobe on the floor. He said, 'fuck you, Y, what are you going to do?'. He had a piece of wood in his hand and he went for me. I took a step back. I said, 'You're going to get arrested or be restrained'. I just said, 'Give me the piece of wood'. He took another swipe so we took hold. Still had the wood. I slipped first. I hit the bed. Y went on top of me. He was flying at Y. I said, 'We need to let go'. X popped his head in but I told him to go down. KDE said, 'Who's hit me in the balls?'. I said I needed to make sure you're ok. He had been on top of me. I said, 'If someone has hit you in your private parts you need to report it'. I offered to get him medical support. He said, 'I'll talk to you tomorrow'. I said, 'I would before the other lads go to education'. He had food and drink and was settled. X and KM/WB1 were on the laptop so I wrote them [referencing notes] out on paper."

31. The claimant said he had said to DS, "I need to do the paperwork" and she said, "No, you're dealing with KDE". He wanted to go home but she would not let him go home. He said he had a debrief with KDE.

32. The claimant then said that KDE said, "I want you to stop working on shift with these guys", and "at 1.30pm (26 April) JN took me into the office and suspended me".

33. The claimant then said, "I told her I'd done the restraint, I copied it and put it on the desk". I then left the building. "

34. The claimant was asked whether he had said that the P I(Physical Intervention) should not be written up. He said:

"No. X had said 'I'm not going to do the paperwork for today when I've got last night's to do'."

35. The claimant was asked whether he had said, "Come on then", "pussy" and "ginger" to antagonise BPB and blocked the way out with a sofa. He said he had moved part of the corner sofa and sat on it but he could not stop them going out. He had not said any of the language alleged and he had never heard anybody saying that.

36. The claimant was asked whether he had said to BPB, "you would put a finger up his bum hole". He said that he did not say that and that he had never called BPB "ginger" or offered to dye his hair. He suggested that the whistle-blower was trying to bring the respondent down as she was going to work for another person who had set up a rival home and who had also offered the claimant a job.

37. It was also put to the claimant that had grabbed KDE's balls on three occasions. He denied it. He said he thought he had a good working relationship with WB1 and does not know why she would say it. Could he explain the injuries the boys had? No. He said that the staff were trained to do PIs. He said he had not done anything wrong, only that he did not get the chance to put the paperwork on Clear Care.

38. The claimant was then asked a number of questions from the whistle-blowing statement and was asked for his response, but the questions were not recorded so it is not possible to match the answers with the questions.

39. The claimant also raised a number of points about the fact that he was not happy that the manager had gone home after he had been called in, that he had been brought in when he had already just completed two shifts, that the two people who had had difficulties with the YPs during the day were still on shift as he felt this was likely to lead to trouble.

40. AS, the investigating officer, then produced a management investigation report on 19 July. In the main section there was a summary of SW's responses during the investigation, but the detail he gave regarding the physical interventions was not repeated. In "conclusions" AS said that:

"The statement from the whistle-blower was naming SW specifically and lists numerous incidents where it is alleged SW has, at the very least, been witness to poor and inappropriate practice of other staff. Many incidents detailed would clearly constitute bullying and intimidation and would indicate conduct and attitude that is far from the expectations we have of all our employees. There is no hard evidence to suggest the allegations have been made maliciously and SW was unable to provide any reasoning as to why he may have been named if the incidents detailed had not in fact occurred. SW's involvement has been discussed at several multidisciplinary meetings and

conclusions have been drawn in this forum that harm has taken place and there has been a clear failure to protect the children in residence at Lowther Lodge. Although the police have decided to take no criminal action against SW the decision making for criminal cases is very different to that of employment decisions, and this should be considered carefully with specific focus on safeguarding and the nature of the work of Care4Children.”

He again commented:

“Failure to complete mandatory paperwork: SW has confirmed that the details were never entered on Clear Care.

Multiple restraints: SW gave details where young people at Lowther Lodge were restrained by staff on 25-26 April. This seems excessive and appear to indicate an inability by staff responsible for the Home and young people to gain control of the situation and establish a safe environment. [It seems to conflate the other incidents on 25 April as the claimant only referred to two restraints on two separate individuals]

The evidence gathered throughout this investigation doubts considerable doubt over the honesty, integrity and suitability of SW to work with vulnerable children. Given that it is alleged harm had occurred over a period of time so much so that the children had come to accept it as normal practice gives doubt to the fact that SW as an experienced member of staff working full-time hours was not aware of it. Being a witness is such abuse and failing to report it is inexcusable and no defence for this has been offered.”

41. The report finally said that:

“The case at Lowther Lodge has undoubtedly caused harm, not only physically and mentally to the young people we were entrusted to care for but to the overall reputation of the organisation. The closure of the Home has resulted in significant financial loss and more importantly the disruption of care for those young people who had to be reallocated to other Homes. Their trust in us has been broken...The press release has negative connotations for our reputation with the wider community and may impact on current placements and future referrals as well as recruitment and retention of the skilled workforce.”

42. AS recommended a disciplinary hearing.

43. On 19 July the claimant was invited to a disciplinary hearing on 24 July. The said it would be difficult for him to attend on that date. In addition, the solicitor who had assisted him in respect of the criminal investigation then wrote to the respondent saying that they were seeking to obtain specialist employment advice from another firm for the claimant and that insufficient notice had been given for the hearing even though it had now been organised to 28 July, and asked for an adjournment. The claimant asked for his supervision file to be made available to him before or at the hearing.

44. The respondent refused to adjourn the hearing and the claimant attended without a companion. The hearing then took place over two days, on 28 and 31 July. Katie Sammonds was the Chair of the meeting and the decision maker.

45. The claimant was allowed to view the multi agency minutes before the meeting and they were in the room but he was not allowed copies. At the disciplinary hearing the claimant stated he was not happy with the notes of the meeting AS had produced neither was he happy with AS being the investigating manager given he was also the responsible manager for the Home. He also pointed out he did not know about multiple restraints: these had probably happened during the day and that this was overstating the issue. He then again gave a description of what had happened, which was consistent with the description he had given earlier, and he stated quite clearly that KM, who was WB1, was not even on the stairs or in the bedroom, she was downstairs so could not have seen what happened. He stated he had hit his head not KDE and that he agreed KDE had said someone had “kicked him in the balls” but he was not saying this was deliberate. He said he had never made the comments that were put to him and that he had never seen anybody else mistreating the children. He believed KM’s whistle-blowing was malicious and he suggested it was because KM was unhappy with her salary. He also said the bruises could have occurred prior to him coming on shift.

46. Mrs Sammonds’ decision was to dismiss the claimant. She took into account the fact that on 24th April DB had said he was frightened of going home. She believed this statement, and there was no evidence to suggest it was untrue. She stated:

“I am also of the view that the whistle-blower accounts combined with the conclusions of the multiagency meetings that harm had occurred to young people at Lowther indicate that you were witness to events at Lowther Lodge that you have not escalated to senior management in line with safeguarding and whistle-blowing guidance.”

She stated:

“The reports of the young people and whistle-blowers indicated you have also applied restraints incorrectly and caused harm to the young people.”

47. Regarding the inappropriate language, the boys’ and the whistle-blower’s statements indicated the use of swearing and inappropriate threatening language which led her to conclude this was standard practice in the Home.

48. In relation to allegation 9 she stated:

“Inappropriate and unprofessional conduct. Telling, witnessing and/or not reporting jokes relating to rape and homophobia.

The whistle-blower accounts directly reference you being present when such jokes were told. I have in other investigation meetings established that there were occurrences when this happened.”

49. The claimant was advised his last day of employment was recorded as Wednesday 2 August, which is when the decision had been orally reported to him, although the outcome letter was not sent out until 8 August.

50. It is clear from this letter that Ms Sammonds who heard the other disciplinary hearings regarding X and Y had learned information from those meetings which she took into account in making her decision. However the minutes of the other meetings were not available to the claimant neither were there any statements of what was said by the young people to the social worker. The claimant raised this on 11 August, saying there were no statements shown to him from the multiagency meetings. He had not seen any boys' statements. He asked for them as he was going to appeal. Mrs Sammonds said that they did not have them only references to them and extracts from them in the multiagency minutes. However, these references did not refer to SW.

51. The claimant then appealed on 2 January to Mr Abassi.

52. The matters the claimant mentioned in his appeal letter were:

- (1) Regarding his supervision file he had hoped it would contain information regarding his work ethic and behaviour which would disprove the allegation made by AS in his management report, however it could not be found.
- (2) He said he was not on duty during the day of the 25 April. As AS was the responsible officer for the home, he should have been involved in the situation when they were short-staffed and he was asked to come in on the evening of the 25th. Consequently he believed that AS should not have conducted the investigation. He would not have taken part if he had known what he knew now about AS.
- (3) He was now aware one of the whistle-blowers went on sick leave just after 26 April. Subsequently she resigned and is now employed by an ex C4C member of staff who subsequently opened a Home in the same area as Lowther Lodge in direct competition with C4C.

"I think that the allegations are malicious in order to blacken C4C's name. I also think this person could be the person who reported the matter to the local press."

The claimant also asked whether the whistle-blower's account made to Ofsted mention him at all? He said:

"I have not seen a copy of this and was only made aware of its existence at the disciplinary hearing."

It was also stated that the boys made statements but no copies have been made available so he could not refute the contents. The police did not make his solicitor aware of any statements before his policed interview. If they were just verbal comments to the social worker, did the social worker record them anywhere? Were they general comments or were there specific mentions of himself?

- (4) He denies the comments made by the whistle-blowers and doubts that when he was on duty when some of the alleged incidents happened. As they were not interviewed, and more importantly not interviewed after the rebuttal of the allegations following the investigation, then the disciplinary process is flawed.
- (5) Whistle-blower2 had commented favourably on him in her own supervision: he had been informed of this by the manager undertaking the supervision, and yet a month later she was accusing him of all sorts of things, suggesting they were longstanding. That should have resulted in the whistle-blower being interviewed.
- (6) The question of bruising was never raised in his police interview, and of course no further action was taken against him by the police. The bruises could have occurred at any time when they ran away from Lowther Lodge or during activities or from restraints earlier in the day when the claimant was not on duty. They should have investigated further. There appeared to be no factual evidence.
- (7) He was not on duty for most of the 25th. He said he had always applied restraints applying the training he had had, and he had explained to police the methods of restraint and no further action was taken against him. The person who cracked his head on the bed was in fact the claimant. He was not aware a YP had banged his head. If a YP had banged his head, why did the person not report it at the time and get a medical examination for bruising or damage to record this? There was nothing to indicate that the claimant had caused this to happen.
- (8) He stated the police did not raise anything specific with him and therefore he believed the multiagency team were generalising. The whistle-blower who had made the allegation was not in the building at the first restraint and was in fact still at the police station, and at the time of the second restraint she was “downstairs in the office with Sam”, so “how can her statement be accepted as true and mine not?”. He had not denied the restraint had took place and he had given a full written statement about the restraint and left it Lowther Lodge when he was suspended. He reiterated he only used MAPA restraint procedures and there was no evidence that he did not. If others did not he had not witnessed that.
- (9) He pointed out that the LAC nurse visited Lowther Lodge and if abuse had occurred surely she would have noticed bruising and taken appropriate action.? He said how was he supposed to have observed abuse when the LAC nurse, Ofsted, the manager and the Area Manager did not identify any evidence themselves.? He also said there was some evidence that certainly “one of the YPs does not always tell the truth”. He wanted to know where the reports were of the managers as to what happened on those two days. He believed he had been targeted as he was one of two remaining staff members (the two managers had left).
- (10) Regarding the child who was too frightened to return home the claimant said he was not on shift on that occasion, implying that therefore it could

not have been about him, and that he also believed there was a possibility he did not want to return to Lowther Lodge because he was under the influence of cannabis. The claimant denied that he had ever called BPB “ginger”. His late uncle had red hair and was bullied about it and he would never say anything like that. He ended up by saying:

“I’m still of the opinion as stated at the outset that I am being made a scapegoat for others’ failings and have been blamed by my Area Manager as being responsible for the Home being closed and subsequent loss of income.”

53. The claimant’s appeal was heard on 19 September.

54. At this meeting the claimant said that KM/WB1 was not there when he did the restraint: she was in the office, and that he understood the rape allegation related to a day when he was not there. This had occurred when they were on the pier with the young people and that was not his shift. He had not gone onto Clear Care but CD had told him, but then he said he had spoken to the children about it. He was asked why had he done that and he replied he had asked just whether they had enjoyed the day out. The rape joke had been investigated and “Julie (the manager who had investigated it) was happy with the outcome”. He thought there should be records on Clearcare which supported his contentions

55. The claimant said that KM was unhappy with her wages and unhappy that she had been ill with a panic attack while she was working there. She was best friends with BQ who had opened another Home in competition with the respondent; that she had spoken to BQ that morning and BQ had told her to whistle-blow on it. He said he did not know why he had been targeted but that she was trying to damage the company. BQ had asked him to work for them, and why would they do that if the whistle-blowing allegations were true?

56. The claimant also mentioned that Katie Sammonds’ letter said young people made statements, but he had never been shown any statements and now it turned out there were no statements nor any medical examinations, contemporaneous or otherwise. Mr Abassi agreed that the young people had not been taken for any medical examination at the time and the police had been unable to interview the young people who were then moved across the country. Mr Abassi said that two social workers and two police officers went to visit the Home and spoke to the boys involved, but he agreed there were no statements nor was there a video interview.

57. There was evidence also in this meeting that the claimant said that he was tired because he had just come off an 18 hour shift and Mr Abassi said:

“As you are losing focus and becoming agitated I need to make sure I have understood your reason for appeal.”

58. The claimant was asked about the supervision files. He had explained why he wanted them: because of the allegation AS had put that he was untrustworthy in the investigation report. It goes to the suitability of AS to chair the meeting.

59. The claimant also explained that his stepdad had helped him write the appeal.

60. Mr Abassi upheld the decision to dismiss the claimant.

61. In his outcome letter Mr Abassi said, in relation to the whistle-blowers' accounts being false because one whistle-blower did not observe the physical intervention as she was in the office, that he "could not find any reason why whistle-blowers would falsify such serious matters in an attempt to get back at you", and regarding the rape joke, there was no evidence as to which shift this happened on, and he could not find evidence on Clear Care to support what the claimant had said.

62. Regarding the Blackpool Safeguarding Board's decisions, the respondent could not be responsible for that but noted their conclusions. The claimant would have to address that with Blackpool Safeguarding Children's Board.

63. Regarding lack of visibility from senior managers that the claimant raised, Mr Abassi said there was no regulatory requirement for the manager to attend more often. He said AS had agreed in hindsight his comment about the claimant's honesty, integrity and suitability could have been better worded, but it would not have changed his decision to refer the matter to the disciplinary hearing.

64. The claimant then brought this claim by a claim form dated 11 November 2017.

Parties' Submissions

Claimant's Submissions

65. The claimant submitted that his dismissal was unfair because:

Investigation

- (1) AS should not have chaired the investigatory meeting because he was Operations Director of the Home. [During the hearing and the contemporaneous events it was that he was the responsible person for the Home].
- (2) That he had represented Care4Children at multiagency meetings.
- (3) He did not make Mr Wilson aware of the above two facts.
- (4) AS did not tell him the context of the rape jokes i.e. that this was part of a separate allegation to Ofsted.
- (5) That he appeared to take into account events that happened before the claimant came on shift.
- (6) The claimant made clear that the whistle-blower was not present when the physical intervention was carried out, and he assumed this would be investigated but it was not.
- (7) The meeting minutes were never agreed because there were a number of discrepancies. None of the claimant's comments seemed to have been taken into account by AS.

- (8) That no whistle-blower was interviewed despite the claimant disputing what was said by them. No managers were interviewed despite the claimant criticising the action of managers.
- (9) AS made unsubstantiated allegations about the claimant's honesty and integrity which he would later agree were unwarranted.
- (10) That Mr Sarwar had alleged that the Home was closed because of the events on the night of the 25th.
- (11) That the claimant was not informed that he was not referred to specifically by name in the multiagency meetings.
- (12) The claimant was not provided with copies of the whistle-blowing redacted statements at the investigation.
- (13) That the claimant's solicitor had asked for the disciplinary hearing to be postponed but this was refused.
- (14) The claimant had mentioned in the disciplinary that KM had carried out a PI on KDE on 25 April and there did not appear to be any details on Clear Care about this. The claimant was suggesting that the whistle-blower may be attempting to cover up problems arising in her own physical restraint of KDE on 25 April.

Disciplinary Hearing

- (15) The claimant was only allowed to see redacted copies of the multiagency minutes just before the hearing, but because of the heavy redaction they were difficult to follow and he could not see anything that referred to him and allowed to keep a copy or refer to it in the hearing.
- (16) That the claimant asked Mrs Sammonds if anyone had gone back to the whistle-blower and she said she would look at this. However, this was never undertaken. The police knew the identity of the whistle-blowers as did the claimant. Ms Sammonds could easily have found out and followed this point up.
- (17) That Katie Sammonds implied that statements had been made to the social workers which were in line with the whistle-blower's account, however it turned out there were no such statements.
- (18) That Katie Sammonds said she had been mindful of the fact there had been no issues with the claimant's conduct up to this point but never mentioned this in her disciplinary outcome letter and therefore did not consider any mitigating factors.
- (19) It was unreasonable to conclude that he had used inappropriate MAPPA restraints on the basis of one PI reported by a whistle-blower who did not eye witness this PI and who was never interviewed by the respondent, and who rarely does MAPPA PIs for personal reasons.

- (20) That Katie Sammonds said she had no reason not to believe the claimant was present when rape jokes were told and that he had failed to report this. Again this was based on one anonymous whistle-blowing statement; the other whistle-blower did not name the claimant. It is implied that the young person said it was the claimant when in fact there was no evidence of this. Clear Care was not checked, neither was JN, the manager who dealt with the rape joke incident, interviewed about it.

Appeal

- (21) The claimant was clearly not well during the appeal and was not expecting that they would not go through each individual point. He clearly raised KM not being present during the incident and that it was himself who hit his head and not the young person, but Mr Abassi never pursued any of these issues. There was no medical evidence that KDE had hit his head as no medical investigation of this was recorded anywhere.
- (22) That the claimant provided information he was not on shift at the time, of the rape joke and this appeared not to have been investigated. The daily log had been lost so that could not be checked. There was no documentation in the respondent's records, no witness statements from anyone else who witnessed this or dealt with it, for example JN, and yet the whistle-blower's version was accepted. But having seen the redacted minutes it is clear the young people did identify other people who had behaved incorrectly but that the claimant was not identified.
- (23) That the respondent's suggestion that because SW was referred to as being suspended that any reference subsequently to staff meant SW was unsustainable.

Respondent's Submissions

66. The respondent submitted:

- (1) The respondent submitted the claimant's credibility was unreliable because of his comments regarding KoD an ex resident and how his statement had come about and the fact that he said he had not meant to say "false" but "flawed". I have not referred to these points however in the narrative as they were not relevant to the unfair dismissal decision but will be relevant on remedy when they can be explored further.
- (2) That the claimant had not mentioned clearly until the appeal the allegation that the whistle-blower was not present during the incident.
- (3) That it was reasonable not to provide the claimant with copies of the multiagency minutes. They were unable to do so.
- (4) That the claimant had raised many issues that were not raised at the time of the disciplinary hearing and appeal.
- (5) That it was reasonable of Ms Sammonds to reach her conclusions on the evidence she had available.

- (6) That at the appeal stage it was not possible to examine KDE, it was many months after the incident in any event.
- (7) That no date was attributed to the rape joke and therefore this could not be checked in any event.

The Law

67. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

“A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee.”

68. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

“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 sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

69. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

- (1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?
- (2) were there reasonable grounds on which to base that belief?
- (3) was a reasonable investigation carried out?

70. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

“...is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.”

71. The Tribunal must not substitute its own view for the range of reasonable responses test.

72. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure.

73. In **Sainsbury's PLC v Hitt [2003]** Court of Appeal the court established that:

"The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

74. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

75. In addition, the case of **Salford Royal NHS Foundation Trust v Roldan [2010]** Court of Appeal is arguably relevant. In this case the Court of Appeal stated that:

"In a situation where the employee's reputation or ability to work in his or her chosen field of employment will be curtailed, the requirement to do as much investigation as was reasonable into the matter was particularly important."

76. In **Salford Royal NHS Foundation Trust v Roldan [2010]** Court of Appeal, the claimant's dismissal would also have led to her deportation.

77. The respondent submitted that **Roldan** would not apply as the claimant was not in a professional role, however he was in a role which meant complaints against him if upheld would be reported to a regulatory body and he could be prevented from working in his field again. Therefore I have taken **Roldan** into consideration.

Conclusions

78. I find that the claimant's dismissal was unfair for the following reasons:

- (1) The investigation was inadequate and this was not corrected either at the disciplinary hearing or appeal stage.

In particular, AS showed bias in some of the remarks he made which had no basis, for example saying the claimant lacked honesty and integrity, and that in effect what had happened on the evening of the 25th had caused the closure of the Home.

AS made a mistake in the investigation report in suggesting that the claimant was involved in a number of physical interventions on 25th/26th when in fact he was only involved in two on the evening of 25th/morning of 26th, and that other physical interventions were carried out by X and Y during the day on 25th when the claimant was not on duty.

There was no evidence from the multiagency meeting that the claimant was involved in the issues which concerned that meeting.

- (2) At the disciplinary hearing following matters were not investigated further when they should have been:
- (a) The claimant raised that the whistle-blower's account was based on comments he and the others had made as the whistle-blower could not possibly have actually witnessed what had happened. Whether the claimant was right or wrong, the respondent made the decision not to interview the whistle-blower; they said they did not know who the whistle-blower was. It was quite easy to have determined who the whistle-blower was and to have asked them whether they agreed to a further interview in person or by written questions. The respondent may have encountered difficulties with this but they did not attempt it, and there were issues of real importance which needed to be put to the whistle-blower.
 - (b) The respondent stated there was a great deal of similarity between what the boys said and what the whistle-blower said, but there was no independent evidence of that. There were no statements from the young people and the respondent had given the claimant the impression that there were statements from the young people.
 - (c) That the fact the claimant was allowed only to look at the redacted minutes before the disciplinary hearing made the disciplinary hearing unfair, as he would not be able to retain that information in his head. The claimant should have been provided with a copy in good time for him to make notes.
 - (d) The fact that the claimant had a good record before these incidents on the evening of the 25th was not taken into account. If it had been taken into account it would have been referred to in the outcome letters.
 - (e) The respondent dismissed out of hand the motivation the claimant suggested for the whistle-blower and did not check whether or not, for example, it was true that the whistle-blower 1 knew BQ and had gone to work for BQ.
 - (f) That the respondent assumed the claimant must have been present when the children were abused even if he took no part in it. However, this was not a reasonable assumption to come to when they did not interview any other staff who might have been present when X and Y were working, or any managers who were also may have been present and who it was also likely would have observed any abuse.
 - (g) Mrs Sammonds used information gleaned from the other disciplinaries to make her decision but the claimant had no access to this information and it was not put to him in the disciplinary.
- (3) At the appeal Mr Abassi did not correct any of the above problems, and further went ahead when it is clear that the claimant was struggling.

Accordingly when the respondent formed their belief in the claimant's misconduct they had not undertaken a reasonable unbiased investigation and therefore could not have formed that belief on reasonable grounds. These weaknesses were not corrected by the disciplinary hearing or the appeal. Accordingly the respondents have not met the BHS v Burchell test.

- (4) There were procedural flaws in not attempting to interview the whistleblowers, particularly in the light of a dearth of other evidence in the form of medical examinations or statements from the YPs or the other staff and managers.

I have not considered the respondent's allegations regarding the claimant's credibility as neither point referred to matters the respondent knew at the time; the points may be relevant to remedy.

79. For all the above reasons I find that the claimant's dismissal was unfair. The matter will now be listed for a remedy hearing.

80. Any issues of contributory conduct and **Polkey** will be addressed at the remedy hearing. The claimant should be aware that the respondent has substantial points on remedy for example as to how far interviewing the whistleblowers would have made a difference (e.g. whilst the WB1 might have been downstairs for the restraints she appeared to be in the vicinity for the goading comments), whether his failure to input information on Clearcare contributed to the dismissal, whether the claimant factually was guilty of these or at least some matters (sufficient to justify a dismissal) so that an award of compensation would not be just and equitable.

Employment Judge Feeney

Date: 1st November 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

5 November 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

