



EMPLOYMENT TRIBUNALS

Claimant
Mrs L Guest

BETWEEN
AND

Respondent
Dresden House
Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Newcastle-under-Lyme **ON** 10 & 11 August 2018

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant: In Person
For Respondent: Mrs E Goodwin (Solicitor)

JUDGMENT

The judgment of the tribunal is that:

- 1 The claimant was fairly dismissed by the respondent; her claim for unfair dismissal is not well-founded and is dismissed.**
- 2 The claimant was lawfully dismissed in accordance with her employment contract; her claim for wrongful dismissal (unpaid notice) is dismissed.**

REASONS

1 The claimant in this case is Mrs Lesley Guest who was employed by the respondent Dresden House Limited from 28 April 2002 until 4 October 2017 when she was dismissed. At the time of her dismissal, the claimant was employed as a Registered Care Manager. The reason given by the respondent at the time of dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 16 February 2018, the claimant claims that she was unfairly and wrongfully dismissed.

3 In its response to the claim, the respondent admits that the claimant was dismissed; but asserts that she was dismissed for a reason relating to her conduct; and that the dismissal was fair. The respondent further asserts that, by her conduct, the claimant had acted in fundamental breach of the employment contract - and thus, her summary dismissal was lawful under the contract.

The Evidence

4 The respondent presented its case first and called two witnesses to give evidence: Mrs Angela Gordon-Foley - Managing Director, whose decision it was to dismiss the claimant; and Mr Ian Duncan Wallace – Director, who considered the claimant’s appeal.

5 The claimant gave evidence on her own account. She called three witnesses to give oral evidence - all former colleagues: Ms Deborah Brammer; Ms Diane Byrne; and Ms Sarah Elsmore. In addition, the claimant submitted written statements from other former colleagues: Ms Danielle Tremble; Ms Rebecca Guest; Ms Mandy Bostock; and Ms Karen Sinfield.

6 In addition to the oral evidence, the tribunal was provided with an agreed bundle of documents running to more than 200 pages. I have considered the documents within the bundle to which I was referred by the parties during the hearing.

7 I found the evidence of Mrs Gordon-Foley and Mr Wallace to be clear; compelling; and consistent. They each gave evidence which was consistent with that given by the other; and with contemporaneous documents. Their evidence remained internally consistent: it did not vary during cross-examination. They focused on the issues in the case.

8 By contrast, I found the claimant to be a much less satisfactory witness. She had difficulty in focusing on the issues in the case; preferring instead to talk about historical matters. She was evasive in relation to the central question as to who had made a manuscript alteration to the medication chart for patient JB. The claimant’s credibility was in my judgement significantly undermined by the readiness with which she made serious but wholly unfounded allegations of conspiracy and dishonesty (including the fabrication of evidence) against former colleagues Mrs Gillian Guest (no relation to the claimant) and Mrs Elizabeth Muncie.

9 Ms Brammer’s evidence was of little relevance: when she saw the medication chart, the manuscript alteration was not there. She confirmed in oral evidence that the handwriting looked like that of the claimant - but stated that other unspecified individuals had similar handwriting.

10 Ms Byrne’s evidence was also of little relevance: in her witness statement she added nothing to what emerged in the respondent’s own investigation - (she stated that she could not identify the signature on the medication chart). In oral evidence however, she confirmed that the handwriting did look like that of the claimant.

11 Ms Elsmore's evidence was of little relevance: she could provide no information regarding the medication chart. Her evidence related to the historical relationship between the claimant and Gillian Guest.

12 In her written statement, Ms Tremble confirmed that she had felt intimidated by Gillian Guest when making her written statement during the investigation. But, she does not suggest that what was stated was in anyway inaccurate. Rebecca Guest gave no evidence relating to the incident in question but again spoke of historical difficulties between the claimant and Gillian Guest. Ms Bostock added nothing to what was known from the respondent's investigation.

13 Ms Sinfield had identified the claimant's handwriting on the medication chart at the time of Gillian Guest's investigation. In her witness statements she confirmed that she had named the claimant because it was impossible to complete a Care Quality Commission (CQC) notification without identifying a perpetrator. In her written statements, she confirmed that the handwriting looked like that of the claimant; and that it appeared that the claimant was responsible for the error.

14 In truth, there is little by way of dispute in this case so far as relevant facts are concerned. But, where there is a relevant factual discrepancy between the evidence given by the respondent's witnesses, and that given by the claimant and her witnesses, I prefer the evidence of the respondent's witnesses. It is on this basis that I have made my findings of fact.

The Facts

15 The respondent operates a residential care home providing residential care for up to 25 people over the age of 55 with physical and mental health needs. The managing director Mrs Gordon-Foley is permanently resident in Australia - returning to the UK as required to attend to business needs at least once each year. Mr Wallace is a Director permanently resident in France: again, returning to the UK as required to attend to business needs. The local Director, resident in the UK, and full-time engaged in the business, is Mrs Gillian Guest.

16 The claimant commenced employment with the respondent on 28 April 2002 as a Night Carer; she was later promoted to daytime Team Leader; and then, in March 2004, she was promoted to Registered Care Manager. As Registered Care Manager, the claimant was the senior operational employee in the establishment.

17 The claimant gave evidence of an incident which occurred in the establishment in October 2016; of a CQC report rating the establishment as inadequate in January 2017; about concerns which she raised with regard to her

workload in March 2017; and to disciplinary action taken against her resulting in a final written warning on 24 March 2017. The claimant gave evidence of her belief that, following these incidents, from around March 2017, she was “*placed on a path to dismissal*”. Her case appears to be that Mrs Gillian Guest and Mrs Gordon-Foley assisted by others then contrived a situation to bring about her dismissal.

18 Mrs Gordon Foley’s evidence, which I accept, is that the previous incidents, including the existence of the final written warning, played no part whatsoever in the decision to dismiss the claimant. She was dismissed because of a medication error which occurred in September 2017.

19 On 8 September 2017, Mrs Sinfield and Mrs Muncie - both senior and experienced members of staff, were checking medication received from the local pharmacy against prescriptions issued by residents GPs and the medication charts to be completed by staff as and when medication was administered. Resident JB’s medication chart originally provided for the resident to receive “*Carbocisteine 250mg/5ml oral solution – three 5ml spoonfuls to be taken twice daily*” there had been a manuscript amendment to the medication chart showing the dosage as “*15ml three times a day*”. By reference to the dosage shown on the medication packaging, and by reference to the GP prescription, it appeared that the manuscript amendment was erroneous. The effect of the error was that, for a period of 18 or so days, the resident had been administered an extra dose of the medication; representing a 50% overdose.

20 It was common ground between the parties that this represented a significant medication error with potentially serious implications for the resident. (In the event, in this case, it appears that the resident suffered no harm.) It was of course necessary for the respondent to make appropriate reports to the resident’s family; her GP; and to the CQC. It was reported to Mrs Gordon-Foley that both Mrs Sinfield and Mrs Muncie, told Gillian Guest that they recognised the handwriting on the medication chart as that of the claimant. Mrs Sinfield took responsibility for the completion and submission of a CQC safeguarding report: in the report, she identified the claimant as being responsible for the amendment to the medication chart.

21 Mrs Gillian Guest conducted an internal investigation into what had happened: -

- (a) She obtained written statements from Mrs Sinfield and Mrs Muncie: in these statements, the claimant was not named as the author of the manuscript alteration to the medication chart.
- (b) She conducted face-to-face meetings with five members of staff and telephone interviews with a further four. Each of those nine members of

staff stated that the manuscript alteration to the chart was not their handwriting; five members of staff stated that they did not recognise the handwriting; four members of staff identified the handwriting as that of the claimant; no one identified the handwriting as that of anyone other than the claimant.

- (c) She compiled a dossier of documentation showing the handwriting and signatures of all members of staff
- (d) She conducted an investigation meeting with the claimant on 18 September 2017 - at which the claimant stated that she did not know whether the handwriting on the chart was hers or not. The claimant further stated that she could not say whether she made the entry; and that many people have the same handwriting as her. Significantly the claimant purported to disown the manuscript alteration on the basis that she had not signed or initialled it; but, when giving oral evidence, the claimant was asked about other manuscript alterations on medication charts; which she agreed were made by her; but they were not signed or initialled either. At her own request, the claimant was accompanied at the investigation meeting by Mrs Sinfield.

13 When the error was discovered, and the investigation commenced, the claimant was absent from the workplace on annual leave. She returned on 13 September 2017: she had a meeting that day with Mrs Gillian Guest and she was suspended from duty until the investigation was concluded.

14 Mrs Gillian Guest's investigation report was submitted to Mrs Gordon-Foley on or about 18 September 2017. It contained a recommendation for disciplinary action.

15 On 19 September 2017, Mrs Gordon-Foley wrote to the claimant inviting her to a disciplinary meeting. The claimant was told that the incident involving the medication chart was being treated as a disciplinary offence; and would be dealt with in accordance with the respondent's disciplinary procedure. The claimant was provided with all of the documentation generated in Mrs Gillian Guest's investigation; and she was clearly told that one possible outcome of the meeting was dismissal.

16 The disciplinary meeting was originally scheduled for 22 September 2017 but was rearranged at the claimant's request eventually taking place on 29 September 2017. The claimant was again accompanied by Mrs Sinfield. (The respondent had questioned the suitability of Mrs Sinfield as the claimant's companion bearing in mind her involvement with the relevant events. The claimant's solicitors had intervened and insisted on Mrs Sinfield as the claimant's choice of companion.)

17 During the meeting, the claimant changed her position from what she had said at the investigation meeting: now, she was adamant that the manuscript amendment to the medication chart had not been made by her. She alluded to her suspicions about the fact that the error had been discovered whilst she was absent on leave suggesting, but not explaining, some sort of collusion or conspiracy against her. She was evasive when it came to the identify the handwriting. She came armed with evidence intended to test Mrs Gordon-Foley as to whether Mrs Gordon-Foley could or could not correctly identify the claimant's handwriting. Mrs Gordon-Foley demonstrated her ability to recognise the claimant's handwriting.

18 The disciplinary meeting took place via *Skype* as Mrs Gordon-Foley was in Australia. The claimant suggested in evidence at this placed her at a disadvantage: she has never been specific as to why; the meeting was fully recorded; and professionally transcribed.

19 After the meeting Mrs Gordon-Foley considered the evidence available to her and she was satisfied that it was the claimant that had made the error on the medication chart. This was a serious matter; it could not be attributed to lack of training or experience; it appeared to Mrs Gordon-Foley to be entirely a matter of lack of proper attention to duties. Further, the claimant had not admitted the error and had been prepared to let others take the blame. Mrs Gordon-Foley concluded that this amounted to gross misconduct and that the appropriate sanction was summary dismissal. The respondent could no longer trust the claimant with the welfare of the residents; and further, the claimant's attitude of obfuscation; accusation; and attempting to pass the blame to others; gave Mrs Gordon-Foley no confidence that the claimant would learn from the error and avoid a repetition.

20 On 3 October 2017, Mrs Gordon-Foley wrote to the claimant advising her of the outcome of the disciplinary meeting. The claimant was dismissed with effect from 4 October 2017. The claimant was advised of her right of appeal.

21 By letter dated 10 October 2017, solicitors acting on the claimant's behalf submitted an appeal and set out detailed grounds namely: -

- (a) That the investigation was not impartial.
- (b) That documents were not provided to the claimant in time to allow her to consider them in advance.
- (c) That there were no reasonable grounds to conclude that the claimant made the entry.

22 The appeal was conducted by Mr Wallace. It was again conducted by *Skype*; recorded; and professionally transcribed. The claimant was again

accompanied by Mrs Sinfield. The appeal meeting took place on 20 October 2017; after the meeting Mr Wallace took time to consider his decision.

23 Mr Wallace was satisfied that the investigation had been completely impartial and there was no basis to properly suggest otherwise. The documents which the claimant had only seen on the day of the disciplinary hearing were some further examples of the handwriting of other members of staff. The claimant was given time to consider them and did not indicate on the day that the time given was insufficient. Mr Wallace was quite satisfied that the evidence overwhelmingly supported the proposition that it was the claimant who had made the entry on the medication chart.

24 On 26 October 2017, Mr Wallace wrote to the claimant advising that appeal was dismissed and that the decision to dismiss her was upheld.

The Law

Unfair Dismissal

25 **Employment Rights Act 1996 (ERA)**

Section 94: The right [not to be unfairly dismissed]

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(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,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

26 **Cases on Unfair dismissal**

British Homes Stores v Burchell [1978] IRLR 379 (EAT)

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)

Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

Sutton & Gates (Luton) Limited –v- Boxall [1978] IRLR 486 (EAT)

The employment tribunal should clearly distinguish in its own mind whether the case in point is one of sheer incapability due to an inherent incapacity to function

or one of failure to exercise to the full such talent as is possessed. Cases where a person has not come up to standard through her own carelessness, negligence or idleness are much more appropriately dealt with as cases of misconduct rather than of capability.

27 **The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).

Wrongful Dismissal

28 The wrongful dismissal claim is a simple claim under the law of contract: under the terms of her employment contract the claimant was entitled to a period of notice of termination of her employment (a minimum of 12 weeks). If she was to be dismissed with a less than that period of notice, she is entitled to claim damages for the losses arising from the breach of contract. Frequently such a claim can be quantified by a payment equivalent to the wages which the employee would have earned during the notice period.

29 The only effective defence to the wrongful dismissal claim (and the only potential defence advanced in this case) is that, by her conduct, the claimant was herself in repudiatory breach of his employment contract; and that, by dismissing her, the respondent merely accepted the breach and chose not to waive it.

30 The principal burden of proof is on the claimant to establish that she was entitled to a period of notice - in this case this is not in dispute. It is the respondent who asserts that the claimant was in repudiatory breach; and the burden of proof is on the respondent to establish this on the balance of probabilities.

31 The test which the tribunal must apply to the claim for wrongful dismissal is very different from that to be applied to the claim for unfair dismissal. In the wrongful dismissal claim the tribunal is not concerned with the reasonableness or otherwise of the respondent's decision; but must make its own findings as to whether the claimant had acted in repudiatory breach of contract.

Discussion & Conclusions

Unfair Dismissal

The Reason for the Dismissal

32 I am quite satisfied that the respondent has discharged the burden which is upon it to prove that the reason for the claimant's dismissal, and the only reason, related to her conduct in the manuscript amendment of JB's medication chart

33 What the respondent found to have happened was that the claimant erroneously altered the dosage level shown on the chart with the result that JB received a 50% overdose for a period of approximately 18 days. The respondent was satisfied that this error occurred due to lack of care and attention and could not be attributed to any lack of understanding; training; or experience. The respondent further found that the claimant had falsely sought to exculpate herself and blame others.

General Fairness

Genuine Belief

34 I am satisfied that both Mrs Gordon-Foley and Mr Wallace genuinely believed that the claimant was guilty of the misconduct set out in Paragraph 29 above. I am also satisfied that they properly characterised this as a conduct issue.

Reasonable Belief

35 There was ample evidence for the respondent to reach their conclusion that it was the claimant who made the alteration to the medication chart. The available evidence can be summarised as follows: -

- (a) The two senior members of staff who identified the error both identified the claimant's handwriting. They will have seen her handwriting on many documents during their employment.
- (b) Four out of nine members of staff interviewed identified the claimant's handwriting, and nobody suggested that the handwriting was that of anyone other than the claimant.
- (c) At the investigation meeting the claimant was evasive: claiming to be unable to recognise her own handwriting. At the disciplinary meeting, she adopted the stance that the handwriting was not hers.

- (d) Both Mrs Gillian Guest, and Mrs Gordon-Foley, could, in any event, recognise the claimant's handwriting - which they too will have seen on many hundreds of documents.

The Investigation

36 The investigation was detailed; thorough; and, in my judgement, wholly impartial. Mrs Gillian Guest spoke to all relevant potential witnesses; gathered samples of relevant documents; and presented her report in a neutral way to her co-director for a decision. I am quite satisfied that this investigation was sufficient in the circumstances.

Procedure

37 I am satisfied that the respondent followed a fair procedure which fully complied with the ACAS Code. The fact that meetings took place by Skype did not disadvantage claimant; and, in my judgement, she was not disadvantaged by the production of additional samples of handwriting on the day of the disciplinary meeting. Certainly, the claimant did not complain on the day of any such disadvantage.

Sanction

38 The respondents were entitled to regard this as a serious matter; and they were entitled to regard it as misconduct. The claimant had many years good service with the respondent; and the respondent expressly took no account of a recent final written warning. The issue for the respondent in determining the sanction was how this had affected trust and confidence between it and the claimant. In my judgement, the respondent was entitled to conclude that their trust in the claimant had been fatally undermined; and the position was made worse by the claimant's attitude of denial and accusing others. Because of her many years of good service, it is arguable that the decision to summarily dismiss the claimant was a harsh decision; but, in my judgement, it was clearly within the range of reasonable responses available to the respondent.

39 Accordingly, and for these reasons, I am satisfied that the claimant was fairly dismissed; her claim for unfair dismissal is not well-founded and is dismissed.

Wrongful Dismissal

40 I have considered the evidence placed before me. I have concluded that, on the balance of probabilities, it was the claimant who made the manuscript alteration to the medication chart. The evidence leading me to this conclusion can be summarised as follows: -

- (a) Mrs Gordon-Foley told me in evidence, and I accept, that she was able to identify the claimant's handwriting.
- (b) I found the claimant to be evasive over the question of handwriting. I disbelieve her evidence when she denies that the handwriting is hers; or that she does not know whose it is.
- (c) I had the oral evidence of Ms Brammer and Ms Byrne, and the written evidence of Mrs Sinfield (relied upon by the claimant); all of which tended to show that it was the claimant's handwriting.

41 I find that in making such a serious error and in her failure to acknowledge the error the claimant acted in serious breach of the employment contract the respondent was entitled to accept the breach and dismiss the claimant without notice.

42 Accordingly, and for these reasons, I find that the claimant was lawfully dismissed. Her claim for wrongful dismissal is not made out; and is dismissed.

Employment Judge Gaskell
29 November 2018