



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms Doreen Gibbs

AND

Respondent

Cornwallis Care Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth

ON

13 February 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Mrs Varney, Operations Director

JUDGMENT

The judgment of the tribunal is that the claimant's unfair dismissal claim is dismissed.

REASONS

1. In this case the claimant Ms Doreen Gibbs claims that she has been unfairly dismissed. The respondent contends that the reason for the dismissal was gross misconduct, and that the dismissal was fair.
2. I have heard from the claimant, and I have heard from Mrs Bridget Varney who is the Operations Director of the respondent company on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company is a care home provider of both residential and nursing care services. Many of the people they care for live with dementia. The respondent is regulated by the Care Quality Commission (CQC) and its services are commissioned by both the local authority and the local health authority.
5. Many of the people in the respondent's care are vulnerable because of their dementia which has a significant impact on their cognitive abilities, including their capacity to make

- decisions and their ability to communicate verbally in order to make their needs and wishes known. As a registered care provider, the respondent has a legal responsibility to protect the rights of their patients and to treat them with dignity and respect. All staff complete the necessary Safeguarding training to ensure that they understand and can identify potential abuse and to report concerns without delay.
6. The respondent prepares detailed care plans for those in its care which provide instructions to staff in how to provide care, and what to do in situations where there might be an escalation in behaviours as a result of advanced dementia. Such a care plan would normally require staff to ensure residents were safe, but then to withdraw to allow them time to calm down, before re-approaching and encouraging them to let the carer assist. If this is unsuccessful staff are then required to seek support from senior colleagues.
 7. The claimant Ms Doreen Gibbs was employed by the respondent as a care assistant from 9 September 2014 until 5 July 2018. She was dismissed summarily by reason of gross misconduct at that time in the following circumstances.
 8. The claimant had been issued with a written statement of the terms and conditions of her employment, which included a written disciplinary procedure. The non-exhaustive list of examples of gross misconduct which might result in dismissal included at paragraph 20.5: "Any abuse of a resident. Abuse for this purpose means either: sexual abuse; physical or psychological ill-treatment; theft misuse or misappropriation of money or property; or neglect and acts of omission which cause harm or place at risk of harm."
 9. The claimant had received the relevant training relating to dementia training, Safeguarding training, and completion of her Care Certificate.
 10. On 11 June 2018 another care assistant employed by the respondent namely Ms Shaneene Cavey submitted a written statement to the respondent reporting her concerns about the claimant's conduct towards two patients on Friday, 8 June 2018. She effectively accused the claimant of having sat on a patient namely AK whilst trying to get her shoes on, and having put her hand over the mouth of another patient namely JH in order to shave her face. This resulted in an investigation by the Home Manager Sarah Shields, who suspended the claimant on full pay, and recommended that the matter should proceed to a disciplinary hearing. By letter dated 21 June 2018 Mrs Varney, the respondent's Operations Director from whom I have heard, wrote to the claimant requiring her to attend a disciplinary hearing. The purpose was explained to consider allegations of potential gross misconduct under paragraph 20.5 of the disciplinary procedure. More specifically the allegations were: "Whilst assisting resident AK with personal care on the morning of 8 June 2018 you sat on the resident. It is also alleged that whilst assisting resident JH you put your hand over her mouth." The claimant was informed that if proven the allegations might result in her dismissal, and that she had the right to be accompanied by a fellow employee or trade union representative.
 11. The disciplinary hearing took place on 29 June 2018. Mrs Varney decided to dismiss the claimant summarily by reason of gross misconduct and that decision was communicated by letter dated 5 July 2018. The claimant was afforded the right of appeal.
 12. The claimant did appeal that decision, and an appeal hearing was heard on 8 August 2018. The respondent's managing director Mr Stuart Clarkson, who is senior to Mrs Varney the dismissing officer and who was not involved in the earlier decision, heard the appeal. By letter dated 28 August 2018 he confirmed to the claimant that her appeal was rejected.
 13. The claimant disputes the events as reported by Ms Cavey. She asserts Ms Cavey was an unreliable employee, who is no longer with the respondent in any event, and that because of some form of personal antagonism she had exaggerated the circumstances of the event in her report. The respondent's evidence is to the effect that the initial investigation and subsequent disciplinary process were prompted by Ms Cavey's complaint and report, but the decision to dismiss the claimant was not based upon her evidence for the following reasons. During the disciplinary hearing the claimant was reminded in detail of the allegations against her, and invited to demonstrate how she had dealt with each set of circumstances. With regard to resident AK, the claimant had given a physical demonstration of how (when trying to prevent AK from kicking her and the other carer) she had turned her back on the resident and was in a squatting position over her legs. Although

- the claimant contended that she had not sat on AK she accepted that it might have looked as if she had done so, and that she may well have momentarily made contact with the resident's legs whilst trying to put her shoes on. The respondent concluded that the claimant's actions were a form of restraint which was not included in her care plan and had not been identified as an acceptable action. The respondent concluded that on the balance of probabilities the claimant had made contact with AK's legs.
14. With regard to resident JH, the claimant demonstrated how she had placed her hand on the resident's face to shave her chin. The respondent concluded from what had been demonstrated that the claimant's hand was over and close to the resident's nose and her fingers were touching her in order to pull the skin tighter to be able to shave that area. The respondent was concerned about the impact of this action on someone who has dementia and who was already in a state of distress and heightened anxiety. This was not an essential care intervention which was required immediately, and she should have been allowed time to relax and calm down following her personal care, and it was clear by her response that she had not consented to the action. The relevant care plan was reviewed which states "Staff are to approach JH in a calm and respectful manner, informing JH what you wish to help with and explain why. Staff to allow JH time to formulate a response and respect her wishes if she declines. If JH refuses assistance, staff are to withdraw from JH's bedroom and return after 15 minutes to re-offer assistance". The respondent concluded that the claimant did not follow this advice on the day in question. Mrs Varney concluded "On the balance of probability, I find that the allegations made against you are substantiated and that your actions amount to gross misconduct".
 15. The claimant has today asserted that care staff employed by the respondent are under too much time pressure to read the relevant care plans, and that the care staff simply do not do this. The respondent does not accept this, and asserts that the relevant care plans are an important aspect of the protection of its residents under the relevant safeguarding and care requirements.
 16. Having established the above facts, I now apply the law.
 17. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
 18. I have considered section 98 (4) of the Act which provides "... 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".
 19. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
 20. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
 21. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

22. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
23. The claimant's claim is for unfair dismissal only. The claimant confirmed today that complaint is threefold: first, the respondent should not have believed the statement made by Ms Cavey because of the personal antagonism between them; secondly the respondent should have believed the claimant's version of events; and thirdly, dismissal in the circumstances was too harsh a sanction, particularly given the claimant's clean disciplinary record and the fact that she was only ever acting in the best interests of the residents in question.
24. The claimant does not assert that there has been any procedural breach in the disciplinary process. The fellow employee Ms Cavey who raised the complaint was interviewed and this resulted in an investigation by the Home Manager. She recommended a disciplinary process to examine allegations of potential gross misconduct. The claimant was suspended on full pay and was called to a disciplinary hearing which she knew might result in her dismissal and at which she had the opportunity to state her case against the allegations raised in the presence of a fellow employee or trade union representative. Following her dismissal she was afforded a separate right of appeal to an independent senior manager. The respondent considered the relevant evidence before it, which included the care plans, the statement of the other employee, but in particular the full explanation which the claimant was able to give with regard to her actions. There was no evidence or aspect of the investigation which can be said to have been overlooked. On balance I find that the respondent carried out a fair and reasonable investigation into the allegations which had been raised.
25. It is also clear from the respondent's evidence that the respondent genuinely believed that the claimant had committed the gross misconduct in question. The final question which then arises is the extent which this belief was based on reasonable grounds.
26. I have some sympathy with some of the points raised by the claimant. There may well have been some personal antagonism between Ms Cavey and the claimant, and I note that Ms Cavey did not raise any complaint about the claimant's actions until some three days after the events in question. In addition, the claimant explained that she simply did not have time to study the relevant care plans and only ever acted in a manner in which she thought she was doing the best for the two vulnerable residents in difficult circumstances.
27. However, on balance I find that the respondent was entitled to believe that the claimant's actions, as explained and demonstrated by the claimant in the disciplinary hearing, did amount to a breach of the care plans and did amount to a breach of paragraph 20.5 of the relevant disciplinary procedure, and did therefore amount to gross misconduct.
28. Accordingly, I find that the respondent genuinely believed that the claimant had committed gross misconduct, that this belief was based on reasonable grounds, and that it followed a full, fair and reasonable investigation.
29. The claimant complains that the sanction was unduly harsh. However, it is not for the tribunal to substitute its view for that of the respondent. There is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

30. Given the vulnerability of the respondent's residents, and the statutory registration scheme and safeguarding requirements both within the respondent's business and generally, I find that in these circumstances dismissal was within the band of responses reasonably open to the respondent when faced with these facts.
31. Accordingly, I find that bearing in mind the size and administrative resources of this employer the claimant's dismissal was fair and reasonable in all the circumstances of the case, and I therefore dismiss the claimant's unfair dismissal case.
32. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 15; a concise identification of the relevant law is at paragraphs 17 to 22; and how that law has been applied to those findings in order to decide the issues is at paragraphs 18 to 31.

Employment Judge N J Roper
Dated: 13 February 2019