



EMPLOYMENT TRIBUNALS

Claimant: Mr G Russell

Respondent: Positive Support For You CIC

HELD AT: Middlesbrough

ON:

4 January 2018

13 March 2018

BEFORE: Employment Judge S A Shore

REPRESENTATION:

Claimant: Mr D Robinson-Young of Counsel

Respondent: Ms K Thorpe

JUDGMENT

The Judgment of the Tribunal is that:

- 1 The claimant's claim of unfair dismissal fails.
- 2 Because the claimant's claim of unfair dismissal fails, I can make no award in respect of any alleged failure to provide a written statement of terms and conditions of employment pursuant to section 38 Employment Act 2002.

REASONS

Background

- 1 The claimant was employed as a support worker by the respondent from 6 April 2015 until his summary dismissal on 26 May 2017. He was dismissed for allegedly assaulting a service user who lived in accommodation provided by the respondent. The respondent is a community interest company that provides accommodation and care for vulnerable individuals.

Claims

- 2 Mr Russell claims his dismissal was unfair. He also states that he was not given written terms and conditions of employment as is required by section 1 Employment Rights Act 1996.

Issues

- 3 At the outset of the case I discussed the issues with the representatives. The respondent accepted that the claimant was an employee and that he had not lost the right to claim. The issues before me were: -
- 3.1 What was the reason for dismissal (it was for the respondent to show the reason for dismissal)?
 - 3.2 Was the reason a potentially fair reason?
 - 3.3 If no, then the dismissal was automatically unfair, if yes, then I have to apply the test in section 98(4) Employment Rights Act 1996. The determination of the question of whether a dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.
 - 3.4 I am not permitted to substitute my own opinion on what the employer should have done and I have to decide whether the decision to dismiss was within a band of reasonable responses.
 - 3.5 I have to follow the guidance set out in **British Home Stores v Burchell [1978] ICR 303**: -
 - (1) Did the respondent have a genuine belief in the claimant's guilt?
 - (2) Was the belief based upon reasonable grounds?
 - (3) Were the grounds based upon a reasonable investigation?
 - 3.6 Did the claimant contribute to his own dismissal?
 - 3.7 If the dismissal decision was procedurally unfair, was there a percentage chance that a fair procedure would have resulted in dismissal following the rule in **Polkey v A E Dayton**?

Housekeeping

- 4 I noted that the name of the respondent appeared to be incorrectly recorded on the Tribunal file. The parties agreed that its correct name was Positive Support For You CIC and I made an order changing the name of the respondent at the first hearing. I noticed that there was some dispute over the claimant's start date and discussed this with the parties. The respondent confirmed that the claimant had been added to the payroll in March 2015 and his employment was formalised on 1 July 2015. No copy of the claimant's contract had been produced and Ms Thorpe said that one would be produced. The original was not found but a blank copy was produced to the Tribunal at the start of the second hearing.
- 5 The claimant produced a medical report from his GP dated 20 November 2017 which was added to the bundle and given page number 111.
- 6 I noted that the allegation against the claimant which led to his dismissal concerning issues of his alleged assault upon a vulnerable person in the care of the respondent. There were notes of the service user's name in the papers and their name was used inadvertently by witnesses in the hearing. I advised

the parties that the alleged victim of the assault by the claimant would be referred to as either the service user or the client.

- 7 Mr Russell gave evidence in support of his claim. The witnesses for the respondent were: -
- David Barras – chief executive and disciplinary officer;
 - Katriona McDonald – operations director and investigating officer;
 - Ruth Hicks – voluntary director and appeals officer.
- 8 This matter was initially listed for one day, but it became apparent during the first day of the hearing that two days would be required. The case was therefore relisted for a second day.
- 9 This case concerns an incident that took place on 21 April 2017 in respect of the client who was being looked after at the time by Mr Russell and a colleague Tony Shayler.
- 10 Earlier in the day Mr Russell had been working elsewhere at the respondent's premises and had returned to the Hawthorn residence to look after the service user. He had not been given any indication that the client was in a difficult or aggressive mood, although he knew from past experience that the client did not particularly like him and also that the client had been violent towards colleagues.
- 11 Mr Russell took a telephone call from his supervisor, Ms Robinson, in which she told him various information about the client. Whilst he took the conversation the client was hovering around listening to Mr Russell's side of the telephone conversation. At the end of the conversation the client became agitated and it is not disputed that he punched Mr Russell in the right side of his head. At the time Mr Russell was sat down. Mr Russell got to his feet and was in the process of trying to leave when he was pinned against a wall by the service user.
- 12 It is alleged by Mr Shayler and by the service user that Mr Russell used unnecessary force on the client, namely grabbing him by the neck, according to the client, or grabbing the client around the neck by his t-shirt according to Mr Shayler.
- 13 Mr Russell went to the Roseberry Block where he was seen by colleagues. He reported the matter to the police. He filled out an incident report with Ms Robinson. He also filled out an ABC chart with Ms Robinson; both of these were done within a matter of minutes of the incident.
- 14 Ms Robinson asked if Mr Russell was well enough to drive home; he said that he was. He took some painkillers and then drove himself home. He said he had to stop twice on the way home because he was not feeling well. He went home, he went to sleep and he was then notified that he was suspended and went to see his GP on 24 April 2017. The note from Mr Russell's GP, which was produced on the first day of this hearing and added to the bundle at page 111, is dated 20 November 2017 and states that: -

"Mr Russell is a one to one carer who had been assaulted by his patient, punched to the face and then shoved hard. He had been suspended pending further investigation and is very anxious. Happened Friday, barely slept or settled since. Injuries are settling,

mild soft tissue swelling to one eye still evident if looking closely. He is upset, feels he is being accused by work. He stood up after being assaulted to check the client was safe, and feels he is being accused of escalating the situation. Very anxious. Agreed short term diazepam, discussed work situation advice given. Will call me if med3 needed due to severe anxiety at present”.

- 15 The response of the respondent was to suspend the claimant by letter dated 24 April 2017 [47], which mentioned an allegation that he had not followed protocol. The letter instructed Mr Russell that an investigation was going to be undertaken by Katriona McDonald who gave evidence. Mr Russell met Ms McDonald on 28 April 2017 and she took notes of that meeting [48-51]. Mr Russell’s recollection was that he was not sure of anything that happened, he went dizzy and everything went black. He remembered jumping up when he went to get out. He saw the client in front of him and he was mumbling. Mr Russell was not sure if he went to get his glasses which had fallen off the table when the client pushed him against the pillar of the door. Mr Russell left the house and was trying to type his number into the phone, he walked out of the unit and said he came round from his daze and was in shock. He took painkillers and completed an ABC and sat with Debbie Robinson and went through it all again. Later in the interview, Ms McDonald asked Mr Russell if he was stating that he could not remember what had happened between being punched in the eye and being pushed against the door. Mr Russell responded that that was correct, he could not remember. He firmly denied that he had punched the client at all.
- 16 Looking at the ABC report dated 21 April 2017 [58 and 59] the recollection of Mr Russell is consistent with the account that he gave to Katriona McDonald. Ms McDonald also interviewed Deborah Robinson who said that when she arrived at Roseberry she asked Mr Russell how he was and he replied, “Angry”. Ms Robinson suggested he was possibly in shock to which Mr Russell replied that he wasn’t, he was feeling angry.
- 17 The investigator also spoke to Paul Tait who had interacted with the client and had recorded that the client had told him that Mr Russell had tried to choke him. John Walton was also interviewed. He had also interacted with the client who had told him that Mr Russell had grabbed him by the throat. The client made a formal complaint which was produced at pages 68-69 of the investigation. The investigation also spoke to Tony Shayler, who described Mr Russell as grabbing hold of the client’s t-shirt at the top near his neck causing him to fall backwards on the settee.
- 18 As a result of her investigation, Ms McDonald decided that there was sufficient evidence to proceed to a formal disciplinary meeting. Mr Russell was provided with a copy of the investigation report, which was produced at pages 74-79 of the bundle and invited to the disciplinary hearing which was chaired by Dave Barras, the chief executive of the organisation. That hearing took place on 26 May 2017. I understand that the meeting was recorded but a copy of the recording was not provided for the Tribunal and neither was a transcript. The same is true at the appeal hearing. For future reference, the respondent should be aware that the Tribunal expects to see minutes of meetings produced at hearings.

- 19 The disciplinary outcome letter was written by Mr Barras and dated 26 May 2017. It was produced at pages 80-81 of the bundle. In the second paragraph, Mr Barras states that the allegation was that after suffering an assault Mr Russell, had reacted by grabbing the client at the throat. Later in the letter Mr Barras states that it was clear that Mr Russell had suffered an assault from the client in his care and that it was natural that he found this upsetting and was sorry that he experienced it. However, the client had made a complaint of being grabbed by the throat. That was largely corroborated by the evidence of a colleague (Mr Shayler) and Mr Barras recorded that Mr Russell's explanation was that he blacked out as a result of the punch and, as a consequence, had no memory of those few minutes. Mr Barras comes to the conclusion that he frankly had difficulty believing that Mr Russell had had any blackout. He therefore made a decision that on the balance of probabilities, Mr Russell had assaulted the client. That was an act of gross misconduct and dismissal had to flow from it.
- 20 Mr Russell appealed against the decision by letter of 9 June 2017 which was produced at pages 85-86 of the bundle. His first appeal point was that the dismissal was unfair and not made in accordance with the band of reasonable responses. He gave a history of the matter and reminded the organisation that it was him that had been assaulted by the client initially.
- 21 The second point of appeal was that the procedure adopted by the company was flawed and was procedurally unfair in three aspects: -
- 21.1 First, in the investigatory meeting, no one highlighted that they were going to record the meeting.
- 21.2 Second, he was not advised that in the disciplinary hearing, witnesses would be in attendance.
- 21.3 Third, the company had withheld information by withholding the appeal minutes.
- Mr Robinson-Young indicated that the first and second points were not going to be pursued as points of unfairness. I cannot see how the third point is a point of unfairness because the appeal decision had already been made.
- 22 The third point of the appeal was that the penalty too harsh, and I will address this later in this decision.
- 23 Mr Russell provided a further statement regarding his appeal which is produced at pages 89-90 of the bundle. The appeal was heard by Ruth Hicks, a director of the respondent, on 29 June 2017. Again, as I have indicated previously, no minutes were produced and no recording of the meeting was produced. Ms Hicks heard the case and rejected the appeal on the basis that Mr Barras' decision, based on the balance of probabilities, was correct: the client's evidence and that of Tony Shayler supported the allegation that he had acted in a way that constituted gross misconduct by his interaction with the client on 21 April 2017.
- 24 That brings me to my consideration of the facts which are as follows: -
- 24.1 It is undisputed that Mr Russell was the victim of an assault. Whether or not that assault could have been prevented if he had been briefed properly about the client's mood on the day is moot and I do not find it to be relevant to the subsequent actions and decision.

- 24.2 The key to this case is what the respondent found Mr Russell to have done and whether it followed the principles in **British Home Stores v Burchell** in coming to the conclusion that it did.
- 24.3 In terms of the investigation itself, I find no major fault in it. The respondent is not a particularly large organisation and does not have particularly large resources to call upon. Katriona McDonald's investigation and report is, in my opinion, adequate for the purposes for which it was intended. It could have been better, but it satisfies me that it meets the requirements of the third limb of the **Burchell** test.
- 24.4 The attack on the investigation by Mr Robinson-Young is understandable and has some merit. He focused on the inadequacy of the investigation insofar as Mr Russell's mental state after the initial assault was concerned. However, looking at the contemporaneous paperwork and bearing in mind Mr Robinson-Young's own comments that contemporaneous evidence is usually better than evidence created long after the event, Mr Russell was spoken to within minutes of the assault by Deborah Robinson. He did not mention any of the serious symptoms that he mentioned to the Tribunal about dizziness, disorientation, blackouts etc and did not put forward that as an excuse. In fact, he said to Ms Robinson that he was angry rather than anything else.
- 24.5 In terms of the evidence of Tony Shayler, it does appear that there has been some inconsistency. There are three accounts that I found of his recollection of what happened, each of which is slightly different. Because we do not have the minutes of the disciplinary hearing we do not know the extent to which Mr Shayler was tested on his evidence. However, we do have the cross-examination of Mr Barras in this hearing. Mr Barras was cross-examined carefully, and in some detail and skill, by Mr Robinson-Young as to what he had heard by way of evidence from Mr Shayler. Mr Barras said that he had questioned Tony Shayler about the alleged assault by asking him to describe it and to act it out by demonstrating on Ms McDonald. Mr Barras said that Tony Shayler demonstrated grabbing at the clothes at the throat. I am therefore satisfied that Mr Barras tested the evidence of Mr Shayler and came to a decision that Mr Shayler had given evidence that Mr Russell had physically interacted with the client in an inappropriate manner. Added to that the evidence of the client, which although they have severe learning difficulties, cannot be ignored, I find that it was not unreasonable for Mr Barras to come to the conclusion on the balance of probabilities that Mr Russell had assaulted the client.
- 24.6 Mr Russell says he has no recollection of assaulting the client and I have no reason not to believe him. However, there have been suggestions in this hearing (which were not made at the disciplinary or appeal hearing) that the blow on the head he suffered was a contributing factor to his recollection. I have discounted that proposition because of the medical report of Dr D Hodges of 20 November 2017 [111]. The report of Dr Hodges' consultation with Mr Russell on 24 April 2017 speaks only of anxiety and soft tissue injuries. It does not speak of any of the confusion, dizziness, disorientation or blackouts that Mr Russell says that he suffered at the time.

- 24.7 Just to be clear, I do not doubt that Mr Russell is still unwell and is still in receipt of medical care from his GP for anxiety symptoms described, but in the absence of expert medical evidence that gives me confidence to say that Mr Russell acted as an automaton at the time of the alleged assault against the client, I can come to no other conclusion that the respondent was reasonable in finding that he had committed the disciplinary offence alleged. I find that the respondent had a genuine belief in Mr Russell's guilt and I find that that belief was based upon the reasonable grounds supported by a pretty thorough investigation. I find no fault in the appeal process undertaken by Ms Hicks.
- 24.8 I turn to the rest of the issues that I set out at the start of the case. Given that I find that the respondent was reasonable in coming to the decision that the disciplinary offence had taken place, I can find no other alternative but that dismissal was an appropriate sanction for the disciplinary offence found against him. It cannot be condoned for a carer to become physically aggressive in an inappropriate manner with a client and therefore dismissal was clearly within the band of reasonable responses.
- 24.9 On that basis, therefore, I have to find that dismissal was fair and that Mr Russell's claim of unfair dismissal fails.
- 24.10 Had I found that there had been a procedural error in the decision to dismiss, my findings of fact are such that there would have been a very substantial **Polkey** reduction and a very substantial reduction for contributory fault. Because I have not found in favour of Mr Russell on the unfair dismissal claim, section 38 of the Employment Act 2002 precludes me from making any award for the failure of the respondent to supply him with a written statement of terms and conditions of employment.

Employment Judge S A Shore

Date 05 April 2018

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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