EMPLOYMENT TRIBUNALS

Claimant: **Mr P Kopinski**

Respondent: **Coast Care Homes Limited**

Heard at: **Ashford** **On:** **5 March 2019**

Before: **Employment Judge Moore (sitting alone)**

Representation
Claimant: Mr M Foster, Solicitor
Respondent: Mrs P Hall, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal succeeds.

2. The Claimant's claim for wrongful dismissal succeeds.

REASONS

Background and issues

1. This is a claim for unfair and wrongful dismissal. The ET1 was presented on 29 June 2018. The claim was heard at Ashford Employment Tribunal on 5 March 2019. The Tribunal heard evidence from the Claimant and on behalf of the Respondent, Ms M Walker, manager, Mr K Dewhurst, managing director and Ms D Henderson, manager. There was an agreed bundle of 82 pages and a transcript of a hearing on 20 February 2018 which was agreed by the parties as substantially accurate albeit partial. There was insufficient time to reach a judgment on the day and a judgment was reserved.

2. The issues before the Tribunal were explained to the parties and were as follows:-

3. Unfair Dismissal – S98 Employment Rights Act 1996

- Has the Respondent shown the reason for dismissal? The Respondent relied upon conduct which is a potentially fair reason for dismissal.

- Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

- Was the dismissal within the range of reasonable responses?

- Was there a failure to comply with the ACAS code?

- Did the Claimant contribute to his own dismissal?

4. Wrongful dismissal

- Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment thereby entitling the Respondent to summarily terminate the contract?

Relevant Law

5. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996.

6. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

7. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439.** The test was formulated in the following terms:

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

- the starting point should always be the words of [s 98(4)] themselves;

- in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

- in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what 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 reasonably take one view, another quite reasonably take another;

- the function of the Industrial Tribunal, as an industrial jury, 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. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.

8. If the dismissal is procedurally unfair I must assess the percentage chance of the Claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].**

9. I must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

10. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Findings of fact

11. I make the following findings of fact on the balance of probabilities.

12. The Claimant was employed as a Healthcare Assistant Team Leader from 24 December 2012 until his summary dismissal on 23 March 2018. English is not the Claimant's first language. At the time of his dismissal the Claimant worked at the Whitecliff Residential Care Home in Charles Road, St Leonards-on-Sea. This had around 25 residents at the time of the Claimant's dismissal.

13. The Respondent manages a group of care homes within the Sussex area. The Respondent is a limited company that employs 90 people.

14. Prior to the events leading to the Claimant's dismissal he had an unblemished record and was held in high regard by Mr Dewhurst, Managing Director.

15. In the early hours of the morning on Saturday 17 February 2018, a fire broke out at Whitebeach care home, also in St Leonards-on-Sea. There was a dispute between the parties about the distance between the two homes. Mr Dewhurst says it was 200 metres away. The Claimant says it is a 7 minute walk, and this is backed by google maps. The Claimant was on duty at Whitecliff and was the responsible person in charge. He received a telephone call from Ms M Walker, manager at 00.37am. The timings are precise as they were identified by Ms Walker from her mobile telephone call log during an investigation hearing on 20 February 2018. This call lasted for three minutes. There was a dispute about was said during this call. Ms Walker wrote her own witness statement shortly after the events. This was never shown to the Claimant but available to Mr Dewhurst. In the statement she described how she had informed the Claimant of the fire and stated she needed a member of staff to assist her and the staff at Whitebeach. Ms Walker stated she heard the Claimant ask the other two night staff if they would mind going up to Whitebeach as it was an emergency. Ms Walker reiterated there was a fire and as the team leader he needed to send someone, the call then ended. Ms Walker's evidence when cross examined about the word "send" was that she had also meant for the Claimant to "send himself". I do not accept this explanation or find that it was reasonable for the Claimant to have understood she meant "send himself". That would an unusual interpretation even for someone who has English as their first language. On Ms Walker's own statement the first instruction to the Claimant was to send a member of staff which he attempted to do.

16. The Claimant asked both members of staff to go to Whitebeach. He told them there was an emergency but did not say there was a fire. One member of staff called Janina said she could not go as "her knees were no good" and the other, Wadzanina said she was too frightened to walk outside on her own at that time of night.

17. The Claimant's evidence was that after he informed Ms Walker the two staff would not go he offered to go himself but was told not to as he was the only person doing medication. Ms Walker accepted that at some point, probably during the second call he had offered to go. She disputed she had said not to go as he was the only person who could administer medication. It was common ground that the Claimant was in charge of Whitecliff care home and the only person on the premises emergency trained and able to administer medication.

18. At 00.41am, so about a minute after the first call ended Ms Walker phoned the Claimant again. According to Ms Walker's own statement she informed the Claimant that the situation was under control and at that point there was no need for a member of staff to be sent up.

19. At 00.42am the Claimant called Ms Walker and offered to go himself to Whitebeach but was told again there was no need. Once the fire was under control and the residents were safe Ms Walker later attended Whitecliff and remonstrated with the Claimant and the two night staff as she was disappointed and concerned at the lack of support.

20. Ms Walker accepted under cross examination that it was a regulatory requirement that the person in charge (the Claimant) must not leave the care home

but in her opinion the Claimant should still have come himself as the fire outweighed the risk of residents being left alone.

21. Later on 17 February 2018 the Claimant was suspended by Ms Walker. A letter confirming his suspension was dated 19 February 2018. The allegation was "failure to comply with a management request, namely you had been asked to send a member of staff Whitebeach due to a fire at the premises, and you refused to so".

22. An investigation meeting took place on 20 February 2018. This was conducted by Mr Kevin Dewhurst. The Tribunal had sight of a transcript from a covert recording made by the Claimant, which the Respondent agreed was substantially accurate. The duration was 38 minutes. The Tribunal also had sight of a note taken of the meeting by Ms Walker. It ran to one and a third of an A4 page of typed notes. Mr Dewhurst's evidence under cross examination was that the transcript only represented half of the interview with approximately 20-25 minutes missing but he was unable to point to which sections of the Respondent's note recording the missing sections.

23. The transcript demonstrated a number of points. Firstly that there was a fundamental misunderstanding by Mr Dewhurst of the duration of the incident. Mr Dewhurst repeatedly put to the Claimant numerous times that there had been a 15 – 20 minute time lapse between the first and second phone call and that was the duration of the Claimant's refusal to send anyone. The Claimant repeatedly tried to tell Mr Dewhurst it was not a 15 minute period where nobody would come. It was not until Ms Walker checked her mobile phone records at the end of the meeting that the actual timings were established and even that this was totally discounted.

24. Secondly, that this was not an investigation meeting to try and establish the Claimant's versions of events. The transcript was clear and unequivocal. Both Mr Dewhurst and Ms Walker constantly interrupted the Claimant when he was trying to give answers or explanations on numerous occasions. The Claimant pleads a number of times to be allowed to finish and not be interrupted but to no avail. At one point, Mr Dewhurst is recorded as saying "No, Listen Listen". The Claimant tells them he is finding some of the language difficult to follow.

25. Thirdly, despite the allegation being the Claimant had failed to send a member of staff, an allegation developed that the Claimant himself should have attended the fire.

26. Fourthly, Mr Dewhurst did not approach the investigation with an open mind. He was evidently upset about the situation and his view as to the Claimant's failings. What also antagonised Mr Dewhurst was the Claimant's suggestion that Ms Walker could have picked up a member of staff on the way to the fire although there was no suggestion the Claimant made this suggestion at the time of the incident. I set out some examples of why I make this finding. There were numerous examples from the transcript and to set all of them out would effectively involve setting out the whole 11 page transcript.

27. Mr Dewhurst suggested the Claimant "could not be bothered". I find there was no basis on which this suggestion could have been made. This suggests the Claimant simply did not care or made no effort in a careless way to the address the situation.

28. Mr Dewhurst asked the Claimant if he had acted appropriately in terms of the residents of Whitebeach and when the Claimant replied yes and started to explain why, Mr Dewhurst interrupted and said he "massively disagreed with that".

29. Mr Dewhurst asked the Claimant if he understood his failure to comply with a management request could have resulted in serious harm. When the Claimant disputed he had not failed to comply Mr Dewhurst replied" You did".

30. Mr Dewhurst told the Claimant his actions were grossly insubordinate. The Claimant did not understand what this expression meant. Mr Dewhurst refused to discuss the second and third call even though the Claimant was explaining he had offered to go.

31. I find, having reviewed the transcript of the investigation meeting that there was no attempt by Mr Dewhurst to establish the Claimant's version of events. Mr Dewhurst had already made up his mind about what had happened. The Investigation was biased and unfair on the Claimant. The transcript made a concerning read with numerous examples of the Claimant being pressured into agreeing with statements of guilt and not being allowed to give an answer. Ms Walker was there as a note taker but also put across her opinion in a forceful manner. English is not the Claimant's first language and it is clear he was struggling to get his point across.

32. The Claimant was invited to attend a disciplinary hearing on 23 February 2018. The allegations were lengthy but in summary were that the Claimant had failed to follow a reasonable management request to send a member of staff up to support residents. This was said to represent a gross breach of trust and confidence, could have resulted in endangerment to the lives of residents or may have caused a serious injury and was tantamount to maltreatment of residents by omission. The final allegation was that the Claimant did not know how to handle the situation which showed his unsuitability as a team leader.

33. Mr Dewhurst conducted the disciplinary hearing. He was asked under cross examination why he did so given that he had conducted the investigation meeting. He explained that there were 3 or 4 other line managers and a financial director but he wanted to give the mater his full attention and he heard it with openness.

34. I find that the disciplinary hearing was not conducted with openness. Mr Dewhurst again demonstrated that he had already made up his mind that the Claimant was guilty of the misconduct alleged. This can be seen from the notes of the hearing, for example where Mr Dewhurst puts to the Claimant: "Do you understand that your actions were grossly insubordinate?" … "Do you understand that your actions could have resulted in gross negligence?"…"Do you understand that your failure to act could have resulted in maltreatment of residents at Whitebeach?"

35. The Claimant was informed he was summarily dismissed for gross misconduct. A letter followed confirming the dismissal. Mr Dewhurst preferred Ms Walker's account that she had not informed the Claimant to stay at Whitecliff in the first call as he was medically trained. There was no statement from Ms Walker to this effect so it is not clear how Mr Dewhurst had arrived at this particular conclusion.

36. With regards to the Claimant's explanation that the two night staff had refused to attend, Mr Dewhurst relied on their statements that they had not been aware there was a fire. He concluded that the Claimant had failed to comply with a direct management instruction and was insubordinate, and residents were placed at risk. This led to in Mr Dewhurst's view a fundamental breach of trust that irrevocably destroyed the trust and confidence.

37. The Claimant appealed against his dismissal via a letter from his solicitors dated 28 February 2018. These were in summary that the outcome of the hearing was pre-determined, the Claimant was not asked to attend himself, within four minutes of the first call he had offered to attend and told he was not needed, the reasons the two night staff had not wanted to attend were reasonable and he had not had training on how to respond to a fire at another establishment .Further that at no time had the Claimant been provided from a statement from Ms Walker.

38. The appeal hearing was heard by Danielle Henderson who is the manager of Whitebeach care home. She is subordinate to Mr Dewhurst. It took place on 8 March 2018. The notes reflect that Ms Henderson did allow the Claimant to put across his points of appeal. It was conducted in a fair manner. The Claimant offered to take a written warning. He explained under cross examination that this was not because he accepted any wrong doing but that he was fighting for his job. I accepted this explanation. Ms Henderson upheld the decision to dismiss in a letter dated 13 March 2018. She rejected the Claimant's point that he had been asked to stay by Ms Walker. She accepted the Claimant had asked both members of staff to attend. She rejected the Claimant's point about not being fluent in English as this had never previously prevented him from following instructions.

Conclusions

39. I find that the reason for dismissal was as put forward by the Respondent namely misconduct and this was a potentially fair reason. This was not a case where it was alleged there was another hidden reason for dismissal.

40. I find that the dismissal was substantively and procedurally unfair for the following reasons.

41. The investigation conducted by the Respondent was not an open and fair investigation. Mr Dewhurst did not approach the investigation with a view to gathering all of the information on which to enable the decision maker to reach a balanced conclusion. Ms Walker's witness statement was never shown to the Claimant. Mr Dewhurst had a fundamental misunderstanding about the timings on the night in question that led him to mistakenly believe the Claimant had failed to act for 15-20 minutes whereas the whole telephone conversation with Ms Walker lasted less than 6 minutes and within 4 minutes of the first call the Claimant had offered to go himself and been told he was not needed.

42. The investigation process did not enable the Claimant to present his version of events. The Claimant at both the investigation meeting and the disciplinary hearing was constantly interrupted and asked a series of closed questions. When he tried to challenge the closed questions he was shut down.

43. It was an unfair process for Mr Dewhurst to have conducted both the investigation and the disciplinary hearing. I have considered the size and

administrative resources of the Respondent. There were other managers within the Respondent that could have conducted one of these stages. Danielle Henderson could have conducted one leaving Mr Dewhurst open to the other. Further, whilst accept that Ms Henderson in theory could have overturned the managing director on appeal I find this unlikely.

44. In my judgment there were no reasonable grounds to conclude the Claimant had refused to send someone to the fire. There was no such refusal and no evidence to conclude he had refused. On Ms Walker's own case the Claimant asked the only two members of staff available to attend. Whilst he may not have used the word fire he told them there was an emergency. The reasons both staff gave for refusing to go were not unreasonable particularly in the context of the time of night and what was happening. The distance between the homes was disputed but in my view not highly relevant given the time of night a member of staff was being asked to walk alone to the other care home. Within 4 minutes of the first call starting, and one minute of it ending the Claimant offered to go himself and was told he was not needed. It is difficult to see what else the Claimant could have done short of physically force the two members of staff out of the door. An employee cannot be forced to follow an instruction. The Claimant repeated Ms Walker's instruction to the employees. The Claimant, at worst, failed to persuade the staff to comply which may have demonstrated lack of leadership but did not amount to gross misconduct. This was not in my judgment conduct so serious as to amount to a fundamental breach of trust and confidence. The Claimant to date had an unblemished record and was a trusted member of staff.

45. I also consider that even if the instruction could have been interpreted that the Claimant should "send himself" this was not a reasonable management instruction as the Claimant was being instructed to breach a regulatory requirement.

46. To summarily dismiss the Claimant in these circumstances was not in my judgment within the range of reasonable responses. It is evident that there was a very serious incident at the care home with the fire. The Claimant was within a very short timescale faced with a dilemma. He had two members of staff refusing to go. He was right to be concerned about leaving a home for which he was responsible but nonetheless he very quickly offered to do just that.

47. If the procedural failings had not taken place and a reasonable and fair procedure been followed I judge there was a zero chance the Claimant would still have been dismissed as the decision to summarily dismiss was not within the range of reasonable responses.

48. I also conclude that there was no element of blameworthy conduct for which the Claimant can be said to have contributed towards his own dismissal. I do not consider the fact that the Claimant offered to accept a written warning indicative of any culpable conduct as this was done so by the Claimant in order to try and keep his job. His failing was to persuade the night staff to attend the fire. This did not in my judgment amount to blameworthy conduct.

49. The Claimant's losses will be assessed at a remedy hearing to be listed.

Employment Judge Moore

Date 18 April 2019