EMPLOYMENT TRIBUNALS

Claimant: Mr O Esho-Olijade

Respondent: Holmdene Housing Limited

Heard at: **London South** **On: 30 July 2018**

Before: **Employment Judge Fowell**

Representation:

Claimant: Mr B Udije of counsel

Respondent: Mr R Clement of counsel

RESERVED JUDGMENT

1. The claimant's dismissal was fair.

2. The dismissal was not in breach of contract.

REASONS

Background

1. The claimant was employed as a Housing Support Worker. The respondent operates a number of accommodation centres for young people between 16 and 18 who are in the care of their local authorities. He worked at their Charleville Circus unit in Beckenham as one of the overnight supervisors until he was dismissed on 25 October 2017 on grounds of conduct. This followed events on the night of 21 July 2017 when he is alleged to have broken the company rules on dealing with young people, in particular in respect of a girl whom I shall call T, who was a resident of another of the respondent's accommodation centres and whom he allowed to stay for the night at Charleville Circus.

2. I heard evidence from the dismissing officer, Mr Paul Johnson (Operations Director), Ms Jennifer Allen (Team Manager) and from Mr Esho-Olajide himself. I was also assisted by a bundle of about 100 pages. Having considered this evidence and the submissions on either side I make the following findings.

Findings of Fact

3. Mr Esho-Olajide's duties involved supporting the young people with independent living within the unit. He would be required to follow their care plans, document their activities in the unit log book and have regard to various rules and procedures for their welfare. They are generally vulnerable. Visitors have to have ID and arrange a time to see them, leaving before 11pm. If, for any reason, they do remain, that should be noted in the unit log and the manager informed. Alcohol is not permitted either, and Mr Esho-Olajide was expected to observe appropriate professional boundaries.

4. The overall manager at the unit was Ms Allen. She was responsible for a number of sites. On the morning of 2 August 2017 she was at Charleville Circus investigating an unrelated incident involving two young people, J and O, who had taken a phone from a member of staff. In the course of this meeting they told her (page 35) that staff allowed females into the unit, drank alcohol with them and had sex. They named Mr Esho-Olajide. O, a female, added that he had given them his credit card to go to the shop to buy alcohol, and that afterwards he had gone into J's bedroom with T.

5. Ms Allen's deputy manager, Elaine Hector Wilson, was also at the unit later that day and met with J and O for a care review (38). They told her in slightly different terms what they had told Ms Allen - that Mr Esho-Olajide had given his credit card to T, that they had gone to Crystal Palace to buy alcohol and chicken and chips and came back in a cab, that T had slept on site and in the morning they had gone to McDonalds for breakfast. O also played her a recording from her phone. It was of him talking to J, asking him where he was, telling him to go to his bedroom and telling him to call him uncle.

6. All this was reported to their HR manager, Nicola Turner and she took a statement from J the next day (page 40). J confirmed that he called Mr Esho-Olajide uncle, and said that on the evening in question T had given him some alcohol to drink and said it had come from him. They were in the office with O, Mr Esho-Olajide and another support worker, Kyel Frimpong. T told the claimant she was hungry, he gave her his credit card and pin number, T and O then went to the shops – this was at about 1 or 2 am – bought some alcohol and snacks and came back. Mr Esho-Olajide had told them to be careful not to let the alcohol show on the CCTV camera (in the office) and to keep it in the bag.

7. He added that all day Mr Esho-Olajide was very close to T and at some stage – the sequence of events was unclear – he and T were alone together in his room. It appears from the record of the interview that he believed they were having sex in there. This incident also appears to have happened before getting the alcohol and snacks. The next time Mr Esho-Olajide was on shift he also complained to J and O about them buying things on his card.

8. O was also interviewed the same morning. She said that T had come over to see them that evening and Mr Esho-Olajide had given her some brandy. When they were all sitting in the office, T sat on C's lap. He gave her his bank card and PIN number, after which she and T went to Crystal Palace at about midnight buy vodka and something to eat. After that they took a cab back to the unit and ate it in the lounge, then went into J's room to continue drinking. Mr Esho-Olajide was there too, sitting on the bed next to T. At some point T told her that Mr Esho-Olajide had tried on the staircase to kiss her, and that she should come back on Sunday and that he wanted her to have his kids.

Later, Mr Esho-Olajide gave T £10 to get breakfast and they went off to McDonalds.

9. She also shared with the interviewer a recording made on her mobile phone. In this, Mr Esho-Olajide was heard asking how 'they' knew that T had stayed there, how they knew he had bought alcohol, and then stating that he was finished. He went on to say that they were sacking him and he wanted a suspension not a sacking because it would affect him. He also asked J whose side he was on.

10. The next stage in the interview process was an interview with Mr Esho-Olajide. This was conducted the same day, 3 August, by Ms Allen with a note taker present. In this he admitted allowing T and her friend to order food using his debit card. He said that they gave him the cash as they could only order online rather than pay cash on delivery. He denied any inappropriate sexual behaviour, drinking alcohol in the unit or giving alcohol to young people. He had agreed to let T stay overnight as it was late and raining hard and the girls had begged him to let her stay, and he also admitted that he had not made any record of this in the unit log.

11. Following that meeting she referred the matter to the Local Authority Designated Officer (LADO). It is necessary to say a few words about her role. She has responsibility under the Safeguarding Vulnerable Groups Act 2006 (SVG) to ensure, on behalf of the local authority, that the safety and welfare of children are protected. Accommodation and support facilities like those provided by the respondent come within the definition of a regulated activity under that Act. Staff who undertake such work therefore have to have appropriate checks carried out on them by the Disclosure and Barring Service (DBS), and if a risk of harm is suspected a report must be made to the LADO, who will investigate. She will then generally hold a series of multidisciplinary team meetings with the police, social workers, and the organisation in question, to decide on an appropriate outcome. That may involve a police investigation, and if the appropriate threshold of harm is met, a DBS referral will be made.

12. On this occasion the first meeting took place on 15 August 2017, although no minutes of that meeting were provided. Mr Esho-Olajide remained suspended in the meantime and the conclusion was that the police should carry out an initial investigation into whether there had been any sexual misconduct. As a result of that meeting the suspension was extended.

13. No interview was ever conducted with T as part of the respondent's investigation. The decision not to speak to her directly about this seems likely to have resulted from that initial LADO meeting too, but she was spoken to by her social worker and the results of that conversation fed back to the LADO. Since the minutes of the first meeting were not disclosed, it is not clear what her position was, but it did not lead to any concern being expressed in the minutes of the next meeting, held on 30 August 2017 (page 52) about the reliability of the reports from her friends.

14. JA attended that second meeting and there was a discussion about whether to interview KF. As an agency worker that was felt appropriate for his employer to investigate his conduct. He also became a witness as part of the police investigation, but again he was not formally involved in the respondent's disciplinary investigation.

15. JA also reported the matter internally to Mr Johnson, the company's Operations Director, and he held the disciplinary hearing in due course. When the police became

involved he provided them with the CCTV footage of the evening in question and viewed it himself. It showed the girl in question sitting on his lap, showed him passing round a bottle in a brown paper bag for a group of young people in office, talking on the staircase to the same girl for about ten minutes and entering one of the girl's rooms with her and another girl. The respondent was however told by the LADO that it could not discuss these allegations with Mr Esho-Olajide as they formed part of the police investigation.

16. Mr Johnson reviewed the notes from the brief investigation meeting with Mr Esho-Olajide and noted that he admitted (a) allowing T to stay in the unit overnight, (b) failing to record her presence in the unit log, and (c) allowing her to use his bank card to order food. These were not matters which formed part of the police investigation and so he invited Mr Esho-Olajide to attend a disciplinary hearing on 19 October 2017 to account for them. Prior to that meeting Mr Johnson also listened to the phone recordings from J and O.

17. The invitation letter stated that it was enclosing a resume of notes taken during the investigation and a copy of the company's disciplinary procedure. There was a dispute at this hearing over whether those items were in fact included. On balance I conclude that they were not. There is no mention of them in the midst of the disciplinary hearing and it seems likely that Mr Esho-Olajide would have wanted to take issue with some of the contents. His witness statement for this hearing went into some detail over the discrepancies between the accounts given only J and O. Further, his solicitors, who became involved at the appeal stage, wrote asking for a copy of the disciplinary policy, procedure or handbook, so it seems unlikely that the disciplinary procedure at least had been provided. However, this was an oversight, the invitation letter stated that they were included and no complaint was made in the disciplinary hearing about it.

18. Mr Esho-Olajide attended that hearing on his own. Mr Johnson had a note taker present. It was not a particularly long meeting as the notes only cover two pages.

19. As to the debit card, he said that the young people had come to him joking and begging to be allowed to order food as they were hungry. They gave him £28 in cash and he let them use his debit card to place the order. But in the event the food never arrived and he gave them the cash back. The next day, he found that his card had been debited by £28, so he felt that they had played a trick on him. That was why he rang them afterwards.

20. He gave the same explanation as before about letting T stay overnight and said that he did not record it as he did not want to cause a problem. He accepted that he had let the company down and felt shame. He knew it was wrong. He knew that she lived at a neighbouring unit, that Ms Hector Wilson was her key worker, and that the other unit would have reported her missing to the police. (In fact, T lived about 4 miles away and it would have presented no difficulty to have put her in a taxi). He also accepted that he had not told the oncoming staff when he handed over at the end of the shift.

21. His decision to dismiss was sent out by letter dated 25 October 2017 and he was offered the right of appeal. His solicitors wrote on his behalf. Each of the allegations was admitted but it was felt that dismissal was too harsh. They asked about training on lending money to the young people, said that allowing them to stay over was common practice and there had been other recent incidents. They asked that he be accompanied by a friend at the appeal hearing.

22. R maintained that he could only be accompanied by a work colleague or trade union representative, and so Mr Esho-Olajide declined to attend an appeal hearing.

23. In the interval of about a week between the disciplinary hearing and the outcome letter being sent, Mr Johnson was copied into an email from the police advising that they had completed their investigation and did not propose to charge Mr Esho-Olajide over the alleged sexual misconduct. That meant that he had the option of introducing all of the wider evidence from the CCTV footage and other recordings, and expanding the scope of the disciplinary allegations accordingly. He decided not to do so. That would mean going back to square one, carrying out a further internal investigation resulting in further disciplinary hearing, so he proceeding to give his decision on the evidence and charges available.

24. Subsequently, the LADO concluded her investigations too. She recommended that a DBS referral needed to be made. As the employer, this should come from the respondent, and she helped Mr Johnson to draft the necessary report form. As a result, DBS contacted Mr Esho-Olajide in April 2018 for further information about the circumstances of his dismissal and ultimately concluded that his name be added to their register. As a result, Mr Esho-Olajide has been unable to find any alternative employment in the care sector.

Applicable Law and Conclusions

25. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

> (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 [conduct] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. …
>
> (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. The question therefore is whether the employer acted reasonably in all the circumstances. The Tribunal need not agree with the approach taken. People may disagree about the proper course of action without either being unreasonable. This was made clear in the case of *British Home Stores Ltd v Burchell [1978] ICR 303.*

> "...the tribunal has to consider whether there was a genuine belief on the part of the

> employer that the employee was guilty of the alleged misconduct, whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation, and whether a reasonable employer would have dismissed the employee for that misconduct."

27. Further, in *Iceland Frozen Foods Ltd v Jones [1983] ICR 17* it was held that:

> "…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 [Employment 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. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

28. Similarly, in *Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111* it was held that:

> "The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

29. The focus therefore has to be on the reasons given by the employer, not those which might have been pursued. In the present case the three allegations relating to use of his debit card, allowing T to stay overnight and not recording or reporting the fact, were all admitted.

30. It is well-established that where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full investigation. In *Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT*, the claimant was employed as a residential social worker in a children's home. During an altercation, he spat at one of the children. He admitted doing so at the disciplinary hearing and was dismissed. The Employment Appeal Tribunal said that it was not always necessary to apply the test in *Burchell* where there was no real conflict on the facts. Therefore it was not necessary for the employer to interview the boy with whom the employee had the altercation or to consider the extreme provocation under which the employee was placed.

31. In that case however, the full extent of the wrongdoing was in issue. There was no doubt that the employee had committed the misconduct for which he stood accused. In the present case, the charges were only the admitted aspects of a potentially much more serious offence.

32. Two alternative views could therefore be taken of the present case. On the one hand, the real reason for the dismissal was that Mr Johnson believed that Mr Esho-Olajide was guilty of must more serious allegations - of sexual impropriety (or at least of acts which might lead to that) and of providing alcohol to T and other young people. He had viewed the CCTV footage and described it as damning. He had also listened to the telephone recordings. As a result, he wanted to dismiss the claimant and the actual offences for which he was dismissed were mere ciphers, and but for the belief in the other matters would not have resulted in his dismissal. The alternative view is that these matters were serious enough in themselves to justify his dismissal, and it was

unnecessary to wait for the police to complete their investigation before looking into these matters.

33. Deciding between these two rival views is not straightforward. In my view Mr Johnson had been influenced by the CCTV and other evidence and was intent on dismissal as a result. There are many cases in which such knowledge will taint the fairness of a dismissal, such as where the person who decides to dismiss was also a witness to the offence or comes under pressure from a third party to dismiss. If there is an indication that the employer has pre-judged the outcome, that can be enough to make the dismissal unfair. This was emphasised, for example, in *Sovereign Business Integration plc v Trybus EAT 0107/07*, where it was held that the dismissal was unfair because the investigation was not carried out with an open mind and properly completed. Such conclusions however have no real application where the misconduct is admitted. No failure of the investigation process in the present case can have had any effect on the decision that the claimant was guilty of these three specific offences.

34. In the same way, there are a number of cases giving guidance on the proper approach where an employee is accused of criminal conduct and there is a police investigation. In general, an employer should do its best to satisfy itself of the employee's guilt. In *Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457, CA* the Court of Appeal held that the seriousness of the allegations, which in that case involved the risk of deportation, meant that procedural errors meant that the dismissal was unfair. Here there is a similar risk, as Mr Esho-Olijade is now prevented from working in this sector, but the premise behind such cases is that there is a heightened importance in ensuring a fair hearing and investigation before concluding that an employee is guilty of misconduct.

35. In the present case however, given the claimant's admissions, there is no real issue over whether Mr Johnson had an honest belief in his guilt, or reasonable grounds for that view, or even that he had carried out enough investigation at that stage. I prefer the view that any belief formed about wider allegations, however seriousness, cannot taint the fairness of a disciplinary procedure where the misconduct in question is admitted. The only issue is whether dismissal was within the range of reasonable responses.

36. The Court of Appeal in *London Ambulance Service NHS Trust v Small 2009 IRLR 563, CA,* emphasised the importance of giving full respect to the employer's view of the seriousness of misconduct. In that case a series of shortcomings were identified in Mr Small's handling of a particular patient on a particular day, which the Trust concluded were sufficiently serious to dismiss. They attached importance to them because the whole purpose of the Ambulance Service was the care and welfare of their patients, just as the respondent's role is to safeguard the young people in its care.

37. On any view, these were serious matters. The first mistake made by Mr Esho-Olajide was to allow T to remain overnight. There was no reason to agree with this. The fact that it was raining would not have prevented her from returning by taxi if need be, nor does her pleading to remain excuse the decision. This is a vulnerable young person, who Mr Esho-Olajide knew lived in another of the respondent's units, and if she did not return they would be under an obligation to call the police. (Ms Allen's evidence was that the police were called and that T had a very bad record of absconding.) Whilst Mr Esho-Olajide may not have known these details of T's personal circumstances, he

would know that the police would be called or that they ought to be, so the decision to allow it, and then not to inform her home, was extraordinary. He accepted at this hearing too that he knew that she was at one of the respondent's homes so he could easily have found out by asking her which. His reason for agreeing to let her stay was in part that it would take her an hour by public transport to get there at that time of night, so it is hard to understand how he did not know where it was.

38. He also failed to record it, to inform his own manager, Ms Allen, or to inform the next support worker who came on shift in the morning. All this appears to be calculated to conceal his actions, which is itself serious, and is at odds with the suggestion that there were good reasons for his action, because of the distance home and the safety of her travelling alone.

39. The last allegation of allowing them to use his card to get food is also concerning. His evidence on this point was that such things were allowed in an emergency, but plainly there was no emergency. No food arrived and nothing further was done about it on his account. The risks of adult staff becoming overly friendly with vulnerable young women in their care is obvious, and one which the respondent is alive to. That is the reason for the rules on such issues, and the need to report and record things.

40. In all the circumstances I am satisfied that the respondent took these issues seriously, that they would have done so regardless of the other evidence, and that dismissal on these grounds was within the range of reasonable responses. That appears to me to be the correct test in these circumstances, but for the avoidance of doubt I also conclude that Mr Johnson would *in fact* have reached that conclusion even without the wider evidence of wrongdoing. That is to some extent a speculative exercise, involving a consideration of what would have happened if there had been no CCTV, and no complaint the young people of being provided with alcohol, or sitting on knees or of him being in their bedrooms, but I see no reason to conclude that another conclusion would have been reached. Although reference was made in the appeal letter to other occasions on which young people had been allowed to sleep over, no other examples were raised, either then or at this hearing, and this may well underline the difference between an authorised sleepover which is reported and approved, and the present situation.

41. Given that the misconduct was admitted, this is not a case where the outcome turned on any procedural flaw, unless it was to go ahead with the decision to dismiss having heard the disciplinary hearing and then been told that the police had concluded their enquiries. In my view that decision was within the range of reasonable responses, given that the investigation and hearing was complete. If however that were regarded as a decision rendering the decision unfair, there is in my view a 100% prospect of a dismissal shortly afterwards, once the full facts had been uncovered.

42. Although the CCTV footage was not shown to the Tribunal, the fact that it showed T sitting on the claimant's lap is not disputed. Nor is it disputed that he was pouring drinks for them. Mr Esho-Olijade says that it was non-alcoholic, and that he kept it in the bag because it was very cold and could become wet and sticky as it defrosts. That is an explanation which is almost impossible to accept. Although he points to discrepancies in the accounts given, such as whether the drink was clear or like brandy, that is less significant since he admits that he was giving them something to drink and so the incident is not an invented one. The voice recordings on their phones would also have

proved extremely problematical for the claimant. So, at best, if dismissal on these grounds was unfair, a delay of only a few weeks would have resulted, while the fuller picture was obtained.

43. Further, or alternatively, there is the question of contributory fault to assess. Given my conclusion above, if a decision to go ahead with the dismissal on 25 October 2017 was for any reason outside the range of reasonable responses, on the limited evidence available, contributory fault has to be assessed at 100%. These conclusions are reinforced by the subsequent decision of the LADO to make a DBS referral and the decision by the DBS that the claimant be barred from further work in this sector.

44. For all of the above reasons the claim is dismissed.

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Employment Judge Fowell
Date 06 August 2018