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# EMPLOYMENT TRIBUNALS

## ***Claimant***

## ***Respondents***

Mr Dwight Ackie

**AND**

Sunrise Care Limited

**Heard at:** London Central

**On:** 27 August 2019

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

## **Representation**

**For the Claimant:** In person

**For the Respondent:** Mr T Fuller, Consultant

## **REASONS**

1. This is a claim of unfair dismissal. The Claimant started work as a care worker in October 2016. He was dismissed with notice expiring on 30 October 2018. It is a dispute as to the exact date on which he started his employment in October 2016 but I did not need to decide that. The Respondent now accepts that the Claimant had two year's continuous service by the effective date of termination, and hence he had sufficient continuity of service to claim unfair dismissal.
2. I explained at the beginning of the hearing the law about fair dismissal.
3. I heard evidence from Mr and Mrs Simmonds who are the Directors of the Respondent (which provides personal care services including residential care for vulnerable persons in Wembley, London), and then from the Claimant.

### Facts found

4. The Claimant worked as a care worker at 57-59 Castleton Avenue, Wembley, HA9 7QE which is a residential care home with five residents. There are seven employees of the Respondent who work shifts at that address, and in any one shift there are two care workers, although there are two hours overlapping between shifts, and thus at the beginning and at the end of every shift there are four care workers on duty. In addition, Managers who are registered with the Care Quality Commission (CQC) visit and supervise the premises. The Head Office is in Bracknell, Berkshire where the Directors and the administrative function is based.

5. All care workers employed by the Respondent at 57-59 Castleton Avenue are required to administer medicine to the residents. Once medication has been administered, the medical administration record (MAR) sheet must be signed by the care worker responsible. The MAR sheet is personal to a particular resident or patient and travels with the patient for example if he or she has to go to hospital. The MAR sheet must be maintained and updated as an accurate and contemporaneous record to prevent patients missing medication or alternatively receiving double doses. It is an important part of proper care. A "medical incident" at a care home is defined by the CQC to include occasions when medicine is not administered or if the MAR sheet is found to be not properly updated. The Respondent has to report annually its number of medical incidents to the CQC.
6. The Claimant received abundant training at the beginning and throughout his employment on the importance of these procedures. He agreed that he had obtained sufficient training and that he understood it.
7. He forgot to sign the MRA sheet on 22 May and again on 25 May 2018 and an investigatory meeting was held with him by Mr Simmonds. On that occasion Mr Simmonds was willing to deal leniently with the Claimant and gave him an informal verbal warning.
8. On 20 August the Claimant forgot to give a patient his medication, and on 5 September the Claimant forgot again to sign the MAR document; and a further formal disciplinary process followed in relation to these incidents. Mr Simmonds discussed at length with the Claimant ways and means by which he could try to do his job better in future. For example, Mr Simmonds suggested he should keep a note book to remind himself. On that occasion Mr Simmonds decided to impose a first and final written warning which was handed down on 18 September and to last for twelve months.
9. Two days later on 20 September the Claimant telephoned Nicky Bridle who is a Personal Assistant employed at the Head Office who also provide a quasi-HR role in the form of a listening ear for disgruntled employees. The Claimant complained that he was feeling depressed and overworked and he felt that he was not receiving adequate or proper supervision.
10. On 26 September he forgot to sign the MAR document for another patient. This was the fifth incident since 22<sup>nd</sup> May.
11. He was summoned to a final disciplinary hearing which was conducted by Mr Simmonds. Mr Simmonds decided to dismiss the Claimant with notice which expired on 30 October.
12. The Claimant then submitted a formal appeal which was incoherent in that it referred to various legal matters in generalised terms but did not explain what the grounds of appeal were as a matter of substance. Mrs Simmonds did the best she could, by holding a formal appeal hearing with the Claimant, and asking him to explain what he meant in his appeal letter, but in reply he simply

responded “no comment” and she decided not to uphold the appeal so the dismissal remained effective.

The law relating to misconduct dismissals

13. Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

*.....the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

- a. depends upon 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.'*

14. A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the Applicant had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation **BHS v Burchell [1978] IRLR 379.**

15. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. **HSBC v Madden [2000] ICR 1283.**

16. The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies 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. **Sainsbury v Hitt 2002 EWCA CIV 1588**

17. The ACAS Code of Practice No.1, Disciplinary & Grievance Procedures (2009) provides that that an employer wishing to discipline an employee should carry out an investigation to formally establish the facts; inform the employee in writing of the problem; after a proper interval, hold a meeting to discuss the problem; decide fairly on the appropriate action, and provide an opportunity to appeal.

Conclusions

18. The Claimant's father, who has obviously been the driving force behind this claim, told me that his son the Claimant has been well brought-up and has kept

out of trouble and is honest, and I accept all of that. The Claimant comes across as a pleasant person who tried his best and admitted his faults, however unfortunately that is not the test that I have to apply.

19. One of the issues was to the extent to which the Claimant was at fault. During cross-examination the Claimant suggested that he was not at fault, and when this was explored with him he said other people were at fault. Of course the fact that other people may have been at fault does not mean that the Claimant was not at fault. He was primarily responsible for the fault for which he was dismissed, which was forgetting to sign the MAR sheets and on at least one occasion forgetting to give medication altogether. He clearly admitted having forgotten, and his job was not to forget but to remember.
20. It is clear that staff coming in to relieve people who are completing their shift do have some duty to take over the medical cabinet and to check that the patients have had their medication in the shift just coming to an end, but that is very much a secondary role and the primary responsibility is that of the care worker who is supposed to dispense the medication and sign the MAR sheet in the first place.
21. The Claimant suggested that two people should have been present when the medication was administered to the patient, one to hand over the medication and one to sign the MAR sheet. I don't accept that that is the correct or a required process by the CQC or by the Respondent's procedure. I accept the Respondent's evidence that 2 care workers at the dispensing point are required only where there is a controlled drug and the Claimant was not involved in this.
22. It was submitted by the Claimant's father that as an alternative to dismissing the Claimant, the Respondent should have removed him from the role of having to administer medicine. The Claimant did not actually ask for that, even when he had the conversation with Miss Bridle in September. I do not think it would have been a reasonable request had he asked for it. If he had been relieved of having to administer medication that would have meant the other persons on duty would have had to do even more administering of medication and they may themselves have made a mistake or become over-stretched. The Respondent's procedures require all the care workers to take responsibility for administering medication and they receive full training and are employed to do that job.
23. The Claimant's father suggested that the disciplinary procedures were not properly adhered to, because the first time that the Claimant made a mistake in May it was not right for him to have been given just an informal verbal warning and that, before the final-written-warning or dismissal stages were reached, earlier stages should have been gone through for example a first written warning. I have examined the Respondent's disciplinary procedure and find that that is not required. It is fair and reasonable in some cases to go directly to dismissal, and in others it is equally reasonable and legal to go directly to a final written warning.

24. The Claimant suggested that the documents which were to be relied upon during the disciplinary hearings were not sent to him before the hearings in question, but I find that they were sent to him with the letters inviting him to the disciplinary hearings and support for that is to be found on pages 98-99 and 122-123 of the bundle.
25. The Claimant also suggested that the real reason why he was dismissed was that he had had an altercation with a Manager called Tracy on 22 October. Clearly there was an altercation, - it appears that there was some misunderstanding about whether or not a patient should be given an enema and the district nurse had been sent away without the enema having been administered. Tracy did not agree with this, and there were raised voices. Tracey telephoned Mrs Simmonds at Head Office the same day and complained to her about the Claimant and the next day on 23 October the Claimant was phoned by Mr Simmonds and told he was dismissed. Understandably enough, the Claimant wonders whether it was this altercation that caused him to be dismissed rather than the succession of medical incident errors he had made.
26. The final disciplinary hearing had concluded on 18 October with Mr Simmonds saying the following, (as recorded on page 126), "*so we will give you an outcome in a few days*". The Claimant agreed that this was what he was told – ie that Mr Simmonds was not deciding straight away what the outcome of the final disciplinary hearing would be, but would consider and let the Claimant know later. Mr Simmonds then decided on 23 October that dismissal was the proper response, which was consistent with his earlier statement. It is unfortunate timing that the altercation happened in the middle of the decision-making period, but I accept Mr Simmond's evidence that although he had become aware of the altercation, he did not let it affect his judgment about the fair disposal of the disciplinary process. He appears to have dealt with the Claimant throughout in a professional and careful manner. When he spoke to the Claimant on the telephone on 23 October (to tell him that he was being dismissed with notice), Mr Simmonds did not make any reference at all to the Tracy incident. The dismissal letter dated 26 October does not refer to the Tracey incident either. The Claimant complained to Nicky about Tracy on 1 November (when Nicky returned from leave) by which time the dismissal had already been communicated. On a balance of probabilities, I find that the dismissal was for the repeated medical errors, the last of which was within the currency of the first and final written warning, and not for the altercation.
27. I find that the Respondent i.e. Mr Simmonds and at the appeal Mrs Simmonds had a genuine belief in the misconduct, and that the belief was based upon reasonable grounds, (and in large part it was admitted by the Claimant). The dismissal was procedurally fair, and entirely in accordance with the ACAS guidelines.
28. I accept that by September the Claimant may have been feeling some depression and stress but unfortunately that is a common experience at work.

29. Forgetting to give medication or forgetting to record the giving of medication to vulnerable patients in a care home, are serious matters. Such conduct is dangerous not only for patients but also for the standing of the Respondent with the CQC. The Claimant had done this five times in five months. Lesser steps had been taken as an alternative to dismissal on the previous four occasions and Mr Simmonds had tried previously to help the Claimant to avoid further occurrences. Dismissal with notice on the last occasion was within a range of reasonable responses.
30. Hence the unfair dismissal claim fails.

Employment Judge J S Burns

Dated: 31/8/2019

Judgment and Reasons sent to the parties on:

02/09/2019

For the Tribunal Office