



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

MR U D CHINAKA

AND

Respondent

AVON & WILTSHIRE MENTAL
HEALTH PARTNERSHIP NHS
TRUST

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 7TH / 8TH / 9TH AUGUST 2019

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS:

APPEARANCES:-

FOR THE CLAIMANT:- MR R JONES (COUNSEL)

FOR THE RESPONDENT:- MR N CAIDEN (COUNSEL)

JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claim for unfair dismissal is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings a claim of unfair dismissal arising out of his dismissal on 25th September 2018. The tribunal has heard evidence from the claimant himself; and on behalf of the respondent from Ms Emily Bond, Ms Stephen Parker and Mr Ernie Messer, whose status and roles

- are set out below. In addition, the tribunal has considered a bundle of documents of some 350 pages. Although the documentary evidence is relatively substantial the issues between the parties are in fact relatively narrow, and centrally (although not exclusively) turn on the factual question of whether it was reasonably open to the disciplinary and appeal panels to have concluded that the claimant was guilty of the misconduct which underpinned the disciplinary allegations.
2. The claimant was employed as a band three healthcare assistant and was training to become a nurse. He was based at the respondent's Mason Unit where individuals who are in crisis, distressed and a risk to themselves or others can be taken in part for assessment by mental health professionals.
 3. The incident which led to the claimant dismissal occurred on 26 May 2018. A service user, referred to in these proceedings as patient X, had been brought to the unit by three police officers. She was displaying threatening and volatile behaviour. She was assessed and initially placed under a form of observation known as high level intermittent observation. Due to an incident which occurred whilst under that level of observation, it was raised to low level continuous 1:1 observation. This requires that "*The service user should be kept within eyesight of a designated one to one member of staff*". The claimant was a 1:1 trained member of staff and it is not in dispute that Staff Nurse Puddy instructed him to maintain 1:1 observation of patient X, which he did standing outside the room in which she had been placed and viewing through a window in the door. It is also not in dispute that the room had a bathroom, the door of which was not visible to the claimant from his position viewing through the door window. In addition, there were three police officers who had remained at the scene and who were standing in relatively close proximity to the claimant, but whose precise and exact positions at any point are not known.
 4. At some point whilst under the claimant's observation patient X entered the bathroom and was therefore necessarily out of the claimant's eyesight. Shortly thereafter Staff Nurse Puddy came to the room, having answered a phone call, and could not see patient X. She asked the claimant where she was, and was told she was in the bathroom. Staff Nurse Puddy entered the room and discovered patient X in the bathroom having formed a ligature from a shoelace which she had tied round her neck and which was sufficiently tight and had been in place for a long enough time that she had lost colour. There is a dispute as to whether the ligature consisted of one or two shoelaces although on balance the consensus appears to be that it was one; and secondly there is a dispute as to whether the ligature had been constructed with loops at both ends one tied round the neck and one tied round the foot, as the respondent says, or whether it had been wrapped several times around patient X's neck as the claimant asserts. Neither of these disputes is relevant to the issues in this case.

5. There was later a second incident with patient X who, whilst being observed by Staff Nurse Puddy, removed her bra apparently in a second preparatory attempt to create a ligature. This having been observed the room was entered and she was prevented from doing so.
6. As a result of the first incident the claimant was placed under investigation. The investigation was carried out by Emily Bond and related to four allegations which subsequently formed the basis of the disciplinary charges against the claimant:-
 - a) Failing to follow a direct instruction from the charge nurse by failing constantly to observe a service user presenting as a high risk to themselves and others;
 - b) Failed to ensure continual direct observation of a service user;
 - c) Previously failed to maintain required observation of a service user and allegedly repeated this;
 - d) Acted in a manner which could have caused serious harm to the service user.
7. Ms Bond carried out the investigation and reported on 1st August 2018. She had interviewed Racheal Searle Barnes (Ward Manager), Elisabeth Rawsthorn (staff Nurse) Katie-Ann Puddy (Staff Nurse) on 18th June 2018. On 19th June she interviewed the claimant. In addition, she had received a witness statement from one of the Police Officers, PC Durston. She concluded in summary that there was substantial evidence that the claimant had not maintained continuous observation on patient X, and that there was supporting evidence and a case to answer in respect of all four of the disciplinary allegations.
8. In consequence the claimant was summoned to a disciplinary hearing which was heard by a panel chaired by Mr Stephen Parker (Operations Manager) together with Rachel Esposito (Service Manager) and Naomi Adams (HR Business Partner) on 6th September 2018. The claimant, Ms Searle Barnes and Ms Puddy gave evidence. The claimant was represented by a trade union representative. At the conclusion of the hearing the panel found that all four of the allegations had been substantiated, that all four amounted to gross misconduct, and that the appropriate sanction was dismissal.
9. The claimant appealed. The appeal panel consisted of Mr Ernie Messer (Vice Chair/ Non- Executive Director and Senior Independent Director of the Trust), Ms Rebecca Eastley (Medical Director) and Jane Dudley (Deputy Director HR); and as there was a clinical element to the case Mr Phil Harding (Clinical Advisor) was appointed to provide expert assistance. Although formally the appeal is a review of the earlier decision and not a

- re-hearing the claimant was permitted to present a body of further evidence which the appeal panel considered. However, having considered both that evidence and the earlier evidence they upheld the decision to dismiss.
10. With that brief outline of the process the decision for me is whether the dismissal was or was not unfair. The parties are in agreement that in order to determine that I have to apply the well-known Burchell test
 11. The first question is whether the respondent has established a potentially fair reason for dismissal. Conduct is a potentially fair reason within the meaning of s98(2) ERA 1996, and it is not in dispute that this was the genuine reason for dismissal.
 12. In respect of the Burchell questions they are whether there was a reasonable investigation, whether reasonable conclusions as to the misconduct were drawn from that investigation, and whether dismissal was a reasonable sanction. The “range of reasonable responses” test applies to each of those questions.
 13. In summary the claimant presents two central challenges to the fairness of the dismissal. Firstly, was the conclusion of the disciplinary panel reasonably open to it? This is the “key question” (claimant’s written submissions paragraph 11); and in addition was the decision to dismiss rendered unfair by comparison with the treatment of Staff Nurse Puddy (written submissions paragraph 6)
 14. There is no criticism of the investigation from the claimant. It is self-evidently extremely thorough. The only avenue which was not pursued, was the obtaining of written evidence from the other two police officers and making any of the police officers available for cross examination. This was not however, within the gift of Ms Bond or the respondent generally. The police would only cooperate to the extent of providing the one witness statement, and the respondent was not able to take this line of enquiry any further. As a result, there is in reality no criticism of the thoroughness of the investigation.
 15. The critical issue is the conclusion of the disciplinary panel that the claimant had failed to keep continuous observation on patient X. It is common ground that if he had failed to do so he was necessarily guilty of all four of the disciplinary charges, but equally that if he had not failed to do so he was not guilty of any of them. In reality they stood or fell together on the basis that the factual conclusion underpinned all of them.
 16. The claimant’s case is that was not reasonably open to the disciplinary panel to reach that conclusion. The reasons for that are in essence, that no one had observed the process by which patient X had managed to remove the shoelace and construct and apply a ligature whilst in the bathroom.

- There is at least one explanation which is consistent with the claimant keeping continuous observation. The claimant contends that it is possible that patient X removed the shoelace whilst her feet and arms were out of his sight, which would be likely to be at a point when she was standing near the door and he could only see her face through the window. Thereafter she may have been able to construct the ligature at points when she was momentarily out of sight, or in sight but with her back to the claimant. Having done so she could very quickly after having entered the bathroom used the ligature. The claimant submits that given that there is an explanation which is consistent with his having carried out continuous observation, and given that there is no specific evidence to contradict that explanation, that it was outside the range of reasonable conclusions to conclude that he had failed to maintain continuous observation.
17. The respondent submits that there is a wealth of evidence to the contrary, and that that conclusion that he had not fell well within the range open to the disciplinary panel. The first is that they had the witness statement of PC Dunston. Whilst there are potential inconsistencies and discrepancies and whilst the claimant did not have the opportunity to challenge it, the fact is that the police officer's evidence, which is supported by two members of staff, is that she did draw to the respondent's attention both before and after the incident her belief that patient X was not being kept under continuous observation. Something must have happened to have led her to that conclusion. Secondly, they were entitled to draw the common-sense conclusion that the process of removing a shoelace, making a ligature, entering the bathroom and tying the ligature, and being there long enough for her to lose colour was a process that would take some time. It followed either that she had been in the bathroom for much longer than the claimant contended, or that at least part of the process had been carried out whilst he should have been observing her. Finally, they point to the fact that both the claimant himself and his union representative accepted in the disciplinary hearing that he had failed to keep continuous observation and had therefore committed the misconduct alleged against him.
18. In respect of the appeal the challenge is an unusual one. The allegation of unfairness arises out of the apparent generosity of allowing the claimant to present further evidence which was considered by the appeal panel. The claimant submits that although on the face of it a kindness to the claimant, this in fact worked to his disadvantage as it led the appeal panel away from the fundamental task of reviewing the evidence that was before the disciplinary panel, and asking whether the conclusions of that panel were supportable on the basis of the evidence before it. Had they carried out that task they would have been bound to have concluded that the disciplinary panel could not reasonably have reached the conclusion that it did as to the claimant failing to keep continuous observation on patient X, and therefore could not have reasonably concluded that he was guilty of the four disciplinary allegations.

19. In terms of the sanction the claimant submits that it was too harsh in that the respondent failed to consider alternative lesser sanctions, such as permanently appointing him to administrative duties and failing to take into account the mitigation, in particular his anxiety and concern in respect of patients such as patient X.
20. In addition, the claimant points to what he says is the inconsistency between his treatment and that of Staff Nurse Puddy in respect of the second incident. The claimant points to the fact that for an allegation of an incident in which patient X was able to construct a ligature and attempt to use it, he was disciplined and dismissed; whereas in relation to a very similar incident afterwards there was no disciplinary investigation or sanction imposed at all. Accordingly, the claimant submits that the stark difference between the treatment of the two incidents renders the disciplinary sanction was unfair.
21. The respondent submits that taken on its own terms the sanction fell well within that open to the disciplinary panel. If the conclusion that the claimant had failed to keep patient X under continuous observation was reasonably open to them, it followed that it fell within the definition of gross misconduct within a number of the respondent's policies (which is not in dispute), and was a fundamental breach of the claimant's obligations in that the failure to do so placed a service user's life in danger. It could not in reality have been a more fundamental breach of the obligations he owed. There were as a matter of fact no permanent administrative roles to which he could have been appointed, and they cannot be obliged to create or appoint someone to a role simply to avoid dismissal from their own job for gross misconduct.
22. In terms of the comparison the respondent submits that the second incident is precisely the opposite of the first and not one that is comparable at all. In the second incident whilst Staff Nurse Puddy was keeping observation on patient X she was seen to remove her bra and throw it into the bathroom, which prompted her to enter the room and prevent patient X from harming herself. This is the exact opposite of the claimant's case where none of the steps that led to patient X seeking to harm herself were observed at all. In reality Staff Nurse Puddy's observation and prompt intervention provides the example of exactly how the first incident should have been dealt with and highlights the deficiencies in the claimant's observation. The assertion that these are comparable episodes for disciplinary purposes is, submits the respondent, self-evidently false.
23. My conclusions are that is effectively conceded that the investigation fell well within the range reasonably open to the respondent, and in reality there is little criticism that could be made of it. On any analysis it fell within the range reasonably open to the respondent.

24. Similarly, in my judgment whilst the claimant's explanation of how patient X could have constructed a ligature was arguably consistent with his having kept continuous observation, that was not the only conclusion that could be drawn. The conclusion the disciplinary panel drew that the events were inconsistent with the claimant having kept continuous observation was in my judgement a rational one reasonably open to them on the evidence before them.

25. In terms of sanction, given the seriousness of the potential consequences of the failure to carry out the duties, it appears to me that the sanction of dismissal fell well within the range reasonably open to them. I am not persuaded that there is any real similarity, and certainly not sufficient similarity between the first and second incident for that to render the dismissal unfair.

26. Accordingly, in my judgement the claimant's claim for unfair dismissal must be dismissed.

EMPLOYMENT JUDGE CADNEY

Dated: 21 October 2019