



EMPLOYMENT TRIBUNALS

Claimant: Mr P Greene

Respondent: Good Shepherd Services

Heard at: Birmingham **On:** 24 October 2019
Reserved on 25 October 2019

Before: Employment Judge Hindmarch

Representation

Claimant: In Person

Respondent: Mr J Bromige (Counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.

REASONS

1. By an ET1 filed on 24 January 2019, and following a period of early conciliation from 4 December 2018 to 17 January 2019, the Claimant bought a complaint of unfair dismissal. By an ET3 filed on 6 March 2019 the Respondent indicated its intention to defend the claim.
2. The case came before me for a 2 day hearing on 24 and 25 October 2019.
3. The Claimant represented himself and the Respondent was represented by Mr Bromige of counsel. The Claimant called 2 witnesses, Mr Evans, support worker for the Respondent, and Mr Burns, also an employee of the Respondent. He also handed up a number of character witness statements. I shall only refer to those statements where necessary. The Respondent called 2 witnesses Mr Hayden, Operation Manager and Ms

Culpan, Self-employed HR Consultant. The Respondent tendered a witness statement from Ms Sykes who was unable to attend. There was an agreed bundle. At the outset of the hearing the Tribunal assisted the Claimant with the photocopying of sufficient copies of his statements.

4. At the outset of the hearing it was agreed the correct name of the Respondent was Good Shepherd Services, a charity.
5. Again at the outset I identified the issues with the parties as follows:-
 - a. Given the Respondent accepted dismissing the Claimant it was for the Respondent to show the reason for dismissal. The Respondent said the Claimant was dismissed for gross misconduct. Conduct is a potentially fair reason for dismissal.
 - b. I would need to determine whether the dismissal was procedurally fair and whether it was within the band of reasonable responses.
 - c. There were arguments by the Respondent as to 'Polkey' so I would need to determine, if the dismissal was procedurally unfair, what percentage chance there was of the Claimant being fairly dismissed in any event.
 - d. I might also need to consider whether there was contributory fault on the part of the Claimant.
6. On the first day I heard all of the evidence and submissions. We discussed whether the parties should return on day 2 for oral Judgment and, if appropriate, remedy. That was the preference of the Respondent. The Claimant however wanted written reasons in any event and did not want to take further unpaid time off work. After discussion I agreed to reserve Judgment and send it to the parties.

Findings of Fact

7. The Respondent is a charitable enterprise based in Wolverhampton providing support services and food to vulnerable service users. At the time of the Claimant's employment the Respondent had 6 employees.
8. The Claimant commenced employment with the Respondent on 4 January 2016. He was issued with a document entitled 'Main Terms and Conditions of Employment' which he signed on 4th January 2016. A copy appears at pages 86-88 of the bundle. His job titled in this document was 'Programme Support Worker'.

9. Initially it appears the Claimant was line managed by Brother Steven, a member of the religious organisation that funds the Respondent and a volunteer. In April 2018 however the Respondent appointed an employed manager Mr Hayden, who took the title Operations Manager. Mr Hayden took over the review of the Respondents policies, in conjunction with an HR adviser, and in July 2018 a new staff Handbook was introduced.
10. The Claimant accepts he was aware of the introduction of the new staff handbook but that he did not read it. At pages 92A-92C are minutes of a 'Staff Team Meeting' attended by the Claimant on 20 August 2018 in which it is recorded '*Risk assessments, handbooks and new policies... there is a new staff handbook which summarises the main policies and procedures. An electronic copy is attached with these minutes and a paper copy has been printed for each paid member of staff in (Mr Hayden's office)*'. At pages 88B is an email from Mr Hayden to 'All staff' dated 21 August 2018 with attachment '20.08.19 Staff meeting minutes doc; Employee Handbook VI doc' and stating 'Please see attached minutes from yesterday's meeting. Also have attached the employee handbook there is a printed copy for all paid staff members in my office'.
11. The Staff Handbook contained a section headed 'Professional Boundaries' (page 48-49 of the bundle) which stated:

'The Good Shepherd recognises that our workers need to establish a rapport with service users. It is important that all time you are maintaining appropriate boundaries between yourself and service users, their relatives and carers. It is essential that all interactions between service users and workers are viewed and maintained in terms of a professional relationship.

Under no circumstances should you form intimate personal or sexual relationships with service users. Workers should not behave in a way either inside or outside of the workplace which may call into question their professional conduct or endanger the confidence service users, relatives and carers place in The Good Shepherd. Examples of inappropriate actions or relationships include:-

- Breaching sexual boundaries ... forging a sexual relationship with a service user.*
- Any other kind of personal relationship.*
- Friendships including friendships via texting the internet and social networking site.*
- Divulging personal details to service users about themselves... including personal details.*

- *Entering into a financial relationship, this includes the setting up of business/organisations.*

Failure to maintain professional boundaries with service users will be managed through the Disciplinary Policy.'

12. On 2 October 2018 Mr Hayden received an email from a Minister, effectively the Respondents landlord, raising a concern that the Claimant had been seen giving stock to a cleaner. Mr Hayden agreed to investigate. The email exchange is at page 88C-D of the bundle. Mr Hayden discussed his need to investigate this matter with a colleague who informed him that the Claimant had also been paying a service user (X) to work on his (the Claimant's) personal business providing photo booths for parties.

13. It seems that X became a service user of the Respondent in 2017, before Mr Hayden was employed. X was described initially as very vulnerable – alcoholic, homeless, unable to work in the UK and possibly suicidal. At some point X was placed on a service user volunteer programme which is a programme run by the Respondent to assist people to become fit for work. Despite being on this programme X remained a service user and, at the time Mr Hayden received the allegation against the Claimant, X had not been on the programme for 2 months. The Claimant agreed X was vulnerable but says he was asked by Brother Steven to work closely with him.

14. On 4 October 2018 Mr Hayden met with the Claimant to put the allegations to him. Mr Hayden wrote up his detailed notes of that meeting, some of which are said to be verbatim, directly after that meeting. The notes appear at pages 89-90 of the bundle.

15. As regards the allegations made by the Minister the Claimant accepted giving food/stock to the cleaner. As regards X the notes record:-

'I then asked Paul what his relationship was with X a service user as I had reports Paul had paid him to work on Paul's business outside of work. Paul admitted that he has paid X "to help out on his business on weekends providing photo booths for parties". Paul stated he did this as he wanted to "help X financially but didn't want to give him a handout". I explained to Paul professional boundaries and the expectations on staff and also the implications of his business as X does not have the right to work in this UK. I explained this is a clear breach of professional boundaries and that this is not acceptable under (the Respondent's) policy. Paul then stated he has picked up and bought X to the centre and

taken him home at the end of his shift during his own time in his personal car. I explained this again a breach of professional boundaries...'

16. Following the meeting Mr Hayden spoke to the Respondent's HR Adviser Ms Culpan and decided to invite the Claimant to a disciplinary hearing to address both matters. On 8 October 2018 Mr Hayden handed the Claimant an invitation to a disciplinary hearing (page 91) with which enclosed his notes of the meeting between them on 4 October 2018 and which contained the following 2 allegations.

"1) The issue regarding misconduct with professional boundaries. It is alleged that you have not adhered to rules surrounding service users and have breached the policies around conduct and professional boundaries. This includes you bringing in a certain service user when they should not have been on the premises, using your own vehicle for this, meeting with the service user outside of work and entering into a financial relationship with them.

2) The issue regarding misconduct with company property which could be deemed as theft, and also a breach of trust and confidence. It is alleged that you have breached the rules in relation to company property. This includes gifting items to another person without prior permission from the organisation, and without the authority to do so."

The letter confirmed that the Claimant should read the notes of the meeting of the 4 October 2018 '*to check they are an accurate reflection of the discussion*' and warned '*if the allegations are deemed serious enough*' one outcome could be dismissal.

17. The Claimant requested a postponement of the disciplinary hearing which was granted and it was rescheduled to the 16 October 2018. The Claimant passed no comment on the notes of 4 October 2018 in advance of the disciplinary hearing.
18. The disciplinary hearing took place on 16 October 2018. The Claimant attended and was accompanied by Brother Steven. Mr Hayden acted as Chair and decision maker and Ms Culpan was note-taker. Ms Culpan's notes are at pages 93-96.
19. As regards to the allegations concerning service user X, at the disciplinary hearing the notes record '*PG said he did not pay him, X did some work to help out his wife with PG's business. PG had given him money, but PG would give other people money if he saw them in the street begging. PG stated that he did not pay X to work*'. This was different to what was recorded in the notes of the meeting on 4 October 2018.

20. The notes of the disciplinary hearing record that the Claimant accepted giving X lifts '*on a number of occasions*' and that he had driven X to his (the Claimants) wife's church. It was also noted '*PG said that a lot of this had happened before TH (Mr Hayden) had joined*'. Brother Steven was noted as stating that he had asked the Claimant to '*reach out to X*'.
21. As regards the second allegation the Claimant did not believe he had done anything wrong and did not believe he had to have permission to give out items.
22. After the hearing Mr Hayden considered matters. He determined to uphold allegation 1 but not allegation 2. In reaching his decision he spoke to the local authority for guidance. (The local authority commission the Respondent's services). He was advised that allegation 1 could amount (as regards to paying X for work) to modern day slavery and that it was reportable to the procurement team.
23. In reaching his decision on allegation 1, Mr Hayden considered the Claimant should have been aware of the professional boundaries rules, being present at a staff meeting in August 2018 when they were discussed and the handbook being emailed to him thereafter. In Mr Hayden's view the Claimants role was not to conduct 121 work with service users, that was the role of other employees. Mr Hayden was concerned that the Claimants attitude to the allegations demonstrated a lack of understanding of the rules and that there was a risk of repetition. There was no remorse shown. Mr Hayden considered the Claimant had changed his story between the meeting on 4 October 2018 and the disciplinary hearing as regards to payment for work.
24. In reaching his decision on allegation 2 Mr Hayden accepted the Claimant had been given permission previously to give food to the cleaner.
25. Mr Hayden determined that allegation 1 was made out and amounted to gross misconduct and that summary dismissal should follow. He met with the Claimant on 18 October 2018 to explain his decision and handed over a letter of the same date (pages 97-98) which confirmed as follows:-

"1) Allegations

.....

Decisions

This is a serious allegation which could have severe implications. I have taken into account your explanation and I have obtained advice from the Commissioner. You stated at the hearing that it was not a serious matter and it was not like you were having a relationship with

a service user, therefore you are aware of professional boundaries. You do not believe that you have acted in any manner but to help someone, however there are certain legislation and rules that we must adhere to, to safeguard both service users and ourselves. You gave acted in a manner that has broken those rules and I believe that your actions constitute gross misconduct. I therefore have no other option but to dismiss you on the grounds of breaching policies around conduct, safeguarding and professional boundaries’.

26. As regards to allegation 2 this was not upheld and was dismissed, The letter enclosed Ms Culpan’s notes of the disciplinary hearing and again the Claimant was invited to indicate if he did not agree with them. He did not do so. The Claimant was offered the right of appeal.

27. The Claimant appealed by letter dated 22 October 2018, page 102 of the bundle. He gave 6 grounds of appeal ‘1. *Unfair dismissal*, 2. *Inequality of treatment*, 3. *Discrimination*, 4. *Severity of sanction*, 5. *Grey areas – interpretation of Programme Worker or Service user* and 6. *Mitigating circumstances’.*

28. The Respondent initially considered that Brother Robert, a member of its board of trustees should hear the appeal. It then decided against this as Brother Robert was the supervisor to Mr Hayden and so had some knowledge of the allegations. The Respondent therefore engaged an independent HR Consultant Ms Sykes to hear the appeal.

29. On 25 October 2018 the Respondent formally referred the Claimants conduct to the City of Wolverhampton Council.

30. The appeal hearing took place on 12 November 2018. The minutes taken by Nigel Tinsley, Chair of the Respondent, are at pages 117B – 117C. Ms Sykes was present as decision maker and the Claimant was accompanied by a friend, Mr Carter. The minutes record the following:-

“PG responded that he had given X a lift to church when he was in distress, and had given him the occasional lift to work, as they lived in the same area. He had given him small amounts of money to buy a drink or a sandwich, but nothing as a reward for work... PGs wife had given X some work to build up his self-esteem’...

It was noted that the Claimant argued ‘other people gave clients lifts’. This was confirmed by the Claimants witness Mr Burns, who is employed by the Respondent as a Programme Facilitator and whose role is to set up programmes for homeless people, Mr Burns confirmation however was in the context of driving service users as part of the working day.

31. The Claimant filed his ET1 on 24 January 2019. In the particulars he stated *'Two incidents have been cited, One involving me giving someone some chicken, the other involving me giving a service user a lift'*.
32. The 2 key witnesses before me were the Claimant and Mr Hayden. On balance I preferred the evidence of Mr Hayden for the following reasons:-
- a. He took relatively contemporaneous notes of the meeting with the Claimant on 4 October 2018 and he shared these notes with the Claimant on 8 October 2018 inviting him to challenge any discrepancies. These notes record verbatim comments in part and I am of the view they are an accurate account of the conversation. The Claimant appeared to suggest Mr Hayden may have had some motive for making misleading notes, however this was not put to him.
 - b. In the notes the Claimant accepts giving X paid work. He later changed this to effectively X helping his wife out with the business and the Claimant giving X just small amounts of money here and there. By the time the Claimant filed the ET1 he made no mention of this matter. Instead reducing the whole allegation to *'giving a service user a lift'*. In cross-examination he appeared to suggest any work done for his wife by X, was in fact work organised by his wife's Church Minister. The Claimant had handed up a character witness statement from that Minister which made no mention whatsoever of this.
 - c. The Claimant repeatedly accused the Respondent of referring to X as 'a service user' to suit their case. On any objective assessment X was a service user and was a vulnerable person. The Claimant's attempts to argue otherwise are disingenuous. The Claimant said in cross-examination his giving money to X was *'nothing different than a beggar in the street'*. This clearly shows his unwillingness to accept the gravity of the behaviour and the lack of understanding. A *'beggar in the street'* is not a service user of the Respondent and clearly any employee of the Respondent must treat the two quite differently.
 - d. The minutes of the disciplinary hearing record the Claimant as saying 'a lot of this happened before TH had joined'. Of course this does not mean it was not ongoing and Mr Hayden and Ms Culpan believed it was. In cross-examination the Claimant declared it had all in fact happened in 2017, he had told Ms Skykes this and that she was shocked and stated 'they (the Respondent) had led her to believe it was happening now'.

Nowhere had this been asserted previously. It does not appear in the appeal minutes, in the ET1 or in the Claimant's witness statement. The Claimant was accompanied at the appeal hearing by Mr Carter. Whilst the Claimant produced a number of witnesses Mr Carter was not one of them. One has to conclude this was an incidence of the Claimant embellishing his evidence.

- e. In summary the Claimants evidence was unconvincing in parts and he was clearly seeking to downplay his behaviour. I have no doubt the Claimant believed at the time he was acting in the service user's best interests but that is not what the case is about.

Submissions

33. I heard submissions firstly from Mr Bromige and then from the Claimant.

34. Mr Bromige referred me to the familiar cases of BHS v Burchell, Hitt v Sainsburys Supermarkets and Taylor v OCS Group all of which I will return to in my findings. He reminded me it was not for the Tribunal to decide if the Claimant was guilty of misconduct, rather it was for me to consider whether the employer reasonably believed he was. He reminded me it was not for the Tribunal to substitute its view for that of a reasonable employer.

35. The Claimant had challenged the fairness of the investigation. Mr Bromige asked me to find it was as much investigation as was necessary and was reasonable given the Claimants early admissions at the meeting on 4 October 2018 and given the size and administrative resources of the Respondents undertaking. In Mr Bromige's submissions he asked me to find that Mr Hayden had a reasonable belief on reasonable grounds in the Claimant's guilt. He also contended there was no inherent unfairness in Mr Hayden acting as both investigator and dismissing officer. Mr Hayden used outside HR support and the appeal was conducted by an independent person outside of the Respondent organisation.

36. If I was against the Respondent on the fairness of the dismissal Mr Bromige invited me to make a 100% deduction for contributory fault based on his submission that the Claimants behavior was culpable and blameworthy (BCC v Nelson).

37. Finally on the 'Polkey' issue if I found the dismissal was procedurally unfair in any way, and Mr Bromige contended the only unfairness could

be Mr Hayden acting as both Investigator and Dismissing Officer, that unfairness would have made 'no difference' and if another person was involved they would have come to the same conclusion; a 100% likelihood of dismissal.

38. In Mr Greene's submissions he sought to contrast the ethos of the Respondent when Brother Steven was 'in charge' compared to that of Mr Hayden. He contended previous procedure, before the introduction of the July 2018 staff handbook, did not outlaw the giving of money or lifts to service users. He contended he had never been given any training on safeguarding or professional boundaries, He felt the sanction was too severe – what Mr Hayden should have done was draw his attention to the new rules and offer some training. He felt the Respondent had 'manipulated' what he had admitted to. He argued he had showed compassion and only acted to help people and that he had been unfairly singled out when other people had been treated more leniently.

The Law

39. S98 of the Employment Rights Act 1996 provides as follows:

“(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 a reason falling with subsection (2)*

(2) A reason falls within this subsection if it –

- (b) relates to the conduct of the employee*

(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 resource 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.”*

40. The case of British Home Store Ltd v Burchell (1978) IRLR 379, established that when considering the statutory test the Tribunal should consider whether the employer formed a reasonable belief or reasonable grounds after reasonable investigation. The Tribunal has to find whether the employer's decision to dismiss fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.
41. The case of Sainsbury's Supermarkets v Hitt (2003) IRLR 23 held that the range of reasonable responses test applies both to the decision to dismiss and to the investigation. The tribunal must not substitute its own view for that of a reasonable employer.
42. Taylor v OCS Group Limited (2006) IRLE 613(CA) established that procedural issues should not be considered 'in a vacuum' but instead should be considered along with the reason for dismissal, when assessing whether the employer acted reasonably in treating that reason as a sufficient one for dismissal.

Findings

43. It is for the Respondent to show that conduct was the reason for dismissal. The nature of the Respondent's business is key – it provides services to vulnerable service users. The size of its business is also relevant – it had a very small number of employees, a small amount of administrative resource and it was a charitable concern. I have no doubt that prior to Mr Hayden taking up position policies may have been more lax and the Claimant's relationship with X was already in place. Nevertheless in July 2018 a new handbook with a robust policy on 'professional boundaries' was introduced. I also have no doubt this was brought to the Claimant's attention. Had the Claimant read the handbook, which I find he ought reasonably to have done, he would have known the Respondent's view on his relationship with X and that it was prohibited and viewed as a conduct issue.
44. I prefer the evidence of the Respondent, not least because of the contemporaneous note and the Claimant's failure to challenge the accuracy thereof. The account given by the Claimant to Mr Hayden on the 4 October 2018 involved the Claimant's admission that he had paid X to help out with his business and that he had given him lifts. This was a clear breach of the aforementioned policy within the handbook and the Respondent was entitled to conduct a disciplinary hearing. In light of the Claimant's admissions the Respondent was able to conclude he had committed 'misconduct' and demonstrated that as the reason for

dismissal. The decision to dismiss was within the range of reasonable responses open to this employer. I do not take issue with any alleged procedural failings. Given the size and administrative resources available to it, and given the early admissions made by the Claimant, Mr Hayden was able both to investigate and conduct the disciplinary hearing and was, to all intents and purposes, 'sense-checked' by Ms Culpan. The Respondent had matters viewed afresh at appeal by someone entirely independent.

45. Given my findings it was not necessary for me to consider matters of 'Polkey' and/or contributory fault.

46. For these reasons the Claim must fail

Employment Judge **Hindmarch**

Date: 8 November 2019