



EMPLOYMENT TRIBUNALS

Claimant: Mr D Koshy

Respondent: Glebe Housing Association

Heard at: Croydon **On:** 13/3/2020

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Ms K Moss - counsel

LIABILITY JUDGMENT

It is the Judgment of the Tribunal that the claimant's claim fails and is dismissed.

REASONS

1. On 9/10/2019 the claimant presented a claim of unfair dismissal, which the respondent resisted. He was employed as a Health Care Assistant (HCA) from 29/11/2012 until his summary dismissal on 17/6/2019.
2. The respondent is a non-profit organisation providing sheltered accommodation for older people and a 47-bed nursing home (over two

- floors) providing 24-hour care. The respondent employs 76 people of which 33 are HCAs.
3. The Tribunal heard evidence from the claimant and for the respondent; from Mrs Dawson, the registered manager at the care home in West Wickham and from Mrs Goan the CEO. The Tribunal had before it a bundle of approximately 209-pages. Only the pages in the bundle referred to were considered.
 4. The relevant law is s. 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 a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
 - (2) A reason falls within this subsection if it—
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
 - (3) In subsection (2)(a)—
 - (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
 - (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he 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.

5. The respondent relies upon the potentially fair reason of conduct. In a conduct dismissal, the relevant authority is that of British Home Stores v Burchell 1980 ICR 303, the respondent must show that:

it believed the employee to be guilty of misconduct;

it had in mind reasonable grounds upon which to sustain that belief;
and

at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

6. The employer does not therefore have to have conclusive or direct proof of the employee's misconduct. It only needs to have a genuine and reasonable belief, reasonably tested. The burden of proof is that the respondent must establish the first of the three aspects of the test and thereafter is neutral.
7. When assessing whether or not the Burchill test has been met, the Tribunal must ask itself whether what occurred fell within the 'range of reasonable responses' of a reasonable employer. In J Sainsbury plc v Hitt 2001 ICR 111 the Court of Appeal held that the range of reasonable responses test applies in a conduct case to both the decision to dismiss and the procedure by which that decision was reached.
8. The chronology of events is that in early 2019 the respondent was investigating a complaint of neglect which involved different employees, which caused it to view CCTV footage. This footage showed that staff were not complying with the obligations to the residents. There was a delay to the investigation, which was caused by annual leave, absence and the amount of material and the numbers of staff involved.
9. On 30/4/2019 the claimant attended an investigation meeting. There were two further meetings on 10/5/2019 (at which the claimant was suspended) and 16/5/2019. On 12/6/2019 the claimant attended a disciplinary meeting conducted by Mrs Dawson. The claimant was dismissed by letter dated 17/6/2019. He appealed against that decision on 25/6/2019 and the

appeal meeting was held on 17/7/2019. Mrs Goan issued the appeal outcome on 29/8/2019 and she upheld Mrs Dawson's decision to dismiss.

10. The allegations were that the claimant had:

neglected a resident's basic care and needs during the night of 27-28/1/2019;

falsified care records; and

failed to carry out management instructions that there would be turning on a 2-hourly basis with appropriate checks.

11. The claimant was caring for a resident (SF) who required turning or repositioning every two (or at least every two to three) hours. He was also supposed to maintain a daily repositioning record.

12. The repositioning record showed that SF had been repositioned at 1:12 by a HCA SA, assisted by BA, then had been repositioned by SA assisted they the claimant at 3:00 and again at 5:45 by SA assisted by the claimant.

13. There was an audit log, which recorded the claimant had used the respondent's electronic system (called CareDocs). The claimant attended a training course on this system on 24/2/2015 (page 44). The audit system recorded the claimant had logged onto the system at 22:30 on the 27/1/2019 and logged off at 23:03. He also logged on on the 28/1/2019 at 7:28 and off at 7:42 (pages 196-198).

14. The Event Edit Log, showed the entry for SF made on 28/1/2019 at 7:34 by the claimant for SF:

'Time: 3:00 Position:Right side, Equipment used:slide sheet,
Comments: assisted by [the claimant]

Time 5:45 Position:Left side, Equipment used:slide sheet,
comments: assisted by [the claimant]'

15. The record of the CCTV footage showed that the claimant entered SF's room at 6:12:14 and left at 6:15:22. The claimant suggested that the CCTV could not record him entering into the room as it was out of shot. This does not explain how it recorded the claimant entering the room at 6:12 and also other members of staff entering the room:

SA at 1:08:39;
IJ at 2:10:24;

BA at 2:16:54; and
IJ at 4:17:38.

(pages 127-129)

16. The respondent's case was that the claimant knew SF had to be turned and checked upon every 2 (or so, depending upon other resident's requirements) hours. He knew the records needed to be kept and that they needed to be accurate. The CCTV footage, shows that contrary to the record, that there was no turn at 3:00 or 5:45. The event log shows clearly that it was the claimant who made those entries to the log. This was a false record. Throughout the disciplinary process (including three investigation meetings) the claimant gave no apology and the respondent had no confidence that he acknowledged his wrongdoing and that it would not be repeated.
17. The respondent submitted that the procedure does not have to be perfect, it just has to be reasonable. In respect of the claimant's excuses or explanation, the respondent said that it was not until the end of the third investigation meeting that the claimant claimed he had recorded what he had been told on CareDocs by the two other HCAs (SA and BA). Upon further investigation of those two, both denied they had told the claimant they had turned SF as per his record. Contrary to that assertion, the claimant had said on a number of times in three meetings that he did not complete the care record unless he had carried out the care personally. In any event, if it was the other two HCAs who had carried out the care for SF, that was still incorrectly recorded by the claimant, as he had said he had assisted in turning SF.
18. The claimant also said that he was focusing on the end of life care for the resident in room 209 and that he trusted others to look after SF. In fact the CCTV footage shows he spent 12 seconds in room 209.
19. The claimant also said that there was insufficient cover in the home on the night in question. The respondent aimed to have one nurse on each floor and one HCA. On the 27/1/2019 there was only one nurse (this is not in breach of any regulation) who worked on the ground floor with one HCA. There were three experienced HCAs allocated to the first floor. There was not therefore insufficient cover.
20. The claimant suggested he had responsibility for writing up care records and that he trusted his colleagues to carry out the care. The audit log shows that during a 12-hour night shift, he spent 45-minutes logged onto write up records.

21. The claimant suggested that the Event Edit Log (page 194) had also been edited. The respondent had the evidence which it had collated as a result of its investigation and there was no reason to question the integrity of the Log.
22. Finally, the claimant's claim that lack of training caused the misconduct on the night in question did not bare scrutiny. The claimant had had training on using the CareDocs system and had been doing so for the best part of four years without complaint. No refresher training was needed to know not to falsify the records and that was irrelevant to the level of care for SF.

Conclusions

23. The respondent had followed the Acas Code and the investigation and dismissal was more than fair. There had been three investigation meetings and many opportunities for the claimant to put his case across. He was sent all of the evidence in advance of the disciplinary hearing. He was accompanied to the meetings and informed of all the potential outcomes. At each stage an independent manager conducted the process.
24. The only 'flaw' was the length of time the process took; however this was explained. In part, it was due to absences, including the claimant's on a 22-day holiday. In part it was due to the comprehensive investigation and the amount of material which the respondent needed to consider. There was more than one investigation ongoing and other allegations of misconduct against other staff. Although any delay was not ideal, that did not render the decision to dismiss unfair.
25. The respondent submitted that the decision to dismiss was clearly within the range of reasonable responses as the claimant had falsified care records and dishonestly failed to provide basic care which the respondent promises to all its residents.
26. Based upon the evidence presented and upon which the respondent relies, the Tribunal concludes that the respondent did have a reasonable belief in: the claimant's neglect of SF's care during the nightshift on the 27/1/2019; the falsification of the care records; and that he failed to follow management instructions to carry out two-hourly checks and turns of SF. It had a reasonable ground for that belief and it had carried out a reasonable investigation as was warranted in the circumstances.
27. The decision to dismiss, bearing in mind that the respondent does not have to prove the claimant committed the misconduct in question; (it only has to show that it had a reasonable belief, based upon reasonable grounds and that it carried out as much investigation into the matter as the

circumstances warranted) was within the range of reasonable responses which a reasonable employer could reach. This is a regulated industry and the claimant was an experienced HCA having worked for the respondent since 2012. There was evidence which resulted in a reasonable belief of misconduct and the subsequent investigation to warrant disciplinary action. There was neglect, falsification of records and a failure to follow management instructions. A reasonable employer could dismiss in these circumstances. The dismissal was therefore fair, the claimant's claim fails and is therefore dismissed.

28. As a result, the remedy hearing provisionally listed for 18/5/2020 is vacated and will not now take place.

16/3/2020

Employment Judge Wright