EMPLOYMENT TRIBUNALS

Claimant: **Mr Jared Holloway**

Respondent: **Welsh Ambulance Services NHS Trust**

Heard at: **Cardiff** **On: 3 – 5 March 2020**

Before: **Employment Judge S Moore (sitting alone)**

Representation:
Claimant: Mr G Bryan, lay representative
Respondent: Mr J Walters, Counsel

JUDGMENT having been sent to the parties on 6 March 2020 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background and introduction

1. The ET1 was presented on 21 September 2019 and the Claimant brought a claim of unfair dismissal. There was an agreed bundle of 374 pages. I heard witness evidence from the Claimant and Mr Bryan (the Claimant's former union representative who also represented him at the hearing). The Respondent called Mr James Gough (Clinical Team leader, Investigating Officer), Ms A Steele (Human Resources) and Mr P Taylor (General manager, Disciplinary Officer) and Mr M Harris (Director and Appeal Officer).

Issues

2. The issues to be determined were discussed and explained to the parties at the outset of the hearing. These were as follows:

Unfair Dismissal – S98 Employment Rights Act 1996

a) Has the Respondent shown the reason for dismissal?

b) Was that reason a potentially fair reason?

c) Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

d) Was the dismissal within the range of reasonable responses? It was explained to the claimant that the Tribunal must not substitute their view for that of the employer.

e) Was there a failure to comply with the ACAS code?

f) Did the Claimant contribute to his own dismissal?

The Law

3. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996.

4. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303,** the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

5. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439.** The test was formulated in the following terms:

- *"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.*

- *the starting point should always be the words of [s 98(4)] themselves;*

- *in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*

- *in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;*

- *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 Industrial Tribunal, as an industrial jury, 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'.*

6. In assessing whether the Claimant's conduct amounted to gross misconduct that conduct must be deliberate wrongdoing or gross negligence. In the case of deliberate wrongdoing it must amount for wilful repudiation of the express or implied term of the contract (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood)**.

7. If the dismissal is procedurally unfair the Tribunal must assess the percentage chance of the Claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503**.

8. The Tribunal must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

9. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal was such that it would be just and

equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. S123 (6) provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

10. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Findings of Fact

11. The Claimant was employed as an Ambulance Care Assistant. This involved driving an equipped PCS ambulance or other vehicle to carry out non urgent and non-critical planned patient journeys. He would transport patients with a variety of conditions, working alone. These included patients who may have been vulnerable and had challenging behaviour. He commenced his employment on 1 December 2014. He was summarily dismissed on 30 May 2019.

12. Until the two matters that resulted in a final written warning and a subsequent dismissal the Claimant had an unblemished and exemplary record and had been highly regarded employee. He received a commendation in 2015 for his attendance at a road traffic accident.

13. On 18 December 2016 an incident took place at the Claimant's home with his partner resulting in the Claimant being charged and cautioned for common assault. The Claimant admitted to "shoving" his partner who has bipolar. The Claimant informed his Operational Team Leader, Mr Thomas on 20 December 2016 and he was subsequently suspended. He was offered access to Care First which is a counselling service operated by the Respondent by Ms Sian Bright, but this was declined by the Claimant. He was also referred to Occupational Health in February 2017 and this

consisted of a referral to discuss his ability to take part in disciplinary proceedings.

14. The Respondent conducted an investigation and at a disciplinary hearing on 8 March 2017 he was given a final written warning which would remain live for 2 years. The Disciplinary Officer found that the allegation amounted to gross misconduct, but effectively commuted it to a final written warning having taken into account the mitigation offered by the Claimant. Following this event the Claimant returned to work and continued in his full duties often working in excess of 50 hours a week.

15. On 11 May 2018 there was another incident that took place in the Claimant's home and this led to the Claimant admitting that he had slapped his partner and he was charged with assault. The Claimant's witness statement stated that he "knew the job was gone" or words to that effect. He also accepted under cross-examination that it was "odds on" that he was going to be dismissed.

16. The Claimant reported this to Mr Thomas on 12 May 2018 and on 21 May 2018 he was sent a date to appear in court of 13 June 2018 at which point Mr Thomas, having been notified of this fact, reported this to Mr Matthews who was the Operations Manager. On 12 June 2018 Mr Matthews wrote to the Claimant advising that he must attend for an initial assessment which was an initial investigatory type meeting under the All Wales Disciplinary Procedure.

17. Between 12 May 2018 and 27 May 2018 the Claimant continued to work in his role but he was subsequently signed off sick with anxiety. On 13 June 2018 he attended court and pleaded guilty and was sentenced to 12 months' probation with a community order and ordered to pay costs and a fine of £85 respectively. He attended a meeting on 19 June 2018 and was suspended from his normal duties by Mr Matthews. He was however redeployed to work in other duties that did not involve frontline care duties and he remained in this role until his subsequent dismissal almost a year later.

18. After returning from a period of sick leave, on 4 September 2018 the claimant attended an investigation meeting with Mr Gough who had been appointed as the Investigating Officer. The terms of the reference for the investigation, as well as the Respondent's disciplinary procedure, provide that such investigation should be conducted in a timely manner. This did not happen. There were a number of explanations for the delay that resulted in the investigation taking some 9 months, namely that Mr Gough was away on training in August 2018 and also that December 2018 had been difficult operationally. Notwithstanding these explanations the delay was significant and there was no satisfactory explanation as to why the Respondent took

the time they did to investigate this relatively straightforward matter insofar as there was not a dispute that the Claimant had committed the assault.

19. After the interview with the Claimant on 4 September 2018, steps were taken to interview Mr Matthews but he went on long term sick. Mr Gough also interviewed Mr Thomas. The Claimant informed Mr Gough that he had had a diagnosis of PTSD relating to childhood events and Mr Gough asked the Claimant specifically if he had received any welfare support. Mr Gough asked if he had had involvement with Occupational Health and the Claimant confirmed that he had spoken to them and there was nothing much they could do. Mr Gough also specifically asked the Claimant if he required any more support at that time to which the Claimant replied "no not really, there is nothing more they can do. It's my own doing."

20. The HR Representative also explained that it was about the Claimant's welfare and that he could also be referred to the counselling services through the charity called TASC (The Ambulance Service Charity).

21. Mr Gough informed the Claimant on 10 December 2018 that he was awaiting further documentation and requested information from the court regards the Claimant's sentencing. The investigation report was not completed until 27 March 2019. The Claimant was invited to attend a disciplinary hearing in a letter of 18 April 2019. The allegations put to the Claimant were as follows:

"That on 11 May 2018 you were charged with an assault that took place that day."

22. The Claimant was informed that the allegation if proven could constitute potential gross misconduct and could result in summary dismissal. The letter also referred to misconduct being failure to meet required standards of performance and behaviour as expected within the employee's role and responsibilities, serious misconduct quoting personal behaviour conducted inside or outside work that results in bringing the NHS organisation or any of its employees into disrepute and serious failure to meet required standards of performance and behaviour as expected within the employee's roles and responsibilities.

23. Ms Steele emailed HR colleagues the day before the disciplinary hearing on 29 May 2019 to ask if there were any similar cases that they had been involved in and she was informed that there had been a dismissal of a colleague in North Wales in similar circumstances.

24. The Disciplinary Hearing took place on 30 May 2019, the Claimant was able to present two character references that he had received from Mr Thomas and Mr Miftari. He attended the hearing accompanied by his Trade Union

Representative, Mr Bryan. Mr Bryan made representations on the Claimant's behalf which were in summary, that there was no evidence that the Claimant had brought the service into disrepute, it was not assault within the definition of policy as the Claimant's partner was not a patient or member of the public or an employee, the Claimant had expressed deep remorse and also that he had been permitted to work during the period shortly after the incident had taken place until he was redeployed.

25. I find that Mr Taylor conducted a fair hearing. The Claimant was permitted every opportunity to have his say and Mr Taylor engaged with the hearing with an open-mind and followed up queries as appropriate, for example, he challenged Mr Gough as to why no statement had been included that had been provided by the Claimant's partner. He accepted Mr Gough's explanation and agreed with it that any such statement would not have changed the fact that the Claimant had been convicted of an assault. He considered mitigation but in view of the fact the Claimant was on a live final written warning he concluded the risk of reoccurrence was too large and that redeployment would not be an alternative option. Mr Taylor decided to summarily dismiss the Claimant and informed him of such with reasons after an adjournment.

26. There was an appeal on 10 June 2018 conducted by Mr Harris. The Claimant had provided a letter from his Probation Officer which demonstrated that the Claimant had appropriately responded to and engaged actively in the probation sessions.

27. There was a detailed written submission by Mr Bryan on appeal. In summary, that the Respondent had breached their policy again by reference to the assault having been conducted on someone who was not a member of the public, there was no evidence of risk to the public or no evidence of disrepute. Mr Bryan cited a comparator who had, prior to being employed as a paramedic, when he was a teacher, been found to have fraudulently falsified pupils' books and acted dishonestly. Mr Bryan also cited the delay in respect of the whole process. Mr Harris upheld the decision to dismiss the Claimant on 17 July 2018.

Conclusions

28. The Respondent has established that the reason for the dismissal was conduct. This was not in dispute. This is a potentially fair reason for dismissal.

29. Turning now to whether or not the decision to dismiss the Claimant was reasonable in accordance with Section 98(4). There was no real dispute in respect of the conduct in question. The Claimant candidly accepted right from the outset that he was guilty of the offence in question, he had been

convicted of assault and this was a potential act of gross misconduct as cited under the Respondents disciplinary procedure. This really was a case about whether the decision to dismiss was within the range of reasonable responses. I have taken into account in deciding whether the Respondent applied the decision within a band of reasonable responses that the Claimant was on a final written warning for the same behaviour and as such was on direct notice that the Respondent viewed this type of conduct as gross misconduct. On that previous occasion notwithstanding that conclusion they had reduced the sanction due to mitigation.

30. The Claimant subsequently committed a further act of assault which he knew from previous events the Respondent would regard as an act of misconduct and that second act was more serious than the first. The Claimant received a 12-month sentence compared to a caution in respect of the first offence.

31. The Respondent's decision to summarily dismiss the Claimant was in my judgment well within the range of reasonable responses. They were entitled to take into account that the Claimant had on two occasions assaulted his partner. He was responsible in a lone working environment for patients whose behaviour could be challenging. The Respondent needed to have trust and confidence that the Claimant could work alone. The two occasions of assault led the Respondent reasonably to conclude they could not maintain that trust and confidence.

32. I deal now with the Claimant's points that he advanced. Firstly, that there were no return to work interviews or records of return to work interviews, no risk assessments and no Occupational Health support. The thrust of these arguments appeared to be that had the Claimant been offered support following the first incident then the second incident may never have happened. There was simply no evidence on which I could have reached such a conclusion and to have done so would have been so speculative as to be wholly flawed There was a risk assessment conducted by Mr Matthews after the second incident, but not after the first (which had resulted in a caution). Even so, I did not understand how or why this affected the fairness of the decision. If anything the Claimant was given the benefit of the doubt after the first incident and permitted to return to work when he could have been dismissed.

33. In respect of the disrepute I also accepted the Claimant's point that there was no established media report and no tangible disrepute. However this outcome was 'happenstance'. Although no court reporter had been present during those criminal proceedings one could have been and then there could have been significant reputational damage to the Respondent. It is true that the Respondent's policy says the conduct should result in disrepute as opposed to have been likely to have resulted in disrepute, but I also find

that it would be implausible that the Claimant had gone through the entire process at court without anyone knowing throughout that whole process what his job role was, as was suggested by the Claimant.

34. In terms of evidence of risk the Claimant advanced that there was no evidence of risk to patients. I have accepted that the Claimant had an unblemished history of care and he demonstrated to me during his cross-examination he undoubtedly did care for his patients and carried out his duties in a diligent manner. However, the Respondent was entitled to take into account the Claimant's behaviour and the fact that there had been a situation in the domestic setting was irrelevant, there were two incidents of assault and the second when the Claimant knew the seriousness of the consequences. The Respondent was therefore entitled to conclude that the Claimant posed a risk to patient safety.

35. In terms of the delay I have commented above that there was a very significant delay and I gave this very careful consideration as whether the length of the delay in itself would have rendered the dismissal unfair. The reason I have concluded that it did not render the dismissal procedurally unfair was that there was no result in any unfairness arising from the delay. There was no effect on the witness recollection or evidence. Another matter of concern identified was that there were no documented minutes of the disciplinary hearing or appeal. This was said to be standard practice within the Respondent however as there were no disputes about what was said at such meetings this did not impact on the procedural fairness overall.

36. In respect of the argument about comparators I have concluded that the comparator relied upon by the Claimant was not truly similar at all. The comparator was not even employed by the Respondent at the time that he was found to have been guilty of professional misconduct as a teacher. This was not a criminal offence or one that could be said to affect trust and patient care and he was also not on a final written warning. So for those reasons I have rejected the argument in respect of the comparators.

37. Lastly I deal with the 'member of public' definition within the policy. The Respondent reasonably took the view that the Claimant's partner was a member of the public. If I accepted the Claimant's position on this and concluded that the Claimant's partner was not within the definition this would lead to an unacceptable and perverse conclusion that an assault on a family member would be less serious and I could not agree with this contention.

38. For these reasons, I find the dismissal was fair and the claim is dismissed.

Employment Judge S Moore
Dated: 15 April 2020

REASONS SENT TO THE PARTIES ON 16 April 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS