Case Number: 3202026/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Mpande**

Respondent: **Summercare Limited**

Heard at: **East London Hearing Centre**

On: **5 February 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Mr G Ridgeway (Consultant)**

JUDGMENT

The Judgment of the Employment Tribunal is:

(1) The claim for unfair dismissal succeeds. The dismissal was procedurally unfair.

(2) The compensatory award shall be reduced by 50% to take into account the chance that the Claimant could and would have been fairly dismissed had a fair procedure been followed.

(3) The compensatory award shall be reduced by a further 50% to reflect contributory conduct on the part of the Claimant.

(4) The compensatory award will be increased by 5% because of the Respondent's failure to follow the ACAS Code.

(5) No remedy hearing is required as the parties reached an agreement.

REASONS

1 The Respondent provides care for vulnerable adult service users in a variety of settings. One of these is Summer Lodge. The Respondent operates in a heavily regulated sector, requiring it to provide satisfactory standards of care assessed by

inspections by the Care Quality Commission and the local authority.

2 The Claimant was employed by the Respondent from 16 March 2009, initially a Deputy Manager he was promoted to Home Manager at Summer Lodge from September 2014. He was provided with a contract of employment and job description which set out his duties. The duties of Home Manager are important given the vulnerable nature of the service users and the business operated by the Respondent. Summer Lodge Manager bears a great deal of responsibility for ensuring the efficient care provided to service users and the maintenance of Summer Lodge.

3 The Claimant should have received approximately four supervisions a year; in fact, he did not receive any formal supervision. The working history between the Claimant and the Respondent was good. The Claimant had no previous disciplinary or performance warnings. He had managed Summer Lodge well through previous CQC inspections obtaining a "Good" rating in the last CQC inspection in March 2017. The Claimant was made aware that the Respondent had some concern in 2017 about his management of Summer Lodge and the care of a service user "NM", although no formal action was taken, the Claimant was made aware of what was expected of him.

4 In June 2018, Southend Borough Council undertook an inspection of Summer Lodge. A copy of the inspection report was included in the bundle of documents at this hearing. It is a comprehensive, detailed and rigorous inspection given the nature of the care setting. The inspection report gave "good" ratings in many respects but also identified a significant number of areas where Summer Lodge was rated as "requiring improvement". I accept that this provided objective evidence of cause for concern for the Respondent which reasonably anticipated another CQC inspection in the near future.

5 The report was discussed by the Claimant and senior managers and an agreed action plan was produced which identified the areas which required improvement and how this could be achieved. One of the areas requiring improvement, referred to at several points in the report, was the adequacy of care plans. The Claimant was provided with significant support from senior managers who attended Summer Lodge on a more frequent basis. Some of the visits occurred when the Claimant was absent and it is regrettable that there is no formal record of what was done by senior managers when they visited. Nevertheless, the Claimant accepts that he was provided with assistance by senior management by way of, as Ms Homan described it, a more "hands on" and pragmatic approach. I accept that the purpose of the support was to help the Claimant to make the improvements required following the SBC inspection. The Claimant accepted in evidence that whilst he achieved some level of improvement, it was not all of the improvement required of him. In addition to the increased hands on support from senior management, the Respondent also introduced two monthly spot checks where the performance and maintenance of Summer Lodge was kept under review.

6 In or around December 2018, concerns were expressed by the social worker and family of NM that he lost between 10kg and 12kg in weight over a couple of months. As well as being worried about NM's health, the social worker and family were concerned that the rapid weight loss had not been identified and adequately addressed by Summer Lodge. Ms Homan went to Summer Lodge but could find nothing in the care records about medical appointments or treatment for this service user's weight loss. I accept the Claimant's evidence that it had been difficult to monitor the weight of NM as he could not stand on the scales following a fracture sustained in a fall. Nevertheless, a 10kg to 12kg

weight loss over only a couple of months without being identified as a problem or requiring medical advice gave the Respondent serious cause for concern.

7 In contemporaneous email correspondence with the Respondent's managers, the social worker and family of NM expressed serious concern about the standard of care being provided. The Claimant does not accept that the concerns are well-founded or that they could properly be attributed to him or his team. The local authority and family decided to remove NM from the Respondent's care costing up to £1200 per week and causing serious reputational damage due to the council's reluctance to send further service users to Summer Lodge.

8 By the end of January 2019, the Respondent was concerned that the Claimant was not delivering the required level of improvement at Summer Lodge. At an investigation meeting on 22 February 2019, the Claimant confirmed that he understood the nature of his role and the impact on the Respondent of poor management at Summer Lodge. There was a discussion about the poor inspection report the previous summer and the ongoing shortcomings at Summer Lodge. The Claimant's position was that initially he had not been given sufficient time to carry out all of his managerial duties however, he accepted that he was given additional 8 hours per week in order to deliver the items listed in the action plan. In the meeting, the Claimant said that he believed that he had completed 100 percent of the action plan. The Respondent did not agree.

9 Following the investigation meeting, the Respondent decided to hold a disciplinary hearing to consider five allegations of misconduct. These were: failure to follow maintenance reporting procedures; failure to complete and maintain records; failure to ensure that the needs of service users are met; failure to complete the action plan; and failure to ensure that the environment at Summer Lodge were clean. The Claimant was not advised in that letter that these were allegations which may be regarded as gross misconduct or which could lead to his dismissal.

10 The Employee Handbook gives non-exhaustive examples of misconduct and gross misconduct. There is a subjective element in their application. For example, poor effort or substandard work is misconduct whereas wilful abuse, negligence or neglect of duty resulting in potential harm to service users is gross misconduct. Non-serious failure to comply with health and safety requirements is misconduct but serious cases of non-compliance with health and safety instructions is gross misconduct. Negligence or neglect of duty which may expose the Respondent to serious claim or damage to its reputation is gross misconduct. Ms Homan candidly accepted in evidence that when the disciplinary process commenced, she was not considering the possibility of gross misconduct but misconduct instead.

11 The disciplinary hearing took place on 15 March 2019. The Claimant accepted that there had been some shortcomings in his performance, for example fire doors being propped open and an inability to find the records to show that medical audits had taken place. The Tribunal accepts that these are serious matters in their own right. The Claimant strongly denied that he or the Summer Lodge staff he managed were responsible for the circumstances leading to the removal of NM. Ms Homan decided that it was necessary to carry out further investigation and she adjourned the disciplinary hearing in order to do so.

12 In a letter dated 21 March 2019, inviting him to the reconvened disciplinary

hearing, the Claimant was advised for the first time that his conduct may amount to gross misconduct leading to dismissal. Ms Homan explained in evidence what had changed between 8 March and 21 March 2019. I accepted her evidence as truthful and reliable. Following the Claimant's answers at the first disciplinary hearing, Ms Homan had increasing doubts as to the Claimant's steps to complete the action plan and his record keeping, hence the need to investigate further. This further investigation revealed more failings by the Claimant and she was concerned that the harm to NM was greater than initially thought. As a result, Ms Homan believed that the extent and seriousness of the Claimant's misconduct was greater than when the first disciplinary hearing letter had been sent. Of the allegations, Ms Homan believed that the most serious was the failure to meet the needs of SM but she believed that the other allegations were also serious given the nature of the care setting and possible impact upon service users, particularly the failure to keep proper medical or medicine audit records and/or sufficiently detailed care plans.

13 The disciplinary hearing reconvened on 28 March 2019. The evidence obtained in the further investigation was shared with the Claimant who was given an opportunity to comment. There was significant discussion about the care provided to NM. The Claimant's case at this Tribunal was that he had contacted the social worker expressing concern and inviting their engagement to support NM but that the social worker had failed to respond. He said that he had escalated this to Head Office who in turn had failed to respond. There was no evidence of such contact included in the bundle of documents. The Claimant said that this was because he no longer had access to his work email account. I did not find this evidence reliable. The Claimant had not been suspended during the disciplinary process and still had access to his work emails at that date. Nevertheless, the Claimant did not rely upon attempts to engage the social worker and/or Head Office at the reconvened disciplinary hearing and did not produce the emails which he now says he sent. In any event, whilst the Claimant may genuinely disagree that there was anything wrong with the level of care provided to NM, the Respondent was faced with serious concerns being expressed by a key provider of finance through service user placements, namely the local authority.

14 Having considered the evidence and the Claimant's explanations, Ms Homan decided that the Claimant should be summarily dismissed for gross misconduct. She reached this decision by 5 April 2019 and drafted a letter of dismissal which she sent to the Respondent's legal advisers for approval. Ms Homan then commenced a period of annual leave during which the letter was approved, printed out by a colleague and given by hand to the Claimant on 9 April 2019. The dismissal letter was not produced on company letterhead, and it would have been better had it been, but I find nothing sinister and accept the explanation as to why it was not.

15 The letter of dismissal set out the reasons why Ms Homan decided that the Claimant should be dismissed by reason of his conduct. The letter is unduly lengthy and would have benefitted from a degree of editing to make it more concise, nevertheless it sets out Ms Homan's genuine belief at the time. Ms Homan found that each of the allegations of misconduct had been proven. In the letter, Ms Homan said that she took into account the Claimant's length of service but the serious consequences of his actions (or inaction), the impact upon NM, the reputation of Summer Lodge and the financial losses incurred led to such a breach of trust and confidence that she felt she had no option but to dismiss as no lesser sanction was appropriate in the circumstances. The Claimant was advised of his right to appeal against the decision within five working days of receiving the letter.

16 The letter was given to the Claimant by hand on 9 April 2019. He commenced a period of pre-booked annual leave on 10 April 2019 during which time he was out of the country; a fact that was clearly well known to the Respondent. Despite knowing that the Claimant would be out of the country, the Respondent did not extend the time for an appeal. As a result, the Claimant felt that he was not able practicably to appeal against his dismissal.

17 At around the time of the disciplinary process, the Respondent's homecare contract was due to terminate and it was anticipated that the service users and staff would TUPE transfer to the new provider. One of the homecare co-ordinators, Michaela, was unsure as to whether to TUPE transfer or stay with the Respondent. Any alternative work with the Respondent would be in a residential rather than home setting and, I accept, Michaela visited Summer Lodge and some of the Respondent's other residential care settings to learn more about the nature of the work. Ultimately, Michaela did not TUPE transfer and instead became manager of Summer Lodge upon the Claimant's dismissal. I accept as truthful and reliable Ms Homan's evidence that at the time that she decided to dismiss the Claimant, she believed that Michaela was going to TUPE transfer. Ms Homan was not involved in the decision to recruit Michaela and there was no evidence of any pressure on Ms Homan to dismiss the Claimant in order to create a vacancy for Michaela. Whilst it is understandable that the timing caused genuine suspicion in the mind of the Claimant, I find that Ms Homan's decision was not prejudged or indeed influenced by any improper desire to employ Michaela in his place.

Law

18 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

19 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

20 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

21 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA.

22 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563.

23 However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

24 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

24.1 the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive.

24.2 mitigating factors, including length of service, disciplinary record and whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong.

25 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

26 In **Afzal v East London Pizza Ltd t/a Dominos Pizza** UKEAT/0265/17/DA, the EAT held that in modern employment relations practice, the provision of an appeal is virtually universal. It is good employment practice and a requirement of the ACAS Code of Practice to which the Tribunal must have regard. Whether a dismissal is unfair is to be judged on the whole process, including any right of appeal.

Conclusions

27 For the reasons set out above, I have found that the reason for dismissal was Ms Homan's genuine belief that the Claimant had committed acts of misconduct in his management of Summer Lodge. The Employee Handbook includes substandard work and failure to comply with health and safety requirements as examples of misconduct for which disciplinary action may be taken. Ms Homan's decision was not in any way

affected by a desire to employ Michaela as I have found above.

28 Ms Homan's belief was reasonable and based upon a reasonable investigation. The Claimant accepted that some of the misconduct had occurred, for example fire doors being propped open and an inability to find the records to show that medical audits had taken place. There was a complaint from the local authority about the care of NM which, even though disputed, Ms Homan was able to take into account as it had led to the removal of that service user. Ms Homan carried out an investigation meeting, two disciplinary hearings and further investigation in between. There was further objective evidence available in the June 2018 local authority report and subsequent action plan, which had not been fully implemented by January 2019 despite senior management support. Summer Lodge was a relatively small home, providing care vulnerable service users and operating in a highly regulated sector. Taking all of this into account, Ms Homan had a reasonable belief based upon reasonable investigation that the Claimant's shortcomings were more than just performance issues and amounted to misconduct causing serious risk to the Respondent's reputation and finances.

29 It is not sufficient for the Respondent to show a genuine and reasonable belief in misconduct, the Tribunal must also be satisfied that dismissal is fair in all the circumstances of the case. It is easy to feel sympathy with the Claimant who was a long-standing employee with a good disciplinary record. It may well be that this Tribunal would not have regarded his conduct as gross misconduct warranting dismissal. However, it is not for the Tribunal to substitute its view for that of the employer but to apply the range of reasonable responses test.

30 Considering whether dismissal fell into the range of reasonable responses, factors in the Claimant's favour are that he had no previous disciplinary or formal performance warnings, that the Respondent had failed to provide him with formal supervision meetings and that until June 2018, Summer Lodge had been rated as "Good" in CQC inspections. However, the Claimant had been made aware of the concerns raised by the Southend Borough Council inspection in June 2018, had been provided with senior management support and an action plan from August 2018 and had been given more management time. The concerns raised by the social worker and family of NM were serious and had severe financial and reputational consequences for the Respondent. The Claimant had been given at least three months to improve by the point at which the disciplinary process commenced and that there were still admitted shortcomings. The Claimant did not accept that he bore any element of responsibility for failing to identify and act upon the severe, rapid weight loss of a service user.

31 The line between misconduct and gross misconduct in the examples set out in the Employee Handbook involves a large amount of subjectivity but the most serious allegation for Ms Homan was the failure to ensure that the needs of NM were met. There was actual financial and reputational damage to the Respondent as a result, with NM removed and the local authority reluctant to refer further service users. On balance, I consider that it was within the range of reasonable responses for Ms Homan to consider that this was neglect of duty falling within the definition of gross misconduct and sufficient to dismiss.

32 Procedural fairness is important in unfair dismissal cases, not only as good industrial practice but as an essential factor when applying s.98(4) and the ACAS Code of Practice. The importance of an appeal was emphasised in **Afzal,** which also made clear

that the fairness of a dismissal is to be judged on the whole process, including any right of appeal. The right of appeal is an important safeguard against unfair dismissal as it provides the opportunity for an independent reconsideration of the employee's loss of employment and whether such a draconian outcome is warranted in the circumstances. I conclude that in order to provide this safeguard, the right of appeal must be not only exist on paper but also be effective in practice.

33 The Claimant was offered the right of appeal in the dismissal letter, but the right could only be exercised within five working days. The Respondent knew that the Claimant was leaving the country on holiday the following day but did not extend time for the appeal or address the practical problem caused by the deadline. In the circumstances, the Claimant felt that he could not practicably exercise the right of appeal. I considered whether this fell within the range of responses of a reasonable employer and concluded that it did not.

34 In this case, the failure to offer an effective appeal was particularly significant. The Claimant had given ten years of apparently exemplary service before his dismissal. Whilst there were serious and genuine concerns about his conduct held by Ms Homan, the Employee Handbook definitions are to some extent subjective as identified above. Another manager hearing an appeal, may have reached a different conclusion and imposed a lesser sanction. Ms Homan's dismissal letter was given to the Claimant nearly two weeks after the reconvened disciplinary hearing, five of those days occurred after Ms Homan had reached her decision but was waiting for the letter to be approved. If provided sooner, the Claimant would have had time to appeal before leaving the country. Alternatively, knowing that the dismissal letter was given the day before his leave commenced, a reasonable employer would have extended the time to appeal. Looking at the procedure adopted overall, I find that the dismissal was unfair.

35 Of course, even if afforded an effective right of appeal, the Claimant may still have been dismissed and this must be reflected in the compensatory (although not basic) award, see **Polkey**. On balance, this is not a case where I can be certain that the outcome would have been the same had there been an appeal as there is a very real chance that consideration by a more senior manager may have resulted in a lesser sanction in light of the Claimant's service. Equally, there is a very real chance that they would not given the nature of the misconduct in question. Accordingly, I conclude that there is a 50% chance that employment would have continued had there been an appeal.

36 I must also consider whether to make any reduction pursuant to sections 122 and 123(6) of the Employment Rights Act 1996 by reason of the Claimant's conduct. Section 122 requires me to have regard to the circumstances of the case and section 123(6) requires consideration of whether the Claimant's conduct was negligent, foolish, culpable or otherwise blameworthy and caused or contributed to the dismissal.

37 The Claimant admitted at the disciplinary hearing that there were omissions on his part and I found that these were serious matters in their own right. There was evidence that the Claimant should have identified and acted upon NM's rapid weight loss sooner. Overall, I am satisfied that the omissions by the Claimant given the support that was provided to him and the areas of inaction were sufficient to amount to foolishness even if not deliberate or negligent. This conduct was a significant cause of the decision to dismiss. I am not satisfied that there is any good reason to make a different level of reduction to the separate basic and compensatory awards and therefore there shall be a

50% reduction to each.

38 Finally, I turn to the issue of an ACAS uplift. I have concluded that there was a failure to provide an effective appeal in this case. The Respondent is a relatively small employer with no dedicated HR function but it did have the benefit of professional advice, for example in drafting the letter of dismissal. This advice could, and perhaps did, extend to the fairness of the procedure to be adopted. There was significant compliance with the ACAS Code as there was a fair investigation and disciplinary hearing. For all of these reasons, I am satisfied that the appropriate uplift is 5%.

39 The parties were not in a position on the day of the hearing to deal with remedy. A remedy hearing was listed but subsequently vacated as they reached agreement.

Employment Judge Russell
31 March 2020