THE EMPLOYMENT TRIBUNALS

Claimant A

Respondent Mr B
Dr B

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE ON 18 &19 March 2020
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For Claimant in person
For Respondent Mr S Morris Solicitor

JUDGMENT

Dr B is added by consent as a second respondent. The claim of wrongful dismissal is dismissed on withdrawal. The claim of unfair dismissal is not well founded and is also dismissed.

REASONS (bold print is my emphasis and italics are quotations)

1. Introduction and Issues

1.1. The claimant, born 27 January 1981, was employed by the respondents, who are husband and wife, from 1 April 2012 as a carer for their disabled daughter "H", until her dismissal, communicated on 13 July 2013. She has claimed "notice pay" but was paid in lieu of 7 weeks notice, so withdraws that claim. Her remaining claim is unfair dismissal. The reason given is "some other substantial reason" (SOSR), alternatively related to conduct. Employment Judge Johnson ordered a hearing in private and I made anonymity and restricted reporting orders at the start of this hearing.

1.2. The issues are:
1.2.1. What were the facts known to or beliefs held by the respondents which constituted the reason, or if more than one the principal reason, for dismissal?
1.2.2. Were they SOSR or related to conduct?
1.2.3. Having regard to that reason, did they act reasonably in all the circumstances:
(a) in having reasonable grounds after a reasonable investigation for their genuine beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal?
1.2.4. If they acted fairly substantively, but not procedurally, what are the chances they would nevertheless have dismissed the claimant if a fair procedure had been followed?
1.2.5. If dismissal was unfair, did the claimant cause or contribute to it by culpable and blameworthy conduct?

2. The Relevant Law

2.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:
"(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 dismissal
(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 relates to ..... the conduct of the employee."

The Reason
2.2. Abernethy -v- Mott Hay & Anderson held the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. The correct "labelling" of the reason is for me to decide, Abernethy being an example of an employer using an incorrect label, redundancy in that case, out of kindness.

2.3. One SOSR is 'breakdown in trust and confidence'. In Leach v Office of Communications 2012 ICR 1269, the Employment Appeal Tribunal (EAT) emphasised the importance of identifying why the employer considered it impossible to continue to employ the employee. The Court of Appeal concurred. Lord Justice Mummery noted 'breakdown in trust and confidence' is not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason whenever a conduct reason is unavailable or inappropriate. However, in A v B 2010 ICR 849, (approved by the Court of Appeal in Leach), the EAT dismissed the claimant's submission that where a breakdown in trust and confidence arose as a result of a disclosure by the Police to his employer as to the risk he posed to children, that breakdown was not SOSR if it was not linked to acts of misconduct on his part. In the particular circumstances of the case, the employer was entitled to rely on the concerns the disclosure raised, it was not necessary for the employer to prove that breakdown was as a result of misconduct on the claimant's part.

2.4. In some circumstances, employers may attempt to rely on SOSR to avoid having to follow an applicable disciplinary procedure for misconduct, which can be unfair ,but every case must be examined on its facts. In Ezsias v North Glamorgan NHS Trust 2011 IRLR 550, the EAT held an employment tribunal (ET) correctly found dismissal following the breakdown of the working relationship between the claimant and his colleagues was for SOSR rather than conduct. The ET was alive to the refined but important distinction between dismissing the claimant for his conduct in causing the breakdown of relationships and dismissing him for the fact those relationships had broken down. The ET was entitled to find the fact of the breakdown was the reason for dismissal and his responsibility for it was incidental, so the failure to follow the contractual disciplinary procedure, which did not apply to dismissals for SOSR, did not render the dismissal unfair.

2.5. A good example of SOSR based on 'loss of trust and confidence' between the parties is Hutchinson v Calvert EAT 0205/06 . The employer was seriously disabled by muscular dystrophy and employed a carer, a relationship which, as the EAT put it, had to be 'based on complete trust and confidence'. The relationship was satisfactory for more than two and a half years but then became frayed, but there was no abuse by the carer only disagreement about details of employment eg holiday due and sick pay. The employer became upset and subsequently dismissed the carer as he did not want her to continue caring for him, on the basis

their relationship had broken down. The carer claimed unfair dismissal and a tribunal found SOSR had not been made out and the dismissal was procedurally unfair. On appeal, the EAT held the tribunal had applied the wrong test . It noted , following Harper v National Coal Board 1980 IRLR 260, so long as an employer can show a genuinely held belief that he had a fair reason for dismissal, that reason may be a substantial reason provided it is not whimsical or capricious, even if another opinion is it has no objective foundation. However in Phoenix House Ltd v Stockman 2017 ICR 84, the EAT held where an employer had a closed mind to the claimant's argument the relationship had not irretrievably broken down, it was a factor the ET was entitled to take into account when deciding dismissal was unfair.

Fairness

2.6. Section 98(4) of the Act says:

"*Where an 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 all 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

(b) shall be determined in accordance with equity and the substantial merits of the case."

2.7. Some authorities in conduct cases are applicable by analogy in an SOSR case. An employer does not have to prove, even on a balance of probabilities, the facts it believes to be true actually are. It simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation as was reasonable. British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald. In Weddel v Tepper Stephenson LJ said

Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably."

Fair procedure

2.8. In Polkey-v- AE Dayton Lord Bridge of Harwich said :

" *If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Tribunal is not permitted to ask in applying the test of reasonableness .. is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction .. this question is simply irrelevant. … In such a case the test of reasonableness .. is not satisfied …*

2.9. Khanum-v-Mid Glamorgan Area Health Authority said there are three basic requirements to be complied with during an internal disciplinary process: first, the person should know the nature

of the accusation against him; second, should be given an opportunity to state his case; and third, the decision maker(s)should act in good faith.

2.10. Santamera v Express Cargo Forwarding held of the conduct of the disciplinary hearing:
"The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which it may lack the means. That is why cross-examination of complainants by the employee whose conduct is in question is very much the exception in workplace investigations of misconduct.

Sanction

2.11. If the circumstances of two employees are essentially indistinguishable, it may be unfair to dismiss one but not the other. see Post Office-v-Fennell and Hadjioannou-v-Coral Casinos . The latter case contained guidance approved by the Court of Appeal in Paul-v-East Surrey District Health Authority. An argument one employee received a greater sanction than another is relevant where (a) there is evidence employees have been led to believe certain conduct will be dealt with by a sanction less than dismissal (b) where other evidence shows the purported reason for dismissal is not the genuine one (c) where , in truly parallel circumstances, it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal.

2.12. Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt) held I must not substitute my own view for that of the employer unless its view falls outside the band of reasonable responses. In UCATT v Brain, Sir John Donaldson said thus:
"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not. … the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances."

2.13. Taylor-v-OCS Group 2006 IRLR 613 held whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

3 Findings of Fact

3.1. I heard both respondents and three ladies "T", team leader of the carers, and both other carers, D and J. I heard the claimant. I had an agreed document bundle to which some more were added during the hearing.

3.2. Mr B and Dr B , a doctor of medicine, live in Bedfordshire. Their daughter "H", aged 32 but with a mental age of 7, has global developmental delay, attended a school for children with severe learning difficulties, suffers from anxiety and is very vulnerable, regarding everyone as her friend. She requires permanent 24x7 care. In December 2018, they bought for H a house in a small town in Northumberland where H felt more secure and happy than in the rented flat she had before in the same town. They employ four carers, including the claimant. H can say things

which are untrue or exaggerated, sometimes as a joke. When asked if what she has said is true she will invariably admit and apologise if it was not . She feels if there is discord it must be her fault and repeatedly says it is not. She repeats things many times. The more anxious she is about anything the more she will repeat the same topic.

3.3. The claimant for 7 years worked in a close and personal capacity with H and could only continue if there was trust and confidence between herself, the respondents and especially H. The claimant had a contract of employment which included grievance and disciplinary procedures and a job description copies of which she was given. A care plan for H was kept at the house in a place known to carers and was easily accessible. The carers who spent most time with H were T and D, then the claimant, and the least time was with J. None of T, D or J accuse the claimant of anything which could sensibly be called abuse of H but they all think the claimant was not as proactive in her approach to H as they were. One example is that H had difficulty fastening her bra and would often twist the straps. The claimant accepts she would ask H if she needed help and if she said she did not would not do anything, whereas the other three would check to see if H was comfortable rather than accept what H said.

3.4. In 2016 a misunderstanding arose over something D had said to H. The respondents dealt with it and it did not need to involve any disciplinary steps against D, because the good relationship between D and H was not damaged. On another occasion H said something about another carer which was not true and ,as Dr B said, she was being "naughty". When she was asked whether it really happened she admitted it had not. Neither of these situations fall inany category considered in the case of Hadjioannou.

3.5. On 20 February 2019 the carers had a meeting to discuss some points of care strategy for H. During the meeting there was a disagreement . I accept D raised her voice and held her palm up as a "stop signal" to the claimant is a way the claimant found aggressive. The claimant raised a grievance against D in March 2019. An HR consultant was contacted by the respondents and, with her guidance, the grievance was Investigated but not upheld. Mr B was ill at the time and Dr B dealt with everything. Her outcome letter at p 51-2 basically says others at the meeting did not share the claimant's view of D being aggressive. The main priority was for staff to work together in H's best interests.

3.6. Following this, first D and later T raised grievances against the claimant. D's was retaliation for the claimant having accused her of being aggressive. T's was the claimant had shut the door of a room before discussing something with her which made her feel intimidated. Again HR advice was taken. On 10 May 2019, the claimant was invited to attend a meeting on 29 May 2019 and to afford her the opportunity to give her version of events. It went ahead as planned and notes were taken by Dr B which were signed and agreed by the claimant. The grievances against her were upheld. T's statement may be wrong about dates in paragraphs 3 and 4 but the events occurred on or before 28 May 2019 and were known of by Dr B before the meeting on 29 May to address T and D's grievances. Both involved H complaining the claimant had "*not been nice to her*" and had told her to "*shut up*" when H was repeatedly talking about her parents visiting her. T sent Dr B a text about this on 23 May. Dr B was in Northumberland 28-31 May inclusive. I accept she was right not to spring the matters of concern on the claimant on 29 May because the meeting had been called for another purpose. The allegations by H were not of grave concern and may have been her misinterpreting things. As Dr B said, if she reacted swiftly and robustly to everything H said had occurred between her and any carer, that would be premature and disproportionate . What H had said may well have been taken further after the claimant's holiday but would not have led to dismissal

3.7. On 30 May page 79-80 shows a meeting where the claimant was not present. It was suggested by Dr B that if T was to have her request to have more weekend time off granted, the claimant would have to be asked to work more at weekends. Then the three carers, mainly T and D, went into more detail than before as to their concerns about the claimant's level of care towards H falling below what was expected. Dr B asked for more information which they gave. I hestitate to comment on the type of matter being raised, but it was of such as the claimant spending time looking at her phone during H's keep fit class rather than, as D would have done, encouraging and praising H. The claimant said in evidence she did not do that as it would distract H from the teacher's instructions. I detected differences of opinion between the claimant and the other carers which I see as the claimant, being only a few years older than H, treating her like an adult while the others viewed her as a child in an adult's body. I accept the claimant, in her word, "adored" H and would not knowingly do anything to distress her. The claimant went off shift on 31 May in the morning and was on leave until 24 June, but not out of the country.

3.8. At the beginning of June, more concerns started to come to light. H started to exhibit signs of distress about the behaviour of the claimant towards her. The point which troubled me throughout the evidence was that H had not told her parents, D, J and/or T of the claimant not being nice to her over the seven previous years . It may be H had picked up on the discord between her three main carers. The claimant's theory is that because H is a "people pleaser" she was manipulated by D and T into taking sides against her. That is possible but neither respondent believes it is likely, and nor do I. If H had exaggerated she would when challenged have, in Dr B's words " put her head down" and accepted it . She never did, and has not to this day . She added detail to her allegations on separate days 3,4,6,7,8,10 and 12 June all of which were relayed by D or T to the respondents who were at home in Bedfordshire These are all noted in contemporaneous notes or texts.

3.9. On 13 June, H was extremely distressed and inconsolable when she described the claimant's behaviour towards her to D and T and later by phone to Dr B. Both Dr B and T say although H is suggestible they do not think she could have been manipulated by D to make allegations and would not have been so upset for so long as she has been since that night to this day. This was when H said the claimant had told her to "*fuck off".* H was so distraught on the phone late that night that Dr B got the first train north she could the next day. She told H on the phone she would not have to have the claimant back, but that was said to comfort H and does not indicate pre-judgment of the outcome, though I see why the claimant thinks it does .

3.10. On 14 June H made a statement to Dr B. It is not led out of her. In a contemporaneous note Dr B recorded what H said. The main point is that again she was clear she did not want the claimant back.

3.11. On 17 June J found H to be very upset. She mentioned over and over the claimant not being nice to her and the claimant should say "*sorry*". The telling point of J's evidence supported by all the respondent's witnesses is that since June 2019 H has been a changed person, more anxious and more repetitive. The claimant has not seen H since 31 May except for once on 26 June when the claimant went to visit H's neighbour and H came to her uninvited. Both respondents were there and allowed that to happen . Both say such behaviour was typical of H and neither had concerns about H and the claimant being alone together for a few minutes. One of the most telling pieces of evidence was Mr B answering a question put by the claimant regarding her telling H to "fuck off" " *Do you think I am capable of treating H like that*". Mr B did not answer yes or no but " ***Something*** *has happened*". Many employers, in their position as parents, would have been too ready to point the finger of blame at the claimant but neither Mr

nor Dr B did. Their stance remained throughout that **they believed that H believed** she should not be in the unsupervised care of the claimant again.

3.12. On 19 June, the respondents informed the claimant by letter she was suspended on full pay to allow further investigations to take place. H, T, D and J were spoken to and provided statements . Allegations including the claimant telling H to "shut-up", to "fuck off' and that "she was not her friend" on more than one occasion must have related to May or before but H disclosed them in random order in June. I agree it was not unfair for the respondents not to speak to the claimant at this stage because they were emotionally involved and all the claimant would or could have done is to say she had not knowingly done anything wrong. The respondents reviewed the statements along with corresponding text messages and taking into account the claimant had to work with H in close proximity on her own without supervision on a permanent basis, decided to escalate to a formal hearing the above three allegations and ignoring H her on several occasions. The claimant's chance to explain would come at the disciplinary meeting. Following Santamera witnesses, especially H need not have been made available for challenge by the claimant even if the procedure followed had been one they would have used if the claimant was charged with misconduct .

3.13. On 21 June, the respondents sent the claimant a letter inviting her to a meeting on 27 June to be conducted by an HR Consultant, Ms W . The claimant was notified if H could no longer feel comfortable receiving care from her, termination of employment could result for some other substantial reason , **not** for reasons relating to conduct or capability. The claimant was informed of her right to be accompanied and provided with all the relevant evidence to be used, including statements made by her colleagues and by H. The meeting went ahead. The claimant did not bring a representative. She was given an opportunity to state her version, ask questions and discuss any possible ways in which the problem could be resolved. She did not put forward any suggestions. The meeting was recorded with the consent of all parties. The audio recording was transcribed by a professional transcriber. This transcript was later provided to the claimant in the body of the report from Ms W. The claimant requested a copy of the audio recording both from Mr B and Ms W but they was unable to access the audio recording and informed the claimant. The claimant did not put to me any examples of inaccuracy in the transcript.

3.14. The report of Ms W was received by the respondents on 8 July. Weight was attached to the fact H stated she did not want the claimant back. This in combination with the level of her distress convinced the respondents it would be detrimental to H's mental and emotional well-being if the claimant was to return to work. There was no alternative employment to offer the claimant. The respondents approved the reasoning put forward by Ms W for dismissal. On 10 July 2019, they informed the claimant by letter that unfortunately the relationship between her and H had broken down and her employment was terminated for some other substantial reason. A copy of Ms W's report was given to the claimant who was informed of her right to appeal.

3.15. On 15 July 2019, the claimant appealed by letter saying she felt there was not enough evidence to support the termination of her employment. On 23 July 2019, she was invited to an appeal hearing on 26 July 2019 to be heard by another HR Consultant, Ms M , and told she could bring a representative. It went ahead as planned and she did not have a representative. The claimant had not put forward any additional evidence or any procedural or substantive points for appeal. On 2 August 2019, she was informed that, after careful consideration Ms M decided to not uphold her appeal because, on the balance of probabilities the concerns were more likely than not true and there was a breakdown in the relationship between her and H. The

respondents approved such decision and the reasoning. The claimant thinks paying notice in lieu in part before 2 August 2019 indicates pre-judgment but , as I explained to her, it was due on dismissal in July .

4. Conclusions

4.1. The claimant's case is she is not guilty of the matters alleged against her and the evidence of the other carers is in revenge for her grievance and is false. She disputes the relationship between her and H had irretrievably broken down. Although I explained the law, in effect she wants me to (a) "clear her name" of any suspicion of misconduct (b) substitute my view for that of the respondents and (c) ignore the band of reasonable responses test . Dr B accepted that from the claimant's point of view she went on holiday on 31 May knowing little or nothing about how H was said to have felt and returned to a process which saw her dismissed within about 3 weeks. The respondents, and I, understand how distressing that is for her and why she has brought this claim. However, I cannot do as she wants.

4.2. The respondents acted reasonably in all the circumstances in treating 'some other substantial reason', as a sufficient for dismissing the claimant. In these exceptional circumstances, they conducted a reasonable investigation as best they could and having given the claimant the opportunity to respond and try to resolve matters there was no viable alternative. No-one will ever be sure why a relationship which had been good for 7 years ceased to be, but the respondents view it had was well within the band of reasonableness. It reasonably concluded H did not want the claimant to be her carer and if she was not dismissed, H would continue to feel that.

4.3. The procedure the respondent followed, having regard to it employing only four people was also well within the range of reasonable procedures. It would have been even for a conduct related dismissal and all the more so for SOSR.

T M GARNON EMPLOYMENT JUDGE
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23 March 2020