



EMPLOYMENT TRIBUNALS

Claimant

Mr M Finnerty

v

Respondent

St Mungo's Community Housing Association

Heard at: Cambridge (by CVP)

On: 01 & 02 February 2021

Before: Employment Judge KJ Palmer

Appearances

For the Claimant: In person.

For the Respondent: Mr McCombie (Counsel).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

It is the Judgment of this Tribunal that the claimant claims in unfair dismissal and wrongful dismissal both succeed. A Remedy Hearing will take place by CVP before the Cambridge Employment Tribunal on **22 July 2021**. A full day is allowed for that hearing to take place.

REASONS pursuant to a request by Mr McCombie at the hearing

1. The claimant was employed by the respondent latterly as a Housing Management and Lettings Co-ordinator from 27 March 2000 until his dismissal purportedly by reason of gross misconduct, a summary dismissal which took place and was effective on 6 June 2019.
2. Before this Tribunal the claimant pursues a claim for unfair dismissal and a claim for wrongful dismissal added by way of an agreed amendment to his original claim which was added in June 2020. The respondent argues that the claimant was dismissed fairly and that the reason was conduct, they rely on the claimant's gross misconduct. They also argue that this conduct amounted to a repudiatory breach of his contract of employment and that they therefore were entitled to dismiss him without notice.
3. The hearing was conducted by Cloud Video Platform (CVP). I had before me an electronic bundle and witness statements from the principal witnesses who gave evidence. They were the claimant and for the claimant a former colleague of his Diane Dinham. For the respondent I had witness statements from Regional Director Adam Rees who was the individual who conducted the disciplinary process and made the decision to dismiss and also from an Executive Director David Fisher who conducted the appeal which upheld that dismissal.
4. The dismissal arose out of an incident at a housing project which took place on 2 August 2018. The claimant had visited the project and was confronted by a resident who was in the process of being evicted for previously threatening to use a knife on a contractor. The resident wanted to confront the claimant about the decision to evict him. The incident took place at about 10am on the morning of 2 August. There was also a postman present who at the time was attempting to deliver mail.
5. In the bundle was an extract from the CCTV system at the project which showed footage from two cameras, one showing the outside of the front door of the building and the bin store nearby and one showing the inside of that front door inside the building and this included footage of part of the staircase and the hallway. The footage in the bundle ran for some 11 minutes. Mr Rees had the same footage in front of him at the disciplinary hearing and in fact it was the sight of the footage which prompted the respondent to pursue the disciplinary proceedings against the claimant as it was at variance with an incident report which the claimant had filed on the day.
6. Of great significance however is that no sound was available on the footage and therefore the context of the incident is incomplete. I will not seek to recount in detail the 11 minutes of footage which we have all viewed and I have watched on several occasions.

7. Essentially however, the postman attempted to deliver post and rang the doorbell as there was a parcel to deliver which he could not fit through the letterbox and which needed a signature. The claimant came to the door from an office down the hallway which is out of shot. At the same time or very closely associated with the claimant's arrival the resident came down the stairs with his terrier dog possibly a Pitbull type breed. It was here that the claimant says he was confronted by the resident. He says the resident was shouting and swearing at him and threatening to stab him, cut him and kill him. The claimant also says that the resident was trying to sic his dog on him. None of this can really be seen in the CCTV footage as there is no sound, it just looks like there is a conversation, perhaps an animated one. In his letter of dismissal Mr Rees opines that the resident was trying to engage with the claimant but that the claimant seems uninterested. I accept the claimant's evidence that he was subjected to a substantial and very threatening barrage by way of a verbal attack by the resident and this is partially borne out in the CCTV footage because the resident does appear to be in an agitated state. The claimant says he was bouncing about readying himself to attack. I accept that, I accept the claimant's evidence on this point.
8. The claimant also knew that the resident had a history of threatening people with knives because that is why he was being evicted. The claimant quite reasonably feared for his life, he walked away out of shot then suddenly he appeared again and ran at the resident pushing him through the door and outside into the bin store. The resident did not seem to fall over for very long and was soon back up on his feet. The postman was still present at this time. Thereafter after the resident gained entry back into the property an altercation ensued and the CCTV shows the resident eventually pulling one knife from his waistband and then we later see him brandishing two knives and at various points he slashes at the claimant and tries to kick him. The claimant on two occasions picked up a fire extinguisher to defend himself during the course of the rest of the footage.
9. Ultimately and perhaps ironically it was the resident that called the police who attended and he was arrested. He was subsequently charged and convicted. The claimant was not charged with any crime. The claimant gave a statement to the police immediately after the incident which was in the bundle before me. It was not before Mr Rees at the time of the dismissal however it was before Mr Fisher who conducted the appeal. In it the claimant admits that he punched the resident referring to the charge and the push seen on CCTV. The claimant in evidence before this Tribunal confirmed that he was referring to the charge and the push in his police statement. He does not then reveal that in the incident form he fills in a little while later at the project which is a form produced by the respondent. He admits that.

10. So, it was on this basis and that failure that the disciplinary process ensued. Essentially there were two allegations against the claimant, the first was that he had charged at and pushed the resident and essentially initiated violence and the second was that he had misled the respondent. The dismissal letter cites these two allegations, the push or the punch on the resident described as an assault and the statement by the claimant that he had been unable to retreat to the office and lock himself in and call the police as he was being threatened with a knife by someone who had instigated the incident by threatening him with a knife.
11. The respondent says that these are not borne out by the CCTV footage. The respondent's Mr Rees cites the respondent's Disciplinary Policy & Procedure and the respondent's Code of Conduct and he places great store by these two documents. He finds against the claimant on both counts in a lengthy dismissal letter. He takes into account he says a variety of mitigating factors including the claimant's 20 years of unblemished service, the difficult circumstances of the incident, the fact that the resident was known to threaten people with knives, the fact that the claimant had to defend himself against an attacker ultimately armed with two knives and the fact that the claimant had dropped his phone and could not call the police. What he did not do was to hear any evidence from the postman.
12. Mr Rees admitted in evidence that the respondent had made a perfunctory attempt to contact the postman but had failed to follow up that attempt. In my judgment he also did not consider fully and properly, nor did Mr Fisher on the appeal just how differently the incident might have appeared if the CCTV had had sound attached. Both of these facts are in my judgment critical. Mr Rees was particularly swayed by the fact that the push on the resident was in breach of the respondent's Code of Conduct. Ultimately, the claimant appealed and the appeal was heard by Mr Fisher who had some fresh evidence in front of him but he ultimately upheld the decision of Mr Rees and the dismissal of the claimant.

The Law

13. The claimant makes two claims, his claim for unfair dismissal is governed by s.98 of the Employment Rights Act 1996 and it is for the respondent to show what the reason was for the dismissal, and that under s.98(2) it was a potentially fair reason for dismissal. In this case the respondent relies on conduct. In terms of whether it is appropriate to dismiss in those circumstances I have to look at s.98(4). S.98(4) tells me that it depends on all the circumstances including the size and administrative resources of the employers undertaking and I must determine whether the employer acted reasonably or unreasonably in treating that (the conduct), as a sufficient reason for dismissing the employee.

14. I am guided by some authorities in this respect, I am duty bound to consider what is known as the **Burchell** test pursuant to the case of **British Homes Stores Ltd v Burchell [1981]**. Essentially that is a three stage test and I have to determine whether in the circumstances and on the evidence before me the respondent held a genuine belief in the claimant's guilt, whether they carried out in all the circumstances a reasonable investigation and whether ultimately that genuine held belief was reasonably held.
15. I am also guided by other authorities principally the case of **Iceland Frozen Foods Ltd v Jones** in that deciding whether a dismissal is fair or unfair under 98(4) I have to consider whether the decision to dismiss in the circumstances falls within a band of reasonable responses of an employer faced with that set of circumstances.
16. I must not substitute my own view as to what I would have done if I was faced with those circumstances but to consider whether an employer would have been reasonable in dismissing in those circumstances and therefore whether the decision to dismiss fell within a band of reasonable responses.

Conclusions

Unfair Dismissal

17. This has not been an easy case to decide and I consider that the respondent could have conducted a fuller investigation by seeking evidence from the only corroborating witness, that is the postman. They really should have tried harder to contact the postman and seek his evidence. That aside the investigation was perhaps all it could be in that they had considered the CCTV footage which was pretty much all they had before them other than the evidence put forward by the claimant. I am therefore inclined to agree that they passed the first of the two limbs of the **Burchell** test which is that they had a genuinely held belief pursuant to a reasonable investigation, but was it reasonably held? I think not. I do not think that it was sufficient to justify dismissal.
18. They should have taken into account the fact that had they heard the abuse and the very significant threats to the claimant from the resident the whole incident would have been properly contextualised. The actions of the claimant in running at the resident before he then produced two knives would be much more understandable in the context of the verbal abuse and threats that he was being subjected to.
19. It is important to remember that adherence to policies such as the Code of Conduct is admirable but not sacrosanct. Such a policy is only a guide. Policies such as the Code of Conduct are not to be applied in a purely tick box manner. Mr Rees and Mr Fisher should have looked at the matter in the round. Every case turns on its own facts.

20. In the circumstances I consider the claimant's reaction was understandable. His behaviour was not perfect and was not ideal. Another employee might have run into the office and locked the door – he did not. He ran at and pushed the resident. Yes, he did it before the resident had actually produced the knives but the resident had been threatening to produce knives and to cut him and to attack him, even kill him and the claimant was well aware that the resident had a history of threatening people with knives. So, he was right to be frightened for his life as ultimately that was proven to be the case as he was attacked by a man wielding two knives who had a history of violence.
21. As for his failure to replicate the police admission in the incident report and subsequently his failure to correct that, this also was not ideal. I accept however that he was so traumatised by the incident that he did not see the significance of filling in the form at the time. I can understand how he would feel that he had already given his account of the incident by giving a statement to the police and that that was enough. On that particular day he had probably suffered quite enough having had to deal with the attack by the resident. The police charged the resident who was convicted – they did not charge the claimant and they saw the same CCTV and knew of the push or punch. The claimant has subsequently and not surprisingly suffered from PTSD as a result of the incident and was off sick for some time prior to the dismissal.
22. The claimant did not behave ideally but in all the circumstances I do not consider that the decision to dismiss him falls within a band of reasonable responses of an employer faced with the circumstances with which they were faced. Perhaps a more appropriate sanction by the respondent would have been a warning or even a final written warning. He did not fully explain why he gave two versions of events, one to the police and one to the respondent and he had the opportunity to correct that and his reasons for not doing so were not wholly consistent. So, he is not blameless. Nevertheless in applying the **Burchell** test I find on balance that the respondent's belief was not reasonably held. I also consider that the decision to dismiss does not fall within the band of reasonable responses of an employer faced with the evidence the respondent were faced with. I have not substituted my own view but looked at what a respondent would have done in those circumstances. For that reason, I find that the claimant's claim for unfair dismissal succeeds.

Wrongful Dismissal

23. I have considered all the authorities on wrongful dismissal and the fairness of the dismissal is of no consequence in a wrongful dismissal case. I do consider that the claimant behaved in a way which was a breach of contract but in my judgment it was not a sufficiently serious breach to amount to a repudiatory breach entitling the respondent to dismiss him without notice. His wrongful dismissal claim therefore also succeeds and he will be entitled to damages for the notice pay he would otherwise have received.

24. There will be a Remedy Hearing by CVP before me with a full day allowed on **22 July 2021**. The claimant should produce a statement to be sent to the respondent and filed with the Tribunal by **28 February 2021** setting out his attempts to mitigate his loss since dismissal and if he was not able to mitigate his loss by finding other work explain why not. I have seen his Schedule of Loss where he launches into some explanation as to what has happened since but there will need to be witness statement to support that. I will hear arguments on contributory fault in respect of any compensation in the unfair dismissal claim on that day also. It is to be fervently hoped that the Remedy Hearing will not be necessary and the parties will be able to settle matters prior to the Remedy Hearing and that that date can be vacated.

Employment Judge KJ Palmer

Date: 8 February 2021

Sent to the parties on:

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For the Tribunal Office