



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Taylor

**Respondent:** Helping Hands Community Care

## CERTIFICATE OF CORRECTION

### Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the *Judgment* sent to the parties on 12 February 2021, is corrected at paragraph 3.2 by removing the wording in that paragraph after '15th February 2006'.

Authorised by Employment Judge **Speker** OBE DL

Date 17 February 2021

**Important note to parties:**

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Taylor

**Respondent:** Helping Hands Community Care Limited

**Heard at:** Newcastle Hearing Centre by Cloud Video Platform

**On:** Monday 4th and Tuesday 12<sup>th</sup> January 2021

**Before:** Employment Judge Speker OBE DL

***Representation:***

**Claimant:** Mr D Taylor - In person.

**Respondent:** Helping Hands Community Care Limited - Mr Ridgeway

## ***JUDGMENT***

1. The claimant was unfairly dismissed by the respondent.
2. A remedy hearing will be held (two hours allowed) on a date to be fixed.

## **REASONS**

1. This is a claim by Dominic Taylor who claims unfair dismissal from his employment with Helping Hands Community Care Limited. The claim arises out of the dismissal on 23<sup>rd</sup> June 2020 allegedly for gross misconduct. This virtual hearing is being held by CVP because of the Corona pandemic. The claimant is in person representing himself and the respondent was being represented by Giles Ridgeway. I have been provided with a bundle of documents running to 120 pages to which was added the warning letter and the respondent's disciplinary policy.
2. For the respondent I have heard from two witnesses namely Mrs Alison Dixon branch manager who was the dismitter and Mr David Harrison the managing director of the respondent company who heard the claimant's appeal. The claimant gave evidence on his own behalf. The hearing has lasted two days. The commencement was slightly delayed on 4<sup>th</sup> January because the respondent had not had adequate time to take instructions on the claimant's written statement and time was allowed for this to take place.
3. I found the following facts.

- 3.1 The respondent company provides care services in the community and is the preferred provider of domiciliary care in Northumberland. It employs over 450 staff and provides care for more than 900 service users, amounting to 12,000 hours of care per week. There are three branches loosely described as East ( covering Ashington and Bedlington), Hexham (in the west) and specialist services around Cramlington. The company has a contract with Northumberland County Council under which it is a key provider.
- 3.2 The claimant was employed as a home care support worker in the eastern sector, the branch manager of which was Mrs Alison Dixon. The claimant's continuous employment dates from 15<sup>th</sup> February 2006 as he was with the respondent's predecessors and the employment was presumed transferred under TUPE so that the claimant has actually been with this named Respondent company as his employer for over three years.
- 3.3 The company operated by the respondent uses a digital tool known as ECM, Electronic Care Monitoring. This contains details of the care calls rostered for the various home care support workers identifying whether one or two carers will be needed and whether carers are to attend individually. The system also enables carers to log in and out and records times in relation to this. ECM enables the company to identify that carers have called, the times involved and that they have suitably logged in and out. The claimant was familiar with all of these processes, including the need to log in and out at appropriate times and in to deal with the care needs of the service users, including matters such as medication and he knew of the need to make proper log entries.
- 3.4 There was no evidence given to the effect that the claimant was found wanting with regard to the performance of his duties as a carer. There were no complaints recorded or produced to the tribunal to the effect that there had been any complaints by service users or their families as to the manner or failure in the standard of care provided by the claimant or in his general dealings with service users or as to him attending late or not attending at all. No evidence was produced to the tribunal with regard to internal appraisals or monitoring performed in relation to the claimant although the claimant maintained in his statement that his last annual appraisal prior to dismissal had been complimentary and favourable.
- 3.5 On 6<sup>th</sup> January 2020 the claimant was given a written warning following a meeting that day. The written warning letter referred to three specific issues, firstly a blatant disregard to the organisation's dress code and uniform policy, secondly persistent failure to abide by ECM procedures and not using the company issued mobile device as directed, and thirdly call stay times falling below expected levels without valid reason. The letter did go on to say as follows: *'further misconduct within the timescale above is likely to result in further disciplinary action which may include dismissal'*. The time mentioned above was twelve months from the date of the warning.

- 3.6 On 22<sup>nd</sup> June 2020 issues were raised by Sarah Grieves, care co-ordinator, with the manager Alison Dixon to the effect that Sarah had been trying to contact the claimant that morning and she suggested that he had not called at the home of one of the users Mr R Smith and that the claimant had said he was on his way to that call but had left because it had been dealt with by another carer, Ryan Grieves, who incidentally is the husband of Sarah Grieves.
- 3.7 On the following day, 23<sup>rd</sup> June, Alison Dixon spoke to the claimant by telephone after he had dealt with other calls. She queried whether he had attended the home visit for Mr R Smith and the claimant gave an explanation of the circumstances but said he had attended. The claimant was also asked about calls at the home of Peter Skirving, another service user, on 10<sup>th</sup> and 13<sup>th</sup> June and about the times having been changed, this being a double-headed care requirement. The claimant gave his explanation of having altered the times and said that this was what other carers did too. Alison Dixon stated that the claimant having missed calls and having changed the time of double care visits was placing people at risk and that this amounted to gross misconduct and she informed the claimant that she was dismissing him for gross misconduct with immediate effect. The claimant protested robustly and maintained that Alison Dixon could check with the service users or the family to the effect that he had attended. He also mentioned other carers by name, namely Paul Welford, Alan Davison, Ryan Grieves and Ron Woodhouse and maintained that they also altered cares where they were double-booked so that only one carer might attend. However, Alison Dixon stated that none of this would make any difference and that she would not discuss what other carers may or may not do.
- 3.8 The claimant said that he wished to take the matter higher and wanted to speak to David Harrison but he was informed that he should communicate with Andrea McDougall, Head of HR, which he then did. He was informed that he had the right to appeal and this was repeated in the letter of dismissal which was also dated 23<sup>rd</sup> June but which he received possibly two days later. The letter of dismissal stated that the reasons for dismissal were as follows:
- (i) failed to attend care calls;
  - (ii) you changed the time of care calls despite being aware that the second carer would be in attendance and may not be available at those times.
- 3.9 The claimant submitted a notice of appeal by text and an appeal hearing took place before David Harrison, Managing Director, on 9<sup>th</sup> July 2020. The claimant was accompanied by Kerry Hay. Andrea McDougall attended and took notes. The claimant made points about the evidence against him and suggested there were faults with the ECM system. He drew attention to apparent discrepancies and inconsistency in the way in which he was being dealt with and how other carers operated. David Harrison said that he would look into the matter and consider what he had been told and would contact the claimant later. Some hours later Andrea McDougall

telephoned the claimant to tell him that the appeal was not successful and that dismissal stood. The claimant was upset by this and felt that David Harrison had not looked into the issues as he had said that he would. Following this the claimant issued his application in the tribunal.

### **Submissions**

4. Mr Ridgeway made detailed oral submissions. Whist conceding that there were some defects in the procedure, he suggested that there was an adequate investigation into what was alleged and he also referred to the well-known case of *British Home Stores -v- Burchell*. He suggested that Alison Dixon had a genuine belief in the misconduct by the claimant, that there were reasonable grounds to do so and that she had carried out a reasonable investigation. She had said that the faults found with regard to the claimant's conduct and his performance were serious and amounted to gross misconduct and therefore justified the dismissal. He argued that the warning letter, whilst relating to conduct which was not identical to that for which the claimant was dismissed, could be used in the sense that it warned the claimant that further misconduct may lead to his dismissal and therefore he was put on notice by this.
5. Mr Ridgeway suggested that there was no further investigation which needed to have been carried out and in all the circumstances substantively the dismissal was fair. He made reference to the *Polkey* principle on the basis that if there were faults with the procedure then if there had been a fair procedure the outcome would have been the same and he placed the percentage risk of that at one hundred percent. He also argued that if the claimant were to be awarded compensation then this should be reduced on the basis of blameworthy conduct, contributory fault and he placed the extent of this again as one hundred percent and he made reference to the case of *Nelson -v- BBC*.
6. Mr Taylor submitted that the dismissal was unfair both as to the reason as well as with regard to procedure. The respondent had not checked out his explanations as they ought to have done. He had not caused a risk to anyone's safety. His actions were consistent with how other carers acted.

### **The Law**

*Employment Rights Act 1996*

*Section 98 (1)* sets out the requirement to find the reason for dismissal and if more than one the principal reason and that it is a potentially fair reason.

*Section 98 (4)* sets out the statutory test of unfair dismissal.

*British Home Stores Ltd -v- Burchell [1978] IRLR 379 EAT* the approach in conduct investigation

*Iceland Frozen Food Ltd-v-Jones [1982] IRLR 439 EAT* – the test of reasonableness

*HSBC Bank plc-v-Madden [2000] IRLR827 CA* - 'band or range of reasonable responses.

### **Findings**

7. It is established in relation to unfair dismissal that this is to be examined both as to the substance, that is the reason why a person was dismissed and the fairness of the decision, and as to the procedure which has been applied and which is part of the general circumstances referred to in Section 98 (4) of the 1996 Act.
8. Under Section 98 (1) the first issue for me to determine is the reason or if more than one the principal reason for the dismissal of the claimant and whether it is a potentially fair reason. The decision maker here was Alison Dixon. From her evidence, her notes made at the time and her dismissal letter, I find that the reason for dismissal related to conduct, which is a potentially fair reason.
9. Where an employer is considering dismissal, there is a duty to adopt a fair process. There is a requirement by law to have a disciplinary procedure. It was notable that a disciplinary policy or procedure was not included in the bundle of documents initially before me but was then produced during the first day of hearing after I had requested it. Even the document produced, and which was not referred to at all during the disciplinary hearing or the appeal, was stated to have been revised in August 2020 which is after the date of dismissal. Therefore, there is no way of me knowing whether it existed in precisely the same format at the time of dismissal. However, it would be reasonable to assume, giving credit to the respondent, that it had in place a disciplinary procedure in some format in essence requiring a fair procedure to be adopted.
10. It is implicit that if there is a policy then it should be followed. This would require evidence to show that the person who enacted the discipline - the dismitter - was aware of the policy and was endeavouring to follow it. The policy document produced, under the heading 'General Principles' states as follows:
  1. *We will carry out a prompt investigation. We will inform you whether any meeting you are asked to attend is investigatory or disciplinary. In serious cases, where practicable, different people should carry out the investigation and the disciplinary hearing.*
  2. *We will give you or send you a letter setting out the complaint made against you and inform you of the possible outcomes of the disciplinary hearing. Also included will be relevant evidence which may, where appropriate, include witness statements. The letter will inform you that you must attend a disciplinary hearing to discuss the matter and will confirm the time, date and location. The letter will also tell you that you have the right to be accompanied at the disciplinary hearing. If you do not understand the letter you should speak to the HR team.*
  3. *We will give you, together with any permitted representative under the statutory guidance, reasonable time to prepare your response (a minimum of 24 hours).*

4. *At the hearing we will explain the company's case and give you the opportunity to put your case in respect of the allegations made against you.*
  
11. There is a line in the policy which states as follows: "*We may miss out stages of the procedure if we think this would be reasonable in the circumstances*". This was referred to by Alison Dixon as some justification for the fact that there were acknowledged omissions with regard to the company's own policy for a fair procedure. However, to miss out stages of the procedure on this basis would first of all need a positive, conscious and deliberate acknowledgment of what the various stages of the procedure were and then forming a view based upon reasonable grounds as to why it was reasonable to miss out some stages of the procedure and which stages should be missed out.
  
12. I find in the present case that almost every stage of this disciplinary policy and procedure was missed out. In particular the dismissal occurred in a conversation which had not even been entitled as an investigatory meeting but was if anything the commencement of an investigatory process. There had been some communications between Alison Dixon and other carers which are evidenced by notes which she herself typed out but these are not timed and not verified by the persons referred to. When they were eventually shown to the claimant after he was dismissed, they were still in anonymous format even though it may have been fairly obvious to him who the individuals were.
  
13. During the hearing there was reference to the ACAS guide 'Discipline and Grievances at Work 2019' which should be a basis for all employers in order to set out proper procedures for dealing with discipline and grievances in a proper manner. I will not set out all of this Guide in detail but suffice to say that there are clear paragraphs and guidance in basic English setting out the steps which should be taken by employers having a grievance and disciplinary procedure to establish the facts, investigate cases in a proper way, inform the employee of what charges are to be met, holding a disciplinary hearing in a proper manner and preparing the hearing. This is to ensure fairness. I set out some of the points which are made in the ACAS Guidelines as to preparation for a hearing:
  1. *Ensure that all the relevant facts are available such as disciplinary records and any other relevant documents including absence or sickness records and where appropriate written statements from witnesses.*
  2. *Where possible arrange for someone not involved in the case to take a note and to act as a witness.*
  3. *Check if there are any special circumstances to take into effect.*
  4. *Allow the employee time to prepare his case with copies of any relevant papers and witness statements being made available in advance.*

5. *Be careful when dealing with evidence from a person who wishes to remain anonymous and checking the motives for making the statement genuine and assess the credibility and weight to be attached to any anonymous evidence.*
  6. *Consider what explanations may be offered by the employee and if possible check them out beforehand.*
  7. *Arrange a time for the meeting which should be held privately if possible in a suitable room where there will be no interruptions.*
  8. *Try to get a written statement from any witness.*
  9. *Allow the employee to call witnesses or submit witness statements.*
14. There are others but the above are quite sufficient to support the conclusion I have reached that there was not a fair procedure and in itself is sufficient to find this not to have been a fair dismissal. As I have stated, the dismissal arose during a telephone conversation in a call made by Alison Dixon to the claimant which began as a form of investigation. Quite when Alison Dixon decided that she was converting this into a disciplinary hearing is not clear but at some stage during that conversation she made the decision that she was to dismiss the claimant instantly on the basis of alleged gross misconduct. It is clear to me that to proceed to dismiss Mr Taylor in these circumstances and in this manner was contrary to the ACAS guidelines and the respondent's own policy and to any principles of fairness.
  15. Applying the test in the case of *British Home Stores-v-Burchell* myself as submitted by Mr Ridgeway, I do find firstly that Mrs Dixon believed that the claimant was guilty of misconduct. Secondly however, I do not find that, at the time she made the decision to dismiss, she had reasonable grounds for doing so bearing in mind that explanations were being put forward which were not investigated; and thirdly I do not find that there was sufficient investigation into the circumstances as was required.
  16. As to the substance to the reason for dismissal, namely the conduct alleged, and as set out in the disciplinary letter, it was of significance that Alison Dixon described as 'identical' the accusations for which she was dismissing as were set out in the written warning letter. As previously indicated, I find that they were not identical and that this was not a proper approach to adopt, bearing in mind the matters which Alison Dixon was discussing with the claimant on the day of dismissal.
  17. Bearing in mind that the investigation was so wanting, I cannot find that the respondent acted reasonably in dismissing the claimant in these circumstances. This is not a decision which I find would come within the band of reasonable responses as described in the well-known case of *Iceland Frozen Foods Limited-v-Jones 1982 IRLR439EAT*. This case provides that in applying Section 98 (4) a tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers that the dismissal was fair. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many cases



there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another might reasonably take another. The function of the tribunal 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 it falls outside the band then it is unfair.

18. I find in the present case that to have dismissed the claimant for the reasons stated in the manner he was dismissed was unfair. With regard to the question of the procedural unfairness and whether if a fair procedure had been applied there would have been no difference, I did not find this compelling at all. Such were the deficiencies with regard to the investigation that this is not a case where I can say that if there had been a proper investigation the outcome would have been the same.
19. As to the submission regarding blameworthy conduct, this would require something significant upon which I could find that the claimant was effectively the author of his own misfortune. That is what the case of *Nelson-v-BBC* states. It urges the tribunal to consider this when looking at the question of a reduction for blameworthy conduct. I find no material on which such a finding could be made and therefore I do not make any order for such reduction. I make the same finding with regard to the suggestion that there should be a reduction with respect to the basic award.
20. Accordingly, for all of the reasons stated, I find that the claimant was unfairly dismissed and I therefore find in the claimant's favour. I have heard some evidence with regard to the claimant's schedule of loss. It is not an adequate document in order to set out what can be claimed by way of compensation for unfair dismissal. It will therefore be necessary to have a short remedy hearing. Prior to that hearing it is ordered that the claimant shall file in the tribunal and serve upon the respondent within twenty-one days of today a properly itemised schedule of loss setting out arithmetical calculations with regard to all losses he is claiming as a result of the finding of unfair dismissal. This must include the calculations taking into account earnings received from any source and also his evidence as to steps which he has taken with respect to his duty to mitigate his loss following his dismissal. The respondent is ordered, if so advised, to file in the tribunal and serve on the claimant a counter schedule within fourteen days of receiving the claimant's schedule.

**Authorised by EMPLOYMENT JUDGE SPEKER**

**OBE DL**

**Case No: 2501613/2020**  
**JUDGMENT SIGNED BY EMPLOYMENT**  
**JUDGE ON 11 February 2021**

**JUDGMENT SENT TO THE PARTIES ON**  
**12 February 2021**  
**AND ENTERED IN THE REGISTER**

**Miss K Featherstone**  
**FOR THE TRIBUNAL**

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