



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Watson

**Respondent:** The Ashley Foundation

**Heard at:** Newcastle, by video **On:** 25 February 2021

**Before:** Employment Judge Moss

## ***Representation:***

**Claimant:** In person  
**Respondent:** Mr C Peel

## RESERVED JUDGMENT

The judgment of the Tribunal is:

The claimant's complaint of unfair dismissal is not well-founded. This means the respondent fairly dismissed the claimant.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic and all issues could be determined in a remote hearing. Whereas CCTV footage was unable to be viewed simultaneously during the hearing, all present were able to view it separately and evidence regarding its contents was given during the course of proceedings.

## REASONS

### **Claim and issues**

1. The claimant brought a claim alleging that the respondent unfairly dismissed him.

2. The issue for me to determine was whether the claimant was unfairly dismissed. This would involve consideration of the following:
  - 2.1 What was the reason (or the principal reason) for dismissal.
  - 2.2 Was this a potentially fair reason. The respondent's case is that the reason related to the claimant's conduct, which is a potentially fair reason.
  - 2.3 Was the dismissal fair or unfair in accordance with section 98(4) of the Employment Rights Act 1996. This would include consideration of whether there were reasonable grounds for the respondent's belief, whether a reasonable investigation had been carried out, whether there had been procedural fairness generally, whether dismissal was a sanction that came within the band of reasonable responses open to a reasonable employer.
3. It was agreed at the outset that only issues of liability, contribution and the likelihood of the claimant being dismissed in any event (Polkey) could be dealt with during the hearing. If the claim of unfair dismissal was made out, directions would be issued towards a separate remedy hearing.

#### **Evidence and findings of fact**

4. I heard evidence from Mr D Watson (the claimant), Mr W Thompson (Regional Housing Manager for the Respondent), Ms L Cooper (Housing Services Manager for the Respondent) and Ms W Swift (Chief Executive Officer of the Respondent). I was referred to certain documents from within the hearing bundle and I viewed CCTV footage relating to the alleged misconduct relied upon by the respondent in its decision to dismiss the claimant.
5. The respondent provides accommodation for homeless people in need of shelter. The claimant commenced employment with the respondent on 1<sup>st</sup> March 2018, working at one of its hostels, Poplar House, Sunderland. He was employed as a duty supervisor initially and was promoted to the role of team leader after a year.
6. The claimant had never been subject to any disciplinary action prior to this occasion.
7. The claimant was summarily dismissed on 10 August 2020.
8. On 12 July 2020, the claimant was working alone at Poplar House. He contacted the Regional Housing Manager, Mr Thompson, to inform him one of the residents had caused a few issues and suggested that Mr Thompson get rid of him the following day. Mr Thompson responded 'put him out Dave save me the chew on in the morning'.

9. The claimant gave the resident the news that he had to leave. It is not disputed that an incident occurred during which the claimant laid hands on the resident. Once outside, the resident broke some windows at the hostel and the police were called.
10. On 13 July 2020 the claimant sent an email to Mr Thompson and the Housing Services Manager, Ms Cooper, asking what kind of insurance the respondent had and questioning what would be done to minimise the risk of such an incident happening again.
11. Having been asked by the police to download the CCTV footage relating to the incident, Mr Thompson viewed it on 15 July 2020. I accept his evidence that he found the claimant's behaviour worrying and contacted Ms Cooper about his concerns. Ms Cooper asked Mr Thompson to investigate the matter.
12. The claimant attended an investigation meeting with Mr Thompson on 16 July 2020.
13. During the investigation meeting the claimant said the following:
  - 13.1 The resident stood up, started shouting and stormed out of the office.
  - 13.2 The claimant followed him and put his arm in front of him to slow him down.
  - 13.3 The resident slipped his grip, went through the door into the passage outside of room 3 and spat in the claimant's face.
  - 13.4 The claimant physically grabbed hold of him due to his behaviour and aggression, just trying to slow him down.
14. After the meeting, Mr Thompson forwarded his notes to the claimant and asked him if he was happy with them or wanted to add anything. The claimant did not seek to add or amend anything.
15. On 17 July 2020 Ms Cooper sent a letter to the claimant inviting him to attend a disciplinary hearing on 20 July 2020. The hearing was rescheduled twice at the claimant's request and ultimately took place via telephone on 03 August 2020.
16. Each invitation letter alleged the following:
  - You acted in a physically aggressive manner towards a hostel resident;
  - Your conduct was inappropriate and unprofessional which led to further escalation of the incident and which resulted in costly damage to the hostel property;
  - You did not comply with Health and Safety requirements resulting in the serious endangerment of the health and safety of yourself and potentially others.

17. The letters went on to say if the allegations were substantiated, they would be regarded as serious/gross misconduct. Further that the claimant's employment may be terminated in accordance with the respondent's disciplinary procedure should the claimant be unable to provide a satisfactory explanation for the matters of concern.

18. The respondent's disciplinary procedure is set out in the Employee Handbook and includes the following:

*Gross misconduct and summary dismissal will only be considered where there are reasons to believe that you have committed misconduct of such a serious nature that it constitutes a fundamental breach of your employment contract. The following list, although not exhaustive, gives examples of offences which could be construed as gross misconduct:*

- *Aggressive acts and/or physical violence.*

19. The claimant's statement of main terms of employment reads '*this statement, together with the Employee Handbook, forms part of your contract of employment....*'. It is stipulated in the Handbook that in most cases of gross misconduct the employee will be suspended on full pay whilst a full investigation of the facts is carried out. The claimant was not suspended while the disciplinary proceedings were taking place in this case.

20. The claimant was notified of his right to be accompanied by a fellow employee or a Trade Union representative at the disciplinary hearing. He was provided with a copy of the investigation meeting notes, Employee Handbook and CCTV footage.

21. Ms Cooper had viewed the CCTV footage prior to the disciplinary hearing taking place on 03 August. It is common ground that the footage does not show the resident spitting at the claimant. The claimant's position is that the spitting was not captured as it took place in a blind spot. I accept Ms Cooper's evidence that she believed there were discrepancies between what the claimant had said during the investigation meeting and what could be seen on the CCTV footage. Ms Cooper's belief was that the spitting would have been captured had it taken place outside of room 3 as the claimant had said to Mr Thompson.

22. The claimant's explanation in evidence for any discrepancies seems to be that he was not aware that the investigation was a 'mini disciplinary' or he would have taken it more seriously. An investigation meeting is simply a preliminary stage to establish the facts. There is no dispute that a meeting was called and that the claimant was freely able to provide his account of what happened during the meeting.

23. Present during the hearing on 03 August were the claimant, Ms Cooper and Mr Thompson as note taker. Ms Cooper put to the claimant that the CCTV shows him follow the resident and grab hold of him to pull him back and then attempt to grab him a second time. The claimant disputed that he grabbed him, maintaining that he put his arm in front of him to stop him going into the hostel

after he'd been asked to leave. It was put to the claimant that he pushes the resident in the corridor outside of room 3 and places an arm against him to stop him leaving. The claimant stated to Ms Cooper that it was not to stop him leaving but to prevent him from advancing towards him and attacking him. I find that Ms Cooper was putting to the claimant what she genuinely believed could be seen from the CCTV footage and that her interpretation of what it showed was reasonable.

24. The claimant confirmed to Ms Cooper that he had read the Employee Handbook and was aware of the standards of professional behaviour expected of him and stated that he believed he handled the situation well taken into consideration the resident spat in his face during a pandemic. The claimant denied that following the resident out of the manager's office escalated the situation. He said to Ms Cooper that his job is to keep the building safe and he didn't know what the resident was going to do. The claimant stated that he was aware of his responsibilities in terms of health and safety. He said that he hadn't followed the procedure for reporting an incident due to adrenaline and that he had started cleaning up, paperwork being the last thing on his mind.

25. Following the disciplinary hearing Ms Cooper took time to consider the CCTV, investigatory minutes, disciplinary minutes, the organisation's Aggression and Challenging Behaviour policy and its disciplinary procedure. She formed the view that the claimant was not being entirely truthful about the way in which he handled the resident. I accept Ms Cooper's evidence that she believed the claimant's actions were in breach of the Aggression and Challenging Behaviour policy, endangered the health and safety of the claimant and other residents and that it fell within gross misconduct as per the organisation's disciplinary procedure. She decided that summary dismissal was appropriate in the circumstances.

26. On 10 August 2020 Ms Cooper wrote to the claimant terminating his employment on grounds of gross misconduct and informed him of his right to appeal the decision. The findings made by Ms Cooper were:

- that the claimant had acted in a physically aggressive manner towards a hostel resident;
- that his conduct was inappropriate and unprofessional which led to further escalation of the incident and which resulted in costly damage to the hostel property;
- that he did not comply with health and safety requirements resulting in the serious endangerment of the health and safety of himself and potentially others.

27. The claimant appealed the decision, his grounds of appeal being as follows:

- He did not act in a physically aggressive way towards the resident. He accepted that he placed hands on the resident three times but stated that none of his actions were aggressive in nature.

- His conduct was not inappropriate or unprofessional. He stated that he was spat at directly in the face during a global pandemic and that he had repeatedly raised the issue of lone working being especially dangerous at present. He also questioned the lack of training and guidance provided by the respondent on dealing with hostile situations.
- In terms of complying with health and safety requirements, the claimant contended that, if anyone was in breach, it was the respondent by putting the claimant in the position of having to evict a volatile resident while working alone. He stated that his entire response was to ensure the safety of the other residents in the hostel.

28. The appeal was heard by the respondent's Chief Executive Officer, Ms Swift, on 27 August 2020. She invited the claimant to attend at Poplar House for the hearing but his preference was for it to take place via telephone.

29. At the start of the appeal hearing the claimant made it clear he did not want to be reinstated and that he had gained other employment. Ms Swift took the claimant through the points he had raised in his appeal letter and gave him a chance to comment further. The claimant during cross examination conceded that he wanted to get the meeting over and done with and did not give it his full attention as he did not want reinstatement.

30. Ms Swift upheld the decision to terminate the claimant's employment. She notified the claimant by way of letter dated 04 September 2020 of her decision, the reasons for which can be summarised as follows:

- *Acting in a physically aggressive manner towards a resident -*

Ms Swift states that she fully considered the claimant's statements and the CCTV footage. She found that the claimant's reaction was unnecessary and that the situation could have been avoided if he had allowed the resident to have his possessions.

Also taken into account by Ms Swift was that the claimant maintained the resident was pleading guilty to spitting at him but her understanding was that the spitting was denied and the judge had found in the resident's favour. Ms Swift believed that the claimant had withheld that information from the respondent.

- *Inappropriate and unprofessional conduct –*

Ms Swift found that the claimant contravened the respondent's policy on dealing with aggressive and challenging behaviour by not reducing the risks by effective communication and respecting the personal space of the resident. She stated that the policies are there to protect staff and residents, particularly staff when lone working.

- *Failure to comply with health and safety requirements –*

Ms Swift stated that the police should have been called with immediate effect which is detailed in the policies and is part of induction training. She said that the claimant was experienced, having been in the role for over 2 years, and knew what the job entailed.

31. The claimant contended that he had not had sight of the respondent's policy on Aggression and Challenging Behaviour prior to these proceedings. The relevant parts of the policy are as follows:

- *Never stand too close to a client or colleague or touch them*
- *Do not meet aggression with aggression as this leads to confrontation and could result in someone being hurt*

32. The claimant accepted that he had been issued with the Employee Handbook but said he didn't know whether the section on policies and procedures was included in the version he received. He conceded that he could be expected to keep up to date with policies and procedures, especially being a supervisor.

33. I accept Ms Swift's evidence that she had asked the claimant at the appeal hearing whether he had seen the policies referred to in paragraph 2 of the Employee Handbook, particularly on lone working and violence and aggression. The claimant confirmed to Ms Swift his understanding that you should never touch a resident, that the police should be called during the incident. I find that the claimant was indeed aware of the respondent's policy on Aggression and Challenging Behaviour, having confirmed as much by his response to Ms Swift at the time.

34. It is clear from her evidence that Ms Swift kept an open mind and fully considered the alternative outcomes open to her, specifically to either downgrade the decision to a final written warning or to uphold the dismissal. She said that she worked it through and felt the situation had been aggravated and that, had the claimant been looking for reinstatement, she would have arrived at the same decision to uphold the dismissal.

35. It is the claimant's case that he was dismissed for raising concerns about staffing levels and about the safety of the work environment. He contended in evidence that he would have been suspended had the respondent truly believed he was violent. Ms Cooper explained that the claimant was not suspended because the resident had been removed so there was no ongoing threat. She also gave as a reason that there were staffing issues as they only had three night supervisors.

36. I find the reason for dismissal did relate to the claimant's conduct. The facts known to, and/or beliefs held by, Ms Cooper from watching CCTV footage of the incident and weighing that against the claimant's account of what had happened caused her to reach the decision that the claimant had acted in breach of the organisation's policies and that summary dismissal was warranted. The dismissal letter clearly sets out the reasons as including the claimant had acted in a physically aggressive manner towards a hostel

resident. I reject the claimant's assertion that he was dismissed for raising concerns about safety. It is right that he was not suspended during the investigation. An employer is not bound to suspend an employee while alleged misconduct is investigated and I accept Ms Cooper's evidence regarding the reasons behind the decision not to suspend the claimant. Although I am told that the resident has since pleaded guilty to assaulting the claimant during the incident, this was not information that was available to Ms Cooper at the time.

### Legal framework

37. An employee has the right under section 94 of the Employment Rights Act 1996 not to be unfairly dismissed.
38. Where a complaint of unfair dismissal is made, it is for the employer to show that it dismissed the claimant for a potentially fair reason ie. one within section 98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held. If the respondent fails to do that the dismissal will be unfair.
39. Dismissal for a reason relating to the claimant's conduct is a potentially fair reason falling within section 98(2).
40. Where the conduct of the employee is established by the employer as the reason (or main reason) for dismissal, then section 98(4) must be considered which provides as follows:

Where the 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 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 and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.
41. Where misconduct is alleged, an employer must genuinely believe the employee is guilty, and must have reasonable grounds for that belief, which must have been reached following a reasonable investigation. It does not have to prove guilt to a criminal standard and it does not have to adopt a procedure akin to that of a criminal investigation **BHS v Burchell [1978] IRLR 379**.
42. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of, or an appeal against, the merits of an employer's decision to dismiss. The employer, not the Tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function



of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response **HSBC v Madden [2000] ICR 1283**.

43. The range of reasonable responses test (or to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason **Sainsbury v Hitt [2002] EWCA CIV 1588**.
44. In some circumstances unfairness at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process. That will depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case **Taylor v OCS Group [2006] IRLR 614**.

### Conclusions

45. I had to decide whether the respondent had proved the reason for dismissal. I find that the reason for dismissal was the claimant's misconduct ie. the respondent's genuine belief that the claimant had acted in a physically aggressive manner against a hostel resident in breach of the Aggression and Challenging Behaviour policy. I considered the claimant's contention that he would not have been allowed to continue working at the hostel during the investigation had the respondent truly believed he was violent. However, I accepted the evidence of Ms Cooper that the claimant was not suspended because staffing was an issue and that the trigger for the claimant's behaviour had been removed.
46. I find that the respondent's belief that the claimant was guilty of misconduct was held on reasonable grounds. The incident was captured on CCTV, it being a reasonable conclusion to draw from the footage that the claimant had been physically aggressive towards the resident. The dismissing officer's decision to disregard the claimant's account that he had been spat at was reasonable in light of what can be seen from the CCTV footage. Although I am given to understand that the individual has since pleaded guilty to assaulting the claimant, this was not information that was available to the dismissing officer at the time. It is clear that the spitting was said to have happened after the claimant's actions had given the respondent cause for concern in any event.
47. Another issue for me to consider is whether there was a fair and reasonable investigation. I have concluded that there was.
48. There were no other witnesses present during the incident who could have been interviewed. The resident, as the only other person present, had been evicted and was subject to ongoing criminal proceedings. The claimant maintained throughout the investigation that he had been spat at by the

resident and it is clear that the claimant's account was given due consideration but that it could not be reconciled with what the CCTV footage shows. Following the investigation meeting the claimant was sent a written record of the main points of discussion and was asked to let Mr Thompson know if he was happy with it or wanted to add anything to it. The claimant did not raise any issues with accuracy or seek to add anything.

49. I have concluded that the disciplinary procedure, examined as a whole, was fair. As I have said in my findings of fact, the claimant was aware of the relevant policies setting out the standards of behaviour expected of him while performing his duties. It was made clear to the claimant in advance of the disciplinary hearing that dismissal could be a potential outcome if he was found guilty of gross misconduct. He was notified of the right to be accompanied. The claimant asked for the disciplinary hearing to be rescheduled on two occasions and this was accommodated by the respondent. Disclosure of the evidence on which the respondent would rely had been made sufficiently far in advance. The claimant was given ample opportunity to answer to the allegations during the disciplinary and appeal hearings.
50. Ms Cooper took time after the disciplinary hearing to examine all of the information before reaching the conclusion that the claimant was guilty of gross misconduct. It is clear that Ms Swift kept an open mind throughout, not having ruled out reinstatement even though the claimant did not seek it. I am satisfied that the overall procedure was a fair one in the circumstances.
51. Finally, I find that dismissal was a fair sanction. Such outcome was in accordance with the respondent's disciplinary procedure, as set out in the Employee Handbook. I have the band of reasonable responses clearly in mind in reaching my decision. It is immaterial what decision I would have made. I find that a reasonable employer could have decided to dismiss the claimant for use of physical force in the manner found to have taken place. Although the claimant had a clean disciplinary record, use of violence is stipulated in the disciplinary procedure to be gross misconduct. It is clear that being able to rely upon and trust those supervising hostel residents not to act aggressively towards them is an important part of the respondent's operation.
52. In conclusion, having considered the statutory test and the applicable case law, the overall procedure followed and decisions taken, as well as the specific matters with which the claimant raises an issue, I am satisfied that the respondent fairly dismissed the claimant.

Employment Judge Moss

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON**

30 March 2021

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