EMPLOYMENT TRIBUNALS

Claimant: Mr R M Baciley

Respondent: Russell Court Limited

Heard at: London South (Hybrid Hearing) **On: 22, 23 & 24 March 2021**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Adeniyi, Solicitor
For the respondent: Ms Webber, Counsel

JUDGMENT WITH REASONS

The claims for Unfair Dismissal pursuant to s. 94/98 and S.104 Employment Rights Act 1996 are not well founded and are dismissed.

Reasons

Claims, appearances and documents

1. This was a claim for unfair dismissal pursuant to S.94/98 Employment Rights Act 1996 ('ERA'), alternatively S.104 ERA.

2. There was a breach of contract claim for a long service award (£150) which had been settled before the Hearing.

3. The claimant was represented by Mr Adeniyi, Solicitor and the respondent by Ms Webber, Counsel.

4. The Tribunal heard from the claimant and from Ms Susanne Sloper, administrator, Ms Caveney, Home Manager and Mr Andrew West, Director for the respondent.

5. There was an agreed bundle of about 300 pages.

6. This was a hybrid Hearing, the claimant, his representative and the respondent's Counsel were all in person and the respondent's witnesses gave evidence via CVP. There were no technology issues.

7. The claimant's application to admit a recording of the appeal hearing on day 2 was refused. Full reasons were given at the time. Mr Adeniyi also claimed not to have received a copy of the final bundle, though this submission was not made until day 3 and was rejected. The Tribunal was satisfied that Mr Adeniyi did have all the documents referred to in the bundle as he confirmed that he had received a revised index on 14 June 2019 with all the documents.

Relevant Findings of Fact

8. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the witness evidence.

9. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

10. The respondent is a care home for elderly residents many of whom also have nursing needs.

11. There are approximately 55 staff. Mr West is a Director, Ms Caveney a Home Manager. There are no other senior posts.

12. The claimant was a chef whose employment with the respondent commenced on 9 January 2008 until his dismissal for performance reasons on 8 May 2018 with notice. The claimant worked his notice.

13. There were a series of performance concerns in relation to the claimant. These were set out in Ms Caveney's witness statement. The concerns started from February 2013.

14. The concerns in 2013 were about food quality, including the food not being tasted before being served. Also, the claimant was asked to work occasional weekends to cover staff absences.

15. Amongst the background performance concerns, the Tribunal noted there had been several formal concerns (in addition to informal concerns). The claimant had received a verbal warning in November 2013 in relation to giving a resident an incorrect diet and the standard of the food. In April 2014, he had received a written warning regarding food probe wipes.

16. The claimant had been warned in December 2015 in relation to serving incorrect food.

17. The claimant had received a written warning in March 2016 for serving a diabetic resident just a banana for a meal and the claimant was also responsible for out of date food. The Tribunal noted this warning was for 6 months (which was more than the 3 months provided for in the Statement of Terms).

18. The claimant received a final written warning for 9 months on 18 May 2016 (which was outside the 1 month period provided for in the statement of terms) in relation to food hygiene, incorrect food, probe wipes and adding ingredients outside of the recipes. The claimant did not attend this disciplinary hearing.

19. None of the aforementioned warnings were appealed.

20. On 12 February 2018, the claimant received a 3 months written warning for ordering an incorrect hot trolley, not giving a resident a required soft diet and adding sugar to a dish served to diabetic residents.

21. In oral testimony, Mr West said whilst he approved the purchase of the hot trolley, this was in relation to the amount not the specific product about which he would not have the requisite knowledge. He was not a chef, he did not work in the kitchen. This was consistent with what was discussed in the disciplinary hearing at the time. The Tribunal found it was open to Ms Caveney to apportion blame to the claimant in this regard given his subject matter expertise.

22. This warning was not appealed.

23. The claimant also received a final performance warning on 26 March 2018. The claimant denied any knowledge of the existence of this warning. This was in relation to matters highlighted in the food audit since the previous warning to 12 March 2018 in relation to food quality, missing or added ingredients/items. The Tribunal noted that the food audit also contained positive remarks against some dishes. There was evidence in the bundle of the meeting having been rearranged at the claimant's request; further that the claimant had said to Ms Caveney that he would not show for the meeting. Neither of these points were challenged by the claimant during cross examination of Ms Caveney. The Tribunal had regard to Ms Sloper's evidence, who the Tribunal found be credible. Her evidence was certain and concise. That she had not referred to giving the claimant a leaving card was not relevant to her evidence that she had given 3 letters by hand to the claimant, one of which was this letter. On the contrary, the personal leaving card suggested there was no ill feeling towards the claimant such that her evidence would be tainted or unreliable. The allegation that she had essentially said what she had been told to say was rejected. The Tribunal found the claimant was aware of the meeting of 21 March 2018 and did receive the final performance warning dated 23 March on 26 March 2018. The Tribunal also had regard to the ensuing performance meetings which would not have made contextual relevance if the claimant was not aware of the final performance warning with a 4 week window to improve

performance with weekly meetings on a Friday. His evidence wavered too as he accepted he had received a letter about meeting Ms Caveney weekly on Fridays. That detail was in the final performance warning letter.

24. Much was made of the inconsistency between the reference to a final written warning in the disciplinary procedure and statement of terms and the reference to a final *performance* warning. The Tribunal found there was nothing in that distinction. The disciplinary procedure includes performance and unsatisfactory job performance within its reach. In fact, worded as a final performance warning is clearer with regard what the warning relates to.

25. The final written warning was live for 4 weeks and subject to weekly reviews as part of a performance improvement plan.

26. There was evidence of at least 2 such review meetings on 13 April and 27 April 2018 – there were further performance issues raised relating to the food quality/preparation in both meetings including uncooked items and incorrect ingredients. Whilst there was some challenge to the consistency of the shortcomings discussed on 13 April 2018 with the food audit, the Tribunal was not satisfied that there were in fact any inconsistencies.

27. The claimant challenged the accuracy of contents of the minutes of both of the meetings in April 2018. This was not in his witness statement. Under cross examination he said he only accepted he had added cheese for flavour to one dish. The accuracy of these minutes had not been challenged before, neither had the dispute been put to Ms Caveney. The claimant also alleged that his comments had been made up. The Tribunal rejected that allegation, made for the first time at the Hearing and accepted the broad accuracy of those notes. There had also been no suggestion or challenge that they were not contemporaneous.

28. In the light of these matters, the claimant was invited to a further performance meeting to take place on 8 May 2018. In the invitation letter, the claimant was forewarned of the possibility of dismissal for poor performance. In addition it was alleged that the claimant had not completed some mandatory training.

29. This was in relation to training outstanding since 2017. The claimant asserted he had not received the on line code but when taken to an email of 27 April 2018, he could not recall whether or not he did receive the email with the code. The respondent's case was that he previously been sent the code but the Tribunal found that, in any case, the claimant had received the code by 27 April 2018.

30. The claimant attended the meeting on 8 May 2018 but he left the meeting after approximately 6 minutes in to the meeting. Ms Sloper, who took the minutes, confirmed in evidence that is what happened, thus corroborating the evidence of Ms Caveney. There was also a note of meeting. It was not challenged that this note was not contemporary. Ms Caveney was also not challenged that the claimant did not walk out. The claimant's evidence in his own witness statement was ambiguous about this. He said he had been quoted out of context or had

been interpreted wrongly; that was not the same as a denial that he had not walked out or said words to the effect " You get another chef, I'm gone". Under cross examination, he said he had left as needed to get dinner ready for 5.00pm. However the claimant had agreed to have the meeting at 4.30pm. This was an important meeting given the possibility of dismissal.

31. The claimant was dismissed following this meeting for poor performance. In addition the claimant had not completed the online training. The claimant's final performance warning was taken into consideration before the decision to dismiss was made. The Tribunal questioned Mr Caveney in evidence about whether the live written warning was also taken into consideration and her evidence was that that warning was taken into consideration when the claimant was issued with a final performance warning but not expressly in relation to the decision to dismiss.

32. In relation to the recruitment of another chef, the timing of that was a relevant factor for the Tribunal to take into consideration.

33. The claimant's case was that this occurred before his dismissal as set out in paragraph 23 of his witness statement. The respondent's case was that the decision to recruit a new chef was consequent on the dismissal of the claimant. The respondent produced evidence in the bundle which showed an interview record with Teresa Russell on 25th of May 2018 and an offer of employment dated 26th of June 2018. Based on those records, the Tribunal found that the respondent's evidence was to be preferred. Short of any allegation that these documents were fabricated, they were unequivocal in relation to the timeline. As noted above the claimant did work out his notice. The Tribunal accepted that in those circumstances it would have been disappointing for the claimant to be training up his successor whilst working out his notice. But there was nothing unlawful or unreasonable about that. It was confirmed in the morning of Day 3 of this Hearing that the disclosure regarding Ms Russell's interview and offer had been made to the claimant in June 2019, which was at odds with Mr Adeniyi's asserted position on day 2.

34. For the first time under cross examination, the claimant asserted that Ms Russell had been lined up to replace him 3-4 months before she was employed. This was based on information he had received from her niece. This was extremely relevant and perhaps the most important evidence to lend weight to an argument that the claimant's dismissal was pre-mediated or a sham or for an unlawful reason. It was astounding that there was nothing in claimant's witness statement. Nothing had been put to the respondent's witnesses and the respondent had had no opportunity to rebut or challenge this. In those circumstances, the evidence was rejected.

35. The claimant appealed against his dismissal. This was heard by Mr West on 11 July 2018.

36. At the appeal hearing, the claimant referred to his loyalty and attendance over the years even through sickness. Whilst appreciating his attendance, Mr West said he needed to concentrate on the grounds for appeal. The claimant

accepted that he did sometimes change the dishes if he was lacking in ingredients. The Tribunal found the claimant would have responsibility to order or ask to be ordered all the food ingredients. The claimant produced an appraisal document in 2010 from a previous manager which did not have any adverse comments about his performance. The claimant produced photographs of about 10 meals he said he had taken in the last two months (which the Tribunal understood to be in the two months prior to the appeal hearing) and Mr West agreed that these photos showed satisfactory presentation. The claimant stated that he always tasted his food but then amended his statement to say that he normally tastes his food. The claimant also confirmed that he had now completed his online training on 15 May 2018 because he had previously not had the online access code. Under cross examination Mr West accepted that the claimant had had genuine concerns in relation to the completion of this training but said that the claimant had been given many chances to complete the training, everybody else had done the training and he had all the time needed to get the codes which was his responsibility.

37. The appeal minutes were brief and the appeal outcome letter rejecting the appeal was lacking in detail. The Tribunal questioned Mr West in evidence as to what he had taken into consideration as part of his deliberations. Mr West explained that he had looked at the claimant's file and had reviewed all the notes and the minutes of the meetings. He had also sought some guidance from HR. This was in fact his daughter, who was employed by the respondents but that in itself and without more was not a sufficient basis to determine that it was an inappropriate enquiry. His evidence was accepted in this regard.

38. In relation to the claimants hours, the claimant had been instructed to work alternate weekends from 19 September 2017. There was no evidence of any response to this letter in writing. Ms Caveney accepted under cross examination that the claimant had not been happy about the weekend working when initially raised, but she said he never raised it with her thereafter. There was no evidence of a written grievance or other written resistance before the Tribunal. The Tribunal asked Ms Caveney if the claimant had ever said anything about his statutory rights being infringed and if so what. She said nothing had been said. Surprisingly, the claimant's case that he asserted his Working Time Rights ('WTR') had been infringed was never put to Ms Caveney.

39. The claimant said he had raised his concerns orally and it was about working 7 days including the weekend. He said his hours did not change – he was not being asked to work more than 45 hours. The Tribunal accepted the claimant's evidence that he was not happy about weekend working, including because of his health. That was not however a statement or assertion that he was saying to the respondent that his WTR 48 hour working week rights were being infringed. That was the allegation made clear in his further and better particulars of claim and confirmed in closing submissions. The claimant's evidence to the Tribunal was not consistent with that. There was an intimation that there may have been some other requirement being imposed on the claimant but that this was part of without prejudice dialogue. Thus, it was not admissible evidence the Tribunal could have regard too.

Applicable Law

40. The applicable law on unfair dismissal is contained in section 98 (2) and 98 (4) of the ERA:

(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 the dismissal, and
(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:

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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. In ***British Home Stores v Burchell 1978 IRLR 379*** it was established (and has since been settled) that in a conduct case a Tribunal must consider whether:

- the respondent genuinely believed that the employee was guilty of misconduct
- that belief was based on reasonable grounds
- that there was as much investigation as was reasonable

42. The applicable law whether dismissal was automatically unfair for the assertion of a statutory right is set out in section 104 ERA.

Assertion of statutory right

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1):

(a) whether or not the employee has the right, or
(b) whether or not the right has been infringed; but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

43. It was made clear in ***Spaceman v ISS Mediclean Ltd 2018 UKEAT 0142/18/1910*** that there must be an allegation by an employee that there has been an infringement of a statutory right not merely that the employer may or will, or threatens to, or intends to infringe such right.

44. This case cited the leading case of ***Mennell v Newell and Wright (Transport Contractors Ltd) 1997 IRLR 519***. In that case the employee had lost his case because he did not make an allegation of any kind.

Conclusions and Analysis

45. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the application of the law to the issues including the burden of proof. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

46. The respondent's dismissal of the claimant was for poor performance and the Tribunal concludes that this was treated as a reason relating to the claimant's conduct. That appeared to be a conscious decision and was reflected in the dismissal letter. The respondent had taken legal advice beforehand. In addition, poor performance was part of the disciplinary procedure. There was no separate capability procedure. Conduct is a potentially fair reason and in such cases the ***Burchell*** Test is to be applied.

47. The Tribunal was satisfied that the respondent had a genuinely held belief in the claimant's poor performance. This was clear from the warnings the claimant

had received and in particular there was a live final performance warning at the time of his dismissal. The Tribunal considered if, as asserted by the claimant, there was any or sufficient evidence that the real reason or principal reason for the claimant's dismissal was in fact the alleged assertion that the claimant's Working Time Regulations specifically in relation to the 48 Hour working rights had been infringed but given the Tribunal's finding that there had been no such assertion at all, such a conclusion could not stand and infect the respondent's belief in the claimant's misconduct.

48. The Tribunal was satisfied that the respondent had reasonable grounds upon which to hold its belief. The claimant was a chef responsible to provide food to approximately 41 residents of the care home. It was open to the respondent to treat matters of food quality, food hygiene, food safety and food presentation as matters of sufficient priority warranting the instigation of formal procedures and formal warnings if performance standards were not met. The issues of performance concerns leading up to the warning on 12 February 2018 and the subsequent final warning dated 23 March 2018 and the matters raised in the performance review meetings of 13 April and 27 April 2018 were reasonable grounds on which the respondent based its decision to warn and ultimately dismiss the claimant. The Tribunal noted that the meeting of 27 April 2018 was strictly (marginally) outside of the four-week window, but it was not unreasonable for the respondent to take in to consideration the issues raised at that meeting at the meeting on 8 May 2018. It was within the range of reasonable responses to do so. It also included at least one further incident (after 13 April 2018) which was within the 4 week period.

49. To the extent that it was alleged that the final performance warning was manifestly inappropriate, that was rejected.

50. The respondent's investigation was not unreasonable. In particular each matter of concern relating to food quality/food hygiene/food safety/food preparation all of which are stated consecutively in the alternative were discussed individually at the meetings on 13th April and 27 April 2018. The claimant's challenge to the accuracy of those minutes has already been rejected. The respondent's investigation included a food audit which essentially formed the basis of its concerns but the Tribunal noted that where the claimant deserved praise, it was given. The claimant chose not to attend the meeting on 21 March 2018. He chose to leave the meeting on 8 May 2018.

51. The respondent's decision to dismiss the claimant both procedurally and substantively was within the range of reasonable responses.

52. The Tribunal reminded itself that it was not open to the Tribunal to substitute its view for that of the respondent. The claimant was dismissed following additional concerns within the lifetime of a final performance warning which in itself had followed further issues following a written warning and within the currency of that written warning. It was not suggested what alternative sanction would be more appropriate, for example an extension of the final written warning, but as already stated the test for the Tribunal was not what the claimant or indeed the Tribunal consider should have happened, but whether it was within the range of

reasonable responses for the respondent to dismiss the claimant, which the Tribunal concludes it was.

53. In the alternative to the above conclusions, the Tribunal concludes that the reason for the claimant's dismissal was capability for poor performance and the conclusions already reached are repeated. For the avoidance of doubt the respondent genuinely had reached a view that the claimant was no longer capable or competent to continue to perform his role satisfactorily, despite giving the claimant chances to improve.

54. The Tribunal noted that Ms Cavaney was the investigating and dismissing officer but having regard to the size of the respondent organisation and there being only 2 employees in a senior post, there was no unreasonable failure to comply with the ACAS Code. In the further alternative, the appeal before a Director, who, it was asserted had a good personal relationship with the claimant which was accepted by Mr West, cured any asserted procedural defect.

55. If the Tribunal was wrong in its conclusion regarding whether the claimant did assert an infringement of his WTR 48 Hour working week rights, the Tribunal concluded in the alternative there was no causal link with the subsequent dismissal at all.

56. It was Mr Adeniyi's submission that the performance concerns only started to be raised leading to the claimant's dismissal from the assertion of an alleged infringement.

57. The claimant's evidence was also consistent with that as he said the performance concerns only started to emerge after his 'resistance' at this time to working weekends.

58. The plausibility of a causal link between any alleged assertion and a dismissal for poor performance as a result ignored, crucially, a catalogue of both formal and informal performance concerns before September 2017 up to and including a final written warning as already set out and more fully set out in Ms Caveney's witness statement. There was thus, no or insufficient evidence to support the positive case in this regard that the assertion of an infringement was the reason for the claimant's dismissal.

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Employment Judge Khalil

17 June 2021