



EMPLOYMENT TRIBUNALS

Claimant: Mr P Barrett
Respondent: Stallcombe House (A Charity)
Heard at: Exeter Via CVP **On:** 10 May 2021
Before: Employment Judge Smail

Representation

Claimant: In Person
Respondent: Mr T Falcao, Solicitor

JUDGMENT having been sent to the parties, the Respondent has made an application for costs. The Judge, acting on his own motion, has had the Reasons typed so as to inform the decision on the costs application.

REASONS

1. By a claim form presented on 8 April 2020, the claimant claims unfair dismissal. He was employed as a Support Worker in the respondent's care home, The Willows at Stallcombe House in Sanctuary Lane, Exeter. He had been employed by them for just short of eleven years between 10 April 2009 and 6 February 2020. The Willows is a six-bed unit caring for vulnerable adults.
2. The claimant claims he was automatically unfairly dismissed for having made protected disclosures in a meeting with Sara Bold on 20 January 2020. The respondent disputes that he was dismissed for having made protected disclosures. It says he was dismissed because there was evidence which they accepted that he had emotionally abused a vulnerable resident SH who was autistic.
3. I accept that the claimant made protected disclosures about colleagues in a meeting on 20 January 2020. There was a disclosure about financial irregularity by one colleague. The allegation was that the colleague had taken money from a resident's family for the purchase of musical instruments to be used by the service user. The service user may have used the

instruments - but so did the care worker in his band privately. That was the allegation. The respondent already knew about that and were investigating it. There was a further complaint about a colleague care supervisor who had left her service user abandoned for a short period. The respondent looked into it and provided extra support for that colleague. A third concern raised about a third colleague was found to be unsubstantiated. I accept on the balance of probability the claimant made protected disclosures.

4. The claimant raised these disclosures at a time when he was being challenged for referring to a service user in inappropriate terms. The claimant says he wanted a meeting for some weeks to raise these matters but, on any view, he raised the matters at the same time he was being challenged for inappropriate behaviour. That inappropriate behaviour is not material to anything in the case.
5. Although I am satisfied that he raised protected disclosures, I am also satisfied, on the balance of probability, that the respondent shows that the protected disclosures played no role whatsoever in his dismissal. The reason he was dismissed was because of evidence relating to an allegation made by an agency worker who worked with the claimant for the first time on the 4 January 2020. That was not the first time, I accept, she worked for the respondent; but it was the first time she worked with the claimant at the Willows Unit. She raised them for the first time on 15 January 2020. She explained the delay down to the fact that she had never made complaints about anyone before.
6. She reported the following matters to her manager Claire O'Brien, who put them in writing following an earlier meeting with Sara Bolt. The email is dated 22 January 2020. The complainant was Katelyn Bolton. Katelyn had been providing 1-2-1 care with SH, the autistic resident. Katelyn stated that staff member Paul was bullying SH. She witnessed Paul saying "get him out I hate him nobody wants him in here". Paul closed the lounge door on him and stated that "he was always seeking attention". Paul commented "he does not like me". I told him "if he ever hit me again then he would never see his fucking mother again". Sarah, the Team Leader was present at the time as was the Ocean carer Claire Lancaster, Ocean being the agency. SH started hitting the wall and Paul stated "Hit your hand a bit harder and you might actually break it.". SH's body language changed and he was getting agitated and dribbling. Katelyn reported that Paul stated "look at him dribbling again" in a derogatory manner. Paul commented "I fucking hate him". Katelyn reported that inappropriate language was used. She further reported that sexual 'banter' comments were also made on the shift that she worked.
7. The colleague Sarah Triton was consulted, and she emailed on 23 January 2020, as follows:

"I Sarah Triton am writing this in response to an incident I have been questioned about by Sara Bolt on 22 January 20220.

The alleged incident happened on Saturday 4 January late shift when I was a shift coordinator and happened in the Willows Lounge area between a staff member Mr P Barrett and resident SH. I do not remember the alleged incident or the exact words spoken by Mr

Barrett. I do know Mr Barrett and the resident do not work together anymore due to previous difficulties and a possible personality clash. I have heard Mr Barrett in the past make derogatory comments about the resident in question and I have pulled him up on this at the time and reprimanded him on the way he spoke about the resident”.

8. Ms Bolt was interviewed by Sarah Bolton and she expanded on the allegations in an interview on the 27 January 2020. The information is recorded in note form. Ms Bolt relayed that 2.00pm was the changeover, she was 1-2-1 with SH. SH was walking around. His behaviour changed, punched the wall. PB said if he punches the wall he will break his knuckles. PB and someone else went for a walk and SH much better. In the lounge PB said “get him out” referring to SH. SH turned around and walked away. PB advised Katelyn to leave him and not follow. PB told Katelyn that he and SH do not get on and do not get put together. When asked why not to be put together, PB said they hate each other and because of the first time they walked together SH attacked PB and PB said to SH “He would never see his mother again if he went for PB”. [I was told in evidence that SH’s mother occasionally visits, for example, at Christmas.] PB commented about SH’s dribbling whilst eating. A comment by another member of staff to service user NC that “if he did not stop PB would be told”. Sexual references, reference to a blowjob another member of staff Sarah Triton, in front of residents. Matters very awkward did not know how to take it, did not feel comfortable to bring it up at the time. PB was loud and inappropriate. She did not report it straight away as she has not reported anything before. First shift at the Willows, never met PB before, may not have done intentionally but was inappropriate, think it was jokey but the mother comment was not. SH was laid on the bed for the rest of the shift.
9. The claimant was invited to a disciplinary hearing following the investigation conducted by Sara Bolt. The investigation by Sara Bolt was unremarkable and unchallenged and was typical. The allegations in the letter to the disciplinary hearing dated 31 January 2020 were unacceptable language; and language of a sexual nature in the presence of colleagues and at least one resident; derogatory and unacceptable comments about a resident; lack of care and attention towards a resident displaying signs of anxiety.
10. Before that meeting Sarah Triton was further interviewed on 5 February 2020. She was aware that PB and SH did not get along. SH does not really interact with PB, although SH is like that with other staff too. She heard PB acting in a derogatory manner about dribbling. She said “yes I have and I have intervened and told him it is not ok, he has mentioned the dribbling in front of and behind SH’s back to others in a negative way”. She had never heard PB threaten SH. She added “Willows is about banter and it can be of a sexual nature. Banter does go on in front of residents. SH smacking people’s bottoms is not discouraged”. She and PB do banter, they were bantering on that occasion about turkey basters and babies.
11. The claimant was interviewed by Amanda Greenway in the course of the disciplinary hearing. He admitted that there had been some chat with another member of staff about sexual and inappropriate language. On the alleged emotional abuse of resident SH, the claimant said he had never got on with SH. He stated that the dribbling was especially unhygienic and frankly

disgusting in the kitchen. Amanda asked if there were any risk assessments in place which counter-indicated SH being in the kitchen PB said no. Ms Greenway asked PB how he would feel if he had uncontrolled dribbling and was referred to as disgusting as was alleged as PB had just done in the meeting with her. PB stated he would not like it but reinforced that SH was difficult and unhygienic. Amanda Greenway reminded PB that this was the residents' home and they should not be prevented from freely moving about their home.

12. Amanda Greenway confined her findings of gross misconduct to the matter of emotional abuse. Although she was concerned by other matters including sexual innuendo discussed in front of residents she did not regard that as gross misconduct; but she did dismiss for the emotional abuse. In a letter dated 6 February, 2020 she recorded her reason as emotional abuse of a resident. This was not acceptable, she wrote, and is especially serious as the Claimant failed to uphold appropriate dignity in respect of the resident and used behaviour and language which constituted emotional abuse, referring to his dribbling which he has no control over both in front of him and to others behind his back in a derisory manner. This conduct was serious enough to merit dismissal in its own right. This was the case notwithstanding that there were no other formal warnings on file.
13. I put to Ms Greenway what account had she taken of the fact that there was eleven years' service here, which of course is an extensive period of time. Ms Greenway stated that whilst there was no record of formal disciplinary action if you have been doing the job for eleven years you know not to abuse emotionally a resident in that way.

THE LAW

14. It is important and I make clear the role of the Employment Tribunal on an occasion such as this. We are not a Magistrates Court, for example, where we ourselves decide who was guilty of what. This is a review jurisdiction. The Tribunal has regard to Section 98 of the Employment Rights Act 1996. By Section 98(1) it is for the employer to show the reason, or if more than one the principal reason, for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason.
15. By Section 98(4) where the employer has fulfilled the requirements of 98(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.
 - (b) Shall be determined in accordance with equity and the substantial merits of the case.

16. This provision has been interpreted by the case of ***British Home Stores v Burchell [1978] Employment Appeal Tribunal*** as involving the following questions.
- (1) First, was there a genuine belief and misconduct?
 - (2) Second, were there reasonable grounds for that belief?
 - (3) Third was there a fair investigation and procedure?
 - (4) Fourth, was dismissal a reasonable sanction open to a reasonable employer?
17. I have reminded myself of the guidance in ***Sainsburys Supermarket v Hitt [2003] Court of Appeal*** that at all stages of the enquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer bearing in mind there may be a band of reasonable responses.
18. This develops the guidance given in ***Iceland Frozen Foods v Jones [1982] IRLR 439 Employment Appeal Tribunal*** to the effect that the starting point should always be the words of Section 98(4) themselves. In applying this Section, the Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether the Employment Tribunal consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, an Employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many though not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, whilst another quite reasonably would take another. The function of the Employment Tribunal as the industrial jury 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 a dismissal falls within the band the dismissal is fair, if the dismissal is outside the band it is unfair.

CONCLUSIONS

19. Was there a genuine belief of misconduct? Yes, there was. Were there reasonable grounds for belief? Yes, there were. It is noteworthy that this was Katelyn Bolton's first time ever working with the claimant at the Willows. She was so appalled by what she saw that she felt it necessary to make a complaint. The totality of the matters she raised plainly gave cause for concern; plainly, there was reason for an investigation.
20. In the end Ms Greenway focussed on one aspect only. She accepted the claimant's explanations for his comment about breaking the hand because if SH did punch his hand he might sustain injury but she noted in effect the admission by the claimant of his comments about dribbling which corroborated what Katelyn Bolton said she saw in the sense of derogatory comments about his dribbling. That was confirmed also by Sarah Triton and also, importantly, by the claimant himself who described it as disgusting and

unhygienic. There was an ample body of evidence for the respondent to conclude that the claimant was not conducting himself in a manner conducive to delivering care of vulnerable residents. There was credible evidence of bullying, which they accepted as found.

21. In terms of the decision to dismiss, I noted with interest Ms Greenaway's test which is adopted in the industry. It is 'the Mum test': would you be happy for your mum to be subject to this care? Applying that test, plainly, she was entitled to arrive at the conclusion that the care was unacceptable.
22. I commented during the course of the evidence that one had the impression that there was a very unprofessional environment in the Willows. There is a basis for finding that the claimant contributed to that environment in the way described by Katelyn Bolton. Ultimately, however, the one allegation that the respondent went with was the unsympathetic referencing to dribbling by someone who has no control over it. Regrettably, the respondent had an ample body of evidence for arriving at the decision that it did. I do of course, acknowledge, that in the course of eleven years service the claimant will have done many good things but there was a body of evidence that on 4 January 2020, the standard of care that he provided was way below what could be tolerated. The decision to dismiss was for misconduct and was within the rangel of reasonable responses. A reasonable belief in cruelty to a service user is enough to justify dismissal.
23. The dismissal was not connected with any protected disclosure.

Employment Judge Smail
Date: 09 June 2021

Reasons sent to the parties: 22 June 2021

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