



EMPLOYMENT TRIBUNALS

Claimant: Ms L Andrews

Respondent: Hafod Care Organisation Limited

Heard at: Birmingham **On:** 15 April 2021 (by CVP)
and on 2 and 3 September 2021

Before: Employment Judge Hindmarch

Representation
Claimant: Mr Keith, Counsel
Respondent: Mr P Lanegan, Consultant

JUDGMENT

1. The complaint of unfair dismissal is well founded and is upheld.
2. The complaint of wrongful dismissal is well founded and is upheld.

REASONS

This Judgment was given in Tribunal orally on 3 September 2021. On 13 September 2021 the Respondent made a request for written reasons which I set out below.

1. This case came before me initially on 15 April 2021 when we agreed to adjourn due to connectivity issues and resume to an in person hearing on 2 and 3 September 2021. The Claimant was represented by Counsel Mr Keith. On 15 April the Respondent was represented by Mr Hoyle consultant and on 2 and 3 September 2021 by Mr Lanegan consultant. There was an agreed bundle of 116 pages which rose to 118 pages when a job description for the Claimant was produced on 15 April 2021 and added at the back of the bundle. References to page numbers in

this Judgment are to the pages in the bundle. There were three witnesses. I heard oral submissions from the representatives.

2. By an ET1 presented on 27 February 2020 following a period of ACAS early conciliation from 25 November 2019 to 25 December 2019, the Claimant brought complaints of unfair dismissal, and for notice pay. The Respondent accepted summarily dismissing the Claimant, it said for reason of gross misconduct.
3. There had been an Open Preliminary Hearing before Employment Judge Cookson on 28 October 2020 in which she has made a costs order. This had been resolved by 2 September 2021.
4. At the outset of the hearing on 15 April 2021 I identified the issues. As the Respondent accepted dismissal, it was for the Respondent to show the reason for dismissal and that it was a fair reason under the Employment Rights Act 1996. I would need to consider whether the dismissal was procedurally fair. I would consider the BHS v Burchell test; was there a fair investigation in all the circumstances, did the Respondent form a reasonable conclusion that the Claimant was guilty and did the Respondent impose a reasonable sanction. Issues of Polkey and contributory fault were also raised in the ET3 and may fall to be considered.
5. I heard from the following witnesses:
 - a. Mrs Mary Buckley, Principal Manager for the Respondent, (dismissing officer);
 - b. Mr Anthony Perry, Director, and co-owner of the Respondent, (appeals officer); and
 - c. The Claimant
6. It is common ground the Claimant was employed by the Respondent, a provider of care and residential homes and associated support services, from 4 April 2005 to 30 October 2019. She had 14 years unblemished service at the time of dismissal. She worked in a general business administration role and her duties included some HR functions. She was never issued with written particulars of employment.
7. The Respondent is a small business. Mr Perry and his wife Eleri Perry are owners/directors. Mr Perry's role is that of Finance Director and Mrs Perry is Service Manager. Three other persons form the management team; Rachel Wood, Christine Hitchens and Mrs Buckley. The Respondent told me it relied heavily on the advice of its employment law consultants, Croner.
8. It is not in dispute that the Respondent employed a registered manager GM (whom I shall identify herein by her initials) for 8 years until she resigned and left the Respondent's business in February 2018 to take a role elsewhere as a registered nurse. It is further not in dispute that on

19 February 2018 the Claimant provided a reference for GM to her new employer. The reference appears at page 55 of the bundle. The reference is a proforma type with specific questions to be completed. The Claimant described herself as "Human Resources" and in answer to the question "in what capacity have you known them (GM)?" where options suggested were 'friend, employer, boss, colleague', the Claimant answered colleague. When the proforma asked "would you state whether this reference is a personal or professional option" the Claimant answered professional. There was a section in the proforma asking for the person completing it to circle words appearing in the proforma to describe the applicant. The Claimant circled positive words such as honest, reliable and hard working. It is clear the Claimant was being asked to comment on GM's character and her personal qualities, rather than her nursing skills.

9. In 2019 it appears the Respondent had cause to refer GM's conduct to the Care Quality Commission. As a result of the investigation, Senior Management at the Respondent discovered the reference that the Claimant had given for GM back in February 2018. Mr Perry gave evidence that the Respondent discovered this reference in the 10 day period before the Claimant was suspended.
10. The Claimant's mother passed away on 30 September 2019. Despite this the Claimant attended work the following day on 1 October 2019.
11. On the afternoon of 1 October 2019 the Claimant was suspended by Rachel Wood, acting nursing manager. The Claimant was informed she was being investigated for giving a fraudulent reference, but no more.
12. The Claimant heard nothing further until she received a letter dated 8 October inviting her to an investigation meeting with Rachel Wood on 10 October. The letter is at page 65. It refers to 'alleged falsification of a reference' but gives no further details.
13. The meeting was re-arranged by consent to 14 October. Rachel Wood conducted the meeting and Christine Hitchens took notes. These appear at pages 39 – 42. At the outset the Claimant was asked if she had completed a reference for GM. It was put to her that she had previously been asked about this by the directors of the company and had denied it. The Claimant asked for details of these occasions but these were not provided. It was also put to the Claimant that references should be checked or have input from Mrs Perry. The Claimant was not shown the reference.
14. In submissions Mr Lanegan contended that had the Claimant simply admitted at the outset of the investigation that she had given the reference that would have been the end of matters and no disciplinary process or sanction would have followed. I had to consider that against the background of the Claimant's recent bereavement and her not actually having been shown the reference in question and the fact many

months had passed since February 2018, I did not find the Claimant was evasive in any way and I also do not accept that had she simply answered yes that would have been the end of matters. It is telling that her alleged lack of straight forward answering at this juncture did not appear to be a factor at the dismissal and appeal decision stage, more the focus was on the three allegations which I deal with below.

15. The following day, 15 October 2019, Rachel Wood interviewed Mrs Perry. The notes are at pages 43-44. It is clear from the questions that Rachel Wood was putting to the Claimant the previous day, that she must have had previous conversations with Mrs Perry and others but we have no minutes of these and the Respondent chose not to call Rachel Wood (who still works for the Respondent) as a witness to explain her investigation.
16. The notes record Mrs Perry telling Rachel Wood that on an unspecified date after 11 April 2019 she asked the Claimant whether she had received a reference request for GM and the Claimant had said no. Mrs Perry told Rachel Wood that the procedure for references for registered managers is that such requests should go through her. She said on two further occasions she had asked the Claimant about a reference for GM and that the Claimant had said she might have given a character reference and the request had been sent to her home address.
17. By letter dated 22 October 2019, the Claimant was invited to a disciplinary hearing to be conducted by Ms Buckley. The invitation is at pages 45 – 46 of the bundle. It has three allegations and contained evidence in support. The allegations were as follows:
 - i. “Providing an employment reference in respect of former employee GM for the role of Registered Nurse without the knowledge or permission of the Service Manager, as is normal practice.
 - ii. Providing inaccurate and misleading details in the aforementioned employment reference.
 - iii. Repeatedly lying to the Service Manager in that on a number of occasions, you confirmed that an employment reference request had not been received in respect of the aforementioned former employee from the new employer and that you had not provided a reference on behalf of the Company.”
18. The minutes of the disciplinary hearing, again taken by Christine Hitchens, are at pages 47 – 53. The Claimant denied that there was any procedure that required her to escalate reference requests to senior management and explained she would only do so if a matter such as disability came up. She denied being asked by Mrs Perry if she had completed a reference for GM. Quite surprisingly, in her evidence Mrs

Buckley told me that she herself had been present when Mrs Perry had asked the Claimant if she had prepared a reference for GM. This was not in her witness statement and she did not put it to the Claimant in the disciplinary hearing. If Mrs Buckley was telling the truth then she effectively had already decided that allegation was true, being a witness to it herself, and should not therefore have heard the disciplinary as she would not have been impartial. If it is not true then it calls into question the integrity of her evidence.

19. Mrs Buckley made the decision to uphold all three allegations and dismissed the Claimant summarily for gross misconduct. Her decision letter is dated 30 October 2019 and appears at pages 62 – 64. In evidence Mrs Buckley told us that Mrs Perry commissioned the investigation conducted by Rachel Wood.
20. Mrs Buckley told me that after meeting with the Claimant on 14 October and Mrs Perry on 15 October, Rachel Wood would have spoken again to Mrs Perry and that on advice from Croner would have decided a disciplinary hearing was necessary. Mrs Buckley said that it was Mrs Perry who nominated her to conduct the disciplinary hearing. There is no doubt Mrs Perry had a hand in framing the allegations which Mrs Buckley upheld in their entirety.
21. When questioned about the first and second allegation Mrs Buckley was unable to point to any inaccurate or misleading details in the reference. The Respondent could point to no written procedure or policy for dealing with references. Mrs Buckley accepted the real crux of matters and most serious allegation was the third one – the dishonesty, the “breach of trust and confidence” as she put it. In her conclusions Mrs Buckley states “I simply cannot be satisfied that there will not be a future repeat”. Yet she made her decision some 20 months after the reference had been given and could point to no other evidence of reference misconduct in that time, despite the Respondent’s evidence being that the Claimant dealt with references on a weekly basis.
22. The Claimant appealed by letter of 4 November 2019. On discovering Mr Perry, husband of Mrs Perry, had been nominated to hear the appeal the Claimant asked whether someone else could deal with it. Mr Perry explained in his evidence there was no one else. The business is a small one and all managers had already been involved to some extent. There appears to have been no consideration by the Respondent to outsource the matter.
23. The appeal hearing took place on 12 November 2019. The Claimant was accompanied by her father Mr Andrews and Christine Hitchens took notes. Mr Perry decided to uphold the decision to dismiss on all grounds and his decision letter is at pages 111 – 112. In his evidence Mr Perry told us he discussed the allegations with his wife, with Mrs Buckley and Ms Hitchens before the appeal hearing and that they all agreed the Claimant had been asked on a number of occasions if she had provided

a reference for GM and had denied it. There were no notes of these conversations and these additional witnesses and their evidence was never put to the Claimant. He admitted he had accepted their evidence so to that extent his decision was preordained, he had made his mind up in advance.

24. At the end of the appeal hearing Mr Perry told the Claimant he would be speaking to others before reaching his decision. In evidence he firstly said these people were his wife and Mrs Buckley and when asked why he needed to speak to them he said "that's just the way we do things". He then appeared to suggest it was in fact his legal advisers he spoke to. In my finding it was clear he discussed this decision with Mrs Perry and Mrs Buckley, again calling into question his lone independence.
25. The appeal decision was to uphold Mrs Buckley's decision in full. Curiously the decision letter, pages 77-78, states that Mr Perry relied on 'substantial evidence' in relation to the dishonesty allegation from Mrs Perry and other members of staff and that at least on one occasion a conversation was documented. Only the evidence of Mrs Perry was ever shared with the Claimant. There was no evidence of other witnesses to any conversation and no documentary evidence ever produced and even now at trial some 2 years on we do not have it.
26. The law on whether a dismissal is unfair or not appears at S98 Employment Rights Act 1996 considered against the background of BHS v Burchell, this being a misconduct case.
27. "S98 (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 a reason falling within subsection (2)...
 - (2) A reason falls within this subsection if it –
 - (b) relates to the conduct of the employee
 - (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 administration 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."
28. It is for the employer to show that misconduct was the reason for dismissal. A threefold test was established in British Home Stores Ltd v Burchell (1980) ICR 303, and thus the employer must show that –

- It believed the employee was guilty of misconduct
- It had in mind reasonable grounds upon which to sustain that belief
- At the stage at which belief was formed, it had carried out as much investigation as was reasonable in the circumstances.

29. I must first ask whether there was a reasonable investigation in this case.

I find that there was not, even having regard to the size and administrative resources of the Respondent's small undertaking there was a flawed process from the outset. Evidence apparently relied on by decision makers was not shared with the Claimant. Decision makers were directed throughout by the accuser. I cannot find the Respondent had a genuine belief. Both MB and Mr Perry had already determined guilt before ever hearing the Claimant's account.

30. I have reminded myself that I must not substitute my view for that of a reasonable employer. I have not done this. In my Judgment no reasonable employer would have conducted a process as flawed as this one.

31. On allegation one there was no evidence of any process for referring reference requests for nurses to management. In fact, the Claimant gave unchallenged evidence that in 14 years she had completed references for other nurses besides GM and the Respondent's evidence was that the Claimant completed about one reference each week.

32. Allegation two was accepted by the Respondent's witnesses to be without foundation. They could point to nothing in the reference which was untrue and nothing they would have said differently.

33. As to allegation three of dishonesty, the only evidence was that of Mrs Perry. Her statement was taken as fact by Rachel Wood (apparently before the allegation was even put to the Claimant), Mrs Buckley (who claimed to be a witness to it, whilst also deciding that the Claimant should be dismissed) and Mr Perry (who consulted with the accuser and the first instance decision maker before reaching his decision on appeal). They had already made their minds up as to guilt. That cannot have offered the Claimant any fairness within the process.

34. For the reasons above the complaints of unfair and wrongful dismissal are upheld.

Employment Judge **Hindmarch**

Date 6 October 2021