EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr Paul Brown **v** **Kingsley Care Homes Limited**

Heard at: Norwich by CVP **On:** 10 February 2022
Before: Employment Judge Warren

Appearances:
For the Claimant: In person
For the Respondent: Ms B Breslin (Counsel)

JUDGMENT having been sent to the parties on 1 March 2022 and reasons having been requested by the Claimant on 23 February 2022, the following reasons are provided:

REASONS

Background

1. This is a claim of automatic unfair dismissal for raising health and safety matters pursuant to s.100 of the Employment Rights Act 1996. It came before Employment Judge Lewis for case management on 9 August 2021. There was a claim for unlawful deduction from wages in respect of the cost of a DRB check having been deducted, that sum having been reimbursed to Mr Brown, that claim is no longer pursued.

2. Mr Brown had been employed by the respondent between 29 June and 18 August 2020. He went through early conciliation between 29 September and 29 October 2020 and these proceedings were issued in time on 29 October 2020.

3. I delivered an oral Judgment to the parties at the end of the hearing on 10 February 2022 and I signed the Judgment that day. It was sent to the parties on 1 March 2022. In the meantime, Mr Brown requested written reasons on 23 February 2002. That request was not referred to me by the Administration until 16 May 2022.

The issues

4. The issue in this case is to decide what was the reason or principal reason for dismissal? The respondent says it was the way that Mr Brown behaved in a meeting with Ms McBroom, his manager, on 18 August 2020. Mr Brown's case is that he was dismissed for raising health and safety concerns and for leaving his place of work because of health and safety concerns relating to his recent contact with a person who had tested positive for covid.

The law

5. As to the relevant law, the essential point is that the burden of proof is on Mr Brown, (because he does not have the required two years' service to bring a claim of ordinary unfair dismissal) to satisfy me that the reason advanced by the respondent for dismissal is not correct.

6. Section 94 of the Employment Rights Act 1996, (ERA) provides the right of an employee not to be unfairly dismissed. Section 98 sets out what might be described as the, "normal" test of fairness: whether the reason for dismissal was a potentially fair reason and whether it was reasonable in all the circumstances to dismiss for such a reason, which usually would include consideration of whether a fair process was followed and adequate warnings given.

7. However, Section 108 of the ERA stipulates that section 94 does not apply unless the employee has two year's continuous service. However, it also sets out a number of exceptions; circumstances in which the requirement for two years' service does not apply, which includes section 100.

8. Section 100 of the ERA reads:

> *(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—*
>
> *(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
>
> *(b) being a representative of workers on matters of health and safety at work or member of a safety committee—*
>
> *(i) in accordance with arrangements established under or by virtue of any enactment, or*
>
> *(ii) by reason of being acknowledged as such by the employer,*
>
> *the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,*
>
> *[(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),]*
>
> *(c) being an employee at a place where—*
>
> *(i) there was no such representative or safety committee, or*
>
> *(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably*

have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

9. On that wording, it can be seen that if the reason for dismissal is one contemplated by section 100, the dismissal is automatically unfair, (the test of fairness in section 98 would not have to be applied).

10. In a case where the Tribunal does not have jurisdiction to hear a claim of ordinary unfair dismissal and the Claimant is therefore relying on one of the grounds of automatic unfair dismissal, the Claimant bears the burden of proving on the balance of probabilities that the reason for dismissal was the automatically unfair reason, see Smith v Hayle Town Council 1978 ICR 996 CA and Ross v Eddie Stobalt Ltd EAT 0068/13.

Evidence

11. I had before me, in electronic format, witness statements from the dismissing officer and manager, Ms McBroom and from an HR person, Ms Ferguson. I had a statement from Mr Brown, sent within the body of an email, which itself cross-referred to a separate statement he had earlier provided to the respondent contained in the bundle at page 98.

12. I had an electronic bundle properly paginated and indexed. Unfortunately, there were additional documents which had not been included. During the course of the hearing I was sent a further PDF file containing documents page numbered 118 to 124. I also had from Ms Breslin, a skeleton argument and a bundle of authorities, for which I am grateful.

13. Prior to the hearing starting, I read the witness statements and I read the documents referred to in the witness statements.

14. This hearing has been conducted by CVP and, somewhat refreshingly, has proceeded without any great difficulty.

Findings of fact

15. The respondent group of companies run a number of care homes and employ something like 2,000 employees. At the time in question there were 2 human resources advisors, including Ms Ferguson, who was HR Director.

One such care home is Kirkley Manor in Lowestoft.

16. By letter dated 5 June 2020, Mr Brown was offered employment with the respondent at Kirkley Manor Nursing Home in the role of Support Worker. His employment was confirmed in a contract of employment which begins at page 54. His employment was subject to a probationary period of 6 months.

17. There was some disagreement over the correct identity of Mr Brown's employer and therefore the correct respondent to these proceedings. That confusion doubtless, stems from the slightly confusing introduction to the contract, which states that, *"The Employer is Kingsley Healthcare ("the Company") and includes Kingsley Care Homes Limited".*

18. The proceedings had understandably been issued by Mr Brown against Kingsley Healthcare. Ms Ferguson explained, and I accepted, that Kingsley Healthcare is a brand and is the name, (Kingsley Healthcare Limited) of the holding company of the Group, of which Kingsley Care Homes Limited is part. I therefore find that the employer was, and the correct respondent is, Kingsley Care Homes Limited.

19. Mr Brown commenced his employment with the respondent as a Support Worker on 29 June 2020 and, latterly, he had been managed by Ms McBroom.

20. On Saturday 15 August 2020 a colleague of Mr Brown, we will refer to her as RB, gave him and some other colleagues a lift. Mr Brown's lift was to the bus station. The journey took about five minutes. He was sat in the back of the car wearing a mask.

21. On Monday 17 August 2020, an email was dispatched to the respondent's employees at Kirkley Manor, including Mr Brown, which stated that the respondent would be doing covid 19 tests the following Tuesday, Wednesday and Thursday and said, *"Please make sure you are not discussing your result with anybody."* That is a statement which understandably vexed Mr Brown, not least because his partner also works as a care worker with vulnerable service users; if he were to test positive, of course he would expect to be able to inform his partner. I think it is fair to say that everybody involved in the case today agrees that is an odd instruction to issue to the respondent's staff.

22. In the meantime, RB unfortunately tested positive for covid. She reported that to Ms McBroom over the weekend. She also reported that she had spoken to Test and Trace and had provided them with information regarding her recent contacts and that those required to self-isolate were contacted by Test and Trace.

23. At a staff meeting at the beginning of the shift on Tuesday 18 August 2020, Ms McBroom informed the staff, including Mr Brown, that RB had tested positive and that anybody needing to self-isolate will have been contacted via Test and Trace.

24. Mr Brown went to see Ms McBroom in her office shortly after this. Precisely what happened next is disputed. It is agreed that Mr Brown was upset because Ms McBroom had not informed him earlier that RB had

tested positive and he felt that the staff should have been emailed this information sooner. Ms McBroom says that Mr Brown shouted at her almost incoherently, that he was intimidating towards her and that she felt very uneasy about his levels of aggression. In cross examination, she told Mr Brown that he had made her feel intimidated and scared. What Mr Brown says, (his account is at page 98) is that he said to Ms McBroom that he had shared a car or lift with RB and that they should have emailed him sooner with what had happened. What is agreed, is that Mr Brown then stated that he was going home.

25. There is then an important conflict of evidence, for Mr Brown does not accept that he behaved towards Ms McBroom in the way that she describes. I have to resolve that conflict of evidence. Mr Brown points to paragraph 10.2 of the grounds of resistance and, in fairness to Mr Brown, the same point could be made by reference to Ms McBroom's witness statement at paragraph 10, where she says that Mr Brown had told her in that meeting that he had a lift from RB, whereas in an email written close to the time, (page 62 of the bundle, 19 August 2020) Ms McBroom wrote to a Sarah Hartridge in HR:

> "Just to make you aware that I did no realise he had shared a car until after he stalked off. He is a rude obnoxious man who should never have been employed. I have completed his covid test and told him I have."

26. Mr Brown points to that and the fact that Ms McBroom says there that she did not know that he had a lift from RB until after he had walked away, "stalked off" in her words. That, says Mr Brown, is inconsistency. He has a point.

27. From the respondent's perspective, it is also noteworthy that Ms McBroom's comments the day after, that Mr Brown was rude and obnoxious, corroborates her account of how he behaved towards her.

28. Mr Brown also makes the point that it is inconsistent for Ms McBroom to say that he behaved towards her in the way that she alleges, but then to have apparently been happy for him to go off and take a covid test within the precinct of the home and bring it back directly to her personally.

29. It is also noteworthy though, that Mr Brown did not contradict the reference to "unacceptable behaviour" in the letter of dismissal sent to him later that day, (page 64,) when he replied, (page 66).

30. I have to say, that weighing these factors and having observed the demeanor of Mr Brown and Ms McBroom and having regard to the oral evidence, I find that he did behave towards her in the way that she alleges, in that she found his behaviour towards her aggressive and intimidating and she was frightened by him. He was already agitated by the email with regard to confidentiality of test results and was, I have to say, understandably further agitated by the news that morning that someone he had been with in a car with a couple of days earlier, even for only five minutes, had tested positive. So, whilst his anxiety was certainly understandable, as were his concerns about service users, I find that anxiety led him to behave towards Ms McBroom in the way that she describes.

31. Subsequently, Mr Brown did a covid test and took it back to Ms McBroom. He then left, before his shift was finished. Ms McBroom did not try to stop him. At that point, the shift of 13 staff was 3 down with people self-isolating.

32. After Mr Brown had left, Ms McBroom consulted Human Resources. She explained that she had felt that a person behaving in such a way ought not to be caring for vulnerable service users. He was of course on probation and she therefore wanted to dismiss him straight away. Human Resources advised that she add to the letter of dismissal an additional reason for dismissal, namely leaving a shift unsafe. The letter of dismissal dated 18 August 2020, (page 64) stated that the reasons for dismissal were, "*unacceptable behaviour*" and, *"leaving a shift early unsafe*".

33. Mr Brown replied the next day, (page 66) and as I have observed, did not contradict the reference to unacceptable behaviour; he primarily took issue with the reference to leaving a shift unsafe.

Conclusions

34. Having heard evidence from Ms McBroom, I am satisfied that the principal reason she dismissed Mr Brown was the way that he behaved towards her. That he had left the shift was a very minor factor in her mind.

35. Absent two years of service, questions of fairness do not arise.

36. Mr Brown was not dismissed for raising matters of health and safety. Section 100 of the ERA is not engaged. I do not need to enter into a detailed consideration of the interpretation of section 100. Mr Brown was dismissed because of the way he behaved toward Ms McBroom.

37. For these reasons Mr Brown's claim for unfair dismissal fails.

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Employment Judge Warren

Date: 27 May 2022

Judgment sent to the parties on

10 June 2022

For the Tribunal office