EMPLOYMENT TRIBUNALS

Heard at: **Exeter (by video)** **On: 27 April 2022**

Claimant: **Mr Michael Webb**

Respondent: **Parkcare Homes (No. 2) Limited**

Before: **Employment Judge Fowell**

Ms R Hewitt-Gray

Mr G Jones

Representation:

Claimant **In Person**

Respondent **Mr Jonathan Heard of counsel**

JUDGMENT

1. The claimant's dismissal was unfair.
2. A Polkey deduction is made to the compensation award, reducing it to 25%.
3. The Basic Award is also reduced to 25% for contributory conduct.
4. An uplift of 15% is made for breach of the ACAS Code of Practice.
5. The dismissal was not in breach of contract.
6. The complaints of direct discrimination and harassment on grounds of race and/or sex and/or religion or belief are dismissed.
7. The complaints of suffering a detriment at work or dismissal for making a protected disclosure are dismissed.
8. The claimant did not suffer an unlawful deduction from wages.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given on 27 April 2022.

2. The events in question go back some time. Mr Webb was dismissed from his role as a Night Support Worker in April 2020, shortly after the first national lockdown, but the incident which led to his dismissal took place on the evening of 21 February when he is said to have pushed one of the residents in the care home.

3. He brings several complaints about this, starting with unfair dismissal. He also says that it was a wrongful dismissal, i.e. that he was not in breach of contract and so as a minimum he should be entitled to his notice pay, and that it was an act of discrimination on grounds of either race, religion, or sex. A further complaint is that he was dismissed because, following his report of this incident, he was a whistleblower.

4. Other complaints concern the way that the disciplinary process was handled, principally the lack of investigation. He says that it involved acts of harassment (again on grounds of race, sex and religion), alternatively that he suffered detriments because of his whistleblowing. The last claim is that he suffered an unlawful deduction from wages, though this was not pursued. The issues to be decided were set out in detail in a Case Management Order on 27 September 2021 and we will work through them in turn shortly.

Procedure and evidence

5. Before we do so, there is a more fundamental issue to raise. We have been concerned throughout about Mr Webb's ability to focus on all this, not just because of the complexity of the issues or the undoubted difficulties of representing himself at an employment tribunal, but because of the things he has raised in his statement and his ongoing correspondence with the Tribunal.

6. His witness statement is difficult to make sense of in places. It veers off into mention of witchcraft and vampires and of alien abduction. And at paragraph 33 of he says this:

> "Their ritual serves another purpose as well to probe you for your case, and to argue the toss like a schizophrenic, to maintain your own sanity, because the impetus and voices appear from your own mind, even though they are contrived."

7. We raised this with Mr Webb, quoting this passage, because it suggests that he has struggled with his mental health, but he discounted the idea. He did not try to alter or explain away any of his statements and instead told us that it was all to provide us with the full picture.

8. His belief about “the ritual” was mentioned again and again, and he expanded on it in his closing remarks. Clearly he feels that there are hidden forces at work, and that these include the Tribunal. The case management order was singled out as containing hidden and disturbing messages. His statement refers to the ritual as being satanic and his concern about it extends to the whole process, including this hearing. By way of example, yesterday’s hearing was interrupted by a technical failure, and he emailed the Tribunal afterwards to say:

> “I warned you it was a ritual, and asked you to state your stance on it which to my mind you failed to do.”

9. This fed into what seemed to be a persistent confusion over the process and the roles of those involved, particularly when it came to distinguishing between the Tribunal and the respondent. He was very critical of Mr Heard’s involvement and wanted to put questions to him. He also felt that the service user at the centre of the allegation should have been represented. We do not raise any of this as a criticism, and to some extent have found in his favour, concluding that his concerns about the process followed were perfectly valid, but it shows that he has had unusual difficulties to contend with, and we have to try to explain our position to him as clearly as possible in giving these reasons.

10. We asked about any steps we could take to make the process easier for him, but he did not ask for any or suggest any. There is a protocol which can be applied for what are known as vulnerable witnesses, and we adopted that approach. Mr Heard was encouraged to put simpler, open questions, and told that he did not need to put each aspect of the company’s case for the sake of it. Questions were to focus on obtaining information, not just challenging his account, and were limited to 30 minutes at a time. In that way Mr Webb gave us, in the course of the first afternoon, a very thorough account of the incident in question. He is clearly a very able individual. He gave many long responses, going over things in fine detail, and he had no difficulty in addressing the questions put to him. During that part of the hearing there was no mention of the ritual or any sinister motive on the company’s part.

11. The first morning was largely spent in reading and in ironing out difficulties with the bundle of documents and other housekeeping points. These became unusually difficult, and they also need to be explained. The company had provided a bundle of 257 pages before the hearing, conventionally arranged, with each sides’ statement of case at the beginning, the two case management orders from the preliminary hearings, and then the relevant original documents in chronological order. Mr Webb did not have this, or at least he had received an email with this newer bundle but had not been prepared to open it. He had an earlier version, which was somewhat shorter. Going through the index with him it seems that the main new item was the case management order from the second preliminary hearing. (This took place by telephone on 27 September 2021 before Employment Judge Bax.) I pointed out that this would have been sent to him at the time. Having clarified things to that extent, Mr Webb was happy to proceed.

12. However he did make the point that the bundle was not agreed. That was disappointing, given the Tribunal's direction to agree a single bundle, but the situation is not unknown. He said he had sent his own bundle in, but it had been rejected by the Tribunal. That was more puzzling, since the Tribunal staff would not usually take in on themselves to reject a bundle, even where it was supposed to be agreed. Mr Heard had not seen this other bundle either. There was some further discussion about what was in this other bundle and nothing could be identified at the time that was not in the respondent's bundle. There was one exception – an email which Mr Webb says that he sent about arranging an appeal, but we agreed to proceed with his cross-examination and he would look for that overnight.

13. There was no difficulty with the cross-examination since he had all the original documents in the earlier bundle, and as already noted Mr Webb gave a full account of events from his point of view.

14. On the second morning, however, he emailed the Tribunal with his own 188 page bundle, and it became clearer as to why it had been rejected or deflected in some way by the Tribunal staff. Although it is all indexed and paginated, a cursory look would suggest that it is an extended written submission or series of submissions from Mr Webb. It clearly involved a great deal of work, and contains his commentary on various aspects of proceedings, all of which have been typed or re-formatted by him. That includes his original Particulars of Claim and the Grounds of Resistance. There is his draft submissions for the appeal hearing which never took place, a long letter to the Disclosure and Barring Service to appeal against their decision to bar him from work in the care sector and a version of the dismissal letter, with his comments on each section interspersed with the original text. All this material is in the same typeface and has the same general appearance. Needless to say each of these documents went over the incident in question in some detail so there is a good deal of overlap. He also contacted the company's telephone counselling service after his dismissal, then recorded the conversation and transcribed it. That too is included and that also went over the incident on 21 February. Then there is material which was not relevant and so not admissible, including exchanges with firms of solicitors about taking his case, a description about issues at a previous employer and also about harassment at subsequent employers. Naturally, some documents were common to both sets of bundles, and the remaining sections were mainly concerned with correspondence about the appeal and disciplinary hearing, the involvement of the police and efforts to find other work. It does not appear that this was ever sent to the respondent.

15. We took a further extended break to consider this material, and to allow Mr Heard the chance to do the same. He was happy to proceed and did not want to recall Mr Webb to answer further questions about any of this (to the respondent) new material.

16. We then heard from Mr Daniel Bennett, the only witness for the company. It was his decision to dismiss Mr Webb. Although some of the questions were a little out of the ordinary, Mr Webb took him through the disciplinary incident and the

subsequent investigation, including the decision to dismiss him without either a disciplinary hearing or an appeal hearing, and there was a full exploration of the what we believe are the relevant aspects.

17. There was a final hitch during closing submissions. Mr Heard structured his by reference to the issues in the case management order of Employment Judge Bax, but Mr Webb did not have this in his bundle, so there was a hold up while it was sent to him. As already noted, he had been emailed the more up-to-date copy of the bundle prior to the hearing, which contained this case management order, but when we asked him to open it he was unable to do so, so it was sent afresh from the Tribunal file. He said that he had never received it, although of course it had been sent to him in the revised bundle and the Tribunal file shows that it was emailed to his email address on 28 September 2021.

18. When we pointed this out he responded with a screen shot of his inbox for 28 September 2021 in an effort to show that he had never received it, but this in fact shows that he was in email correspondence with the Tribunal that day. We accept however that he did not read it or overlooked it at the time. Although this order arranged the hearing and gave various directions, he must have noted these down at the time of the telephone hearing. There is correspondence on the Tribunal file from him asking for extra time to submit his Schedule of Loss and complaining about the respondent's failure to provide the bundle on time, so he was clearly aware of the various directions given. However, he had not seen the full detail of the issues recorded and was understandably concerned about this. So, we adjourned his submissions until the third morning to give him the chance to consider it. When we resumed he asked for more time, and we allowed a further hour and a half. After that he raised his concerns about a number of coded messages in it, but in fact most of the paragraphs setting out the issues were common to the previous case management order issued by Employment Judge Rayner on 15 April 2021. The main change at the second preliminary hearing was that Mr Webb was allowed to add his whistleblowing complaints, and the religion relied on was changed from Reciprocity and/or a belief in the Golden Rule, to Christianity, so in fact there was only a limited change to the text of the Orders.

19. Having considered all these points we make the following findings of fact. As usual, not every point raised in evidence can be considered, only those necessary to explain and support our conclusions, so some aspects, such as the involvement of the police or the CQC are just mentioned in passing.

Findings of Fact

20. Eastleigh House is home to about nine residents with autism or learning difficulties. All of them lack mental capacity and struggle to communicate verbally. Needless to say this places huge demands on their carers, who have to exercise great patience when communicating with them and working out their wants and needs. Mr Webb worked on night shifts, and on the evening of 21 February 2020

was on shift with two colleagues; Roger Howe and a new joiner called Victoria, whose surname we never learned.

The investigation

21. His immediate manager was a Mr Michael Merrell-Dominguez. The first Mr Merrell-Dominguez knew of this incident was when he came in to work the next day to find an Incident Report Form completed by Mr Webb. This recorded that there had been an incident overnight involving Mr Webb and HH. Under "Duration" it was said to have last 2 seconds "plus a build-up of 30 minutes to one hour." Then, under various headings, it described the event in the following terms:

> 2. Antecedent Analysis
>
> i. Slow triggers (Setting events)
>
> HHconstantly seeking + getting interaction in lounge. ii. Fast triggers
>
> (Antecedent)
>
> HH told NO as kept invading personal space even when I left the room.
>
> iii. Precursor behaviours
>
> HH seeking interaction beyond appropriate levels. 3.
>
> Describe the incident
>
> i. Who was present?
>
> MW HH. Nearby in other room RH + WF.
>
> ii. Describe the incident
>
> HH pursued me to hall. Kept seeking attention. I pushed him away. He didn't get it. I said 'NO' and pushed him away. I was quite forceful though as I was wound up by now. GB had also been very grabby as well in the same period. HH stayed vertical but moved several feet towards the doorway + rebounded into doorframe which he used to steady himself. HH upset but not so much he flew into more of a fit. HH wanted to stay downstairs when reprimanded by RH who directed HH to his room. HH went into lounge + left to calm down. Social upset was 2/10 between all.
>
> HH wanted more personal attention than was professionally appropriate.
>
> Uncomfortable about having to make a point to HH, so more detail required.
>
> Incident unfortunately not observable by RH WF.
>
> Talked it over + I realized that best course is to raise it + make sure all staff trained to deal with HH escalating behaviour via ProScip [A training programme]. Not sure how to deal with it. A need to avoid another.

4. Consequence analysis

i. Immediate consequences

HH unharmed, no marks, bangs, upset either. ii.

Delayed consequences

Calmed down quickly as he was quite happy in lounge.

iii. What do you think the person wanted?

Affection.

iv. Recovery phase

Left to be in same social situation without reprimand implemented to facilitate comfort + appropriate balance of power between the resident + staff.

22. So, this reported that there was an incident in which HH was pushed away, quite forcefully, and rebounded into a doorway several feet away, but which was not witnessed by any other member of staff. Mr Merrell-Dominguez asked a Senior Support Worker to check HH for any marks, and a bruise was found in the centre of his upper back. No photographs were taken and no record of this inspection was ever given to Mr Webb, but it seems to us unlikely that this would have been invented to make more of the incident, which was later reported to the Police and the CQC.

23. Mr Webb was back at work the following evening and Mr Merrell-Dominquez had a meeting with him to investigate this further. A note-taker was present. Mr Webb described the build up to the incident in similar terms but with some additional detail:

> "The incident was instant and it shocked me and I thought I have to report this. The run up was about an hour, me and RH were in the lounge, lots of guys were in bed. GB [another service user] and HH were up, I was sat next to HH and GB was showing me attention. HH was being his normal self and interacting and touching etc but focus was mainly around the TV. GB had been repeatedly sick more than 3 times on the floor. I remember thinking that his top would need changing soon, he was constantly grabbing me for drinks and snacks. HH was tapping my leg with the back of his hand, this was normal he was not agitated, but at some stage he started demanding more (I was watching TV). I thought this is not a professional boundary anymore, I indicated "no more" then HH told me off by hitting me harder. I found this completely wrong, I started to get wound up. I interacted towards H in his way but it's out of my comfort zone. I was looking for a meaning, it meant nothing to me. He told me "no" I thought that's not right I'm staff you're a client. I'm here to help normalise stuff. I started to get wound up with GB as well. I said no to HH and calmly held him away as he followed me, he made a wilful tense loud noise and went for me and I instinctually said "no" and held him back extending his arms and saying the same as before, it was immediate and had the effect of pushing him away."

24. Asked about the "forcible" push he said

> "It was instinctual reaction but in context. Behaviour was consistent he didn't like the answer, he went for me he was going to bump into me. I did it to keep him safe, there was no space."

25. He went on to say that HH stumbled backwards, then:

> "He didn't fall over, I thought it seemed extreme. I don't have that much strength, I didn't know how to handle it better. I think HH has become more confident and pushes boundaries more. What was weird was that he did not fall, he didn't go hard into the doorframe. It was a bit of an enigma at the time.

26. He was also asked about how he was feeling at the time, and he said that he was:

> ".. in an unusual state of mind. I felt slow – a bit vacant. It may be the long cycle of nights and stuff."

27. After that investigation meeting Mr Howe also provided a short statement. It is not clear whether it was asked for or not. He wrote out his recollection on 24 February and did so by hand on a single piece of paper, stating:

> HHwas very vocal in the lounge during the evening of 22/02/2020. HH began invading Mike Webb's personal space, Mike walked out of the room and stood by the front door, but HH followed him which was out of my eyesight. I could hear Mike repeatedly asking HH to give him some personal space. HH's response was to shriek loudly. Mike spoke calmly trying to explain to HH that he needed some space so would HH please move away. (HH has often behaved this way, so I didn't think it was a big deal). Then I heard Mike tell HH more assertively to 'go away', I then saw HH's entire right side appear in the doorway. I walked out of the lounge, and assertively, ask HH to come upstairs with me and watch a video, HH shrieked very loudly and lay on a sofa in the lounge shrieking loudly now and then. A while later Mike put a video on for HH in his room and HH went to watch it.

28. Neither Mr Howe nor his colleague Victoria was interviewed about this in the same way as Mr Webb. In fact, nothing at all was elicited from Victoria. However, Mr Webb was then suspended, on 25 February. The suspension letter told him he could not contact other members of staff and that he should attend an investigation meeting on 5 March. At the same time the CQC were notified, using

    their standard form. Mr Merrell-Dominguez recorded on it that he came into work the next day and spoke to the two other night workers, but neither of them had been in the hallway at the time of the incident. It also noted that the police had been informed.

29. It is not clear what happened with regard to that investigation meeting. It may well be that whoever drafted the suspension letter did not realise that there had already been an investigation meeting. HR support was available throughout from the Priory Group, in this case from a Mr Chris Johnson, Employee Relations Lead. In any

event, there was no such meeting, and instead, on 23 March 2020, Mr Webb was invited to attend a disciplinary hearing, to take place on 27 March, with the Registered Manager, Ms Anne Wilson.

30. The letter stated that due to Covid the hearing would take place by telephone call only. The allegation was described as follows:

- It is alleged that on Saturday 22nd February 2020 [in fact it was 21st] at 21.50, you forcefully pushed a service user in a situation where this action was inappropriate. This action caused the service user to stumble backwards into a door frame.

- It is further alleged that in doing this you failed to adhere to the Safeguarding and PROACT SCIP® - UK training you have received.

31. The company's disciplinary policy lists ill-treatment or even discourtesy to residents as potential gross misconduct, and the letter confirmed that he may be summarily dismissed over this incident. A failure to attend, it went on, would be a breach of a reasonable management instruction which may itself lead to summary dismissal.

The disciplinary hearing

32. All this was about a month after the original investigation meeting. During that time the national lockdown had begun and no doubt Eastleigh House had other priorities, but the fact is that no further investigation was carried out. A Management Report was prepared and sent to Mr Webb with this letter. It described the incident, but the only contemporaneous documents in it were the Incident Report Form and the short handwritten statement from Mr Howe. It also included the reports to outside bodies and relevant policies and training records.

33. As the hearing approached Mr Webb emailed Ms Wilson (p.156) to say that the investigation omitted a great deal of possible evidence. He asked in particular that a statement be taken from Victoria, and offered to send over his typed witness statement describing the events. She forwarded that to Mr Johnson, noting that she felt he had a valid point regarding Victoria. Mr Johnson responded saying that he was under the impression that all witnesses to the incident had been interviewed and statements provided to Mr Webb in the disciplinary pack:

> "If this is not the case then he's right in saying the investigation isn't as thorough as it ought to be [especially considering the possible implications for him i.e. dismissal] Where the consequences of a disciplinary process are likely to be particularly severe then there is an even greater onus on us to do a thorough investigation.
>
> If not all witnesses have been interviewed then to avoid any delay I suggest we proceed as planned and then interview any final witnesses before delivering the outcome. The safest route is of course to delay, interview anyone else who hasn't been spoken to and who was present at the time, then reconvene the hearing sending any further statements to him. However, given he's admitted to the allegation the

> facts aren't as contentious as they could be so if it was me I would move ahead but write back to him explaining that any points of mitigation he raises in the hearing will be fully considered, with further investigation if necessary, before reaching a final decision."

34. Mr Merrell-Dominguez responded that there were no witnesses and asking what he should he do, to which Mr Johnson said that in that case he need not do anything further, adding:

> "If MW says differently in the disciplinary then Anne can follow up with relevant individuals before reaching a final decision."

35. Unfortunately, Ms Wilson then had to self-isolate. The hearing was put back to 1 April and another manager was brought in to hear it. That was Mr Bennett, the Deputy Manager at another home, Riverview. He does not seem to have been a party to any of this advice so was not aware of the potential need to carry out further investigations.

36. Mr Bennett contacted Mr Webb by email to suggest that the hearing go ahead on 1 April at 13.00, asking him to confirm if that date and time was good for him. Mr Webb repeated his concern that the investigation was inadequate, and said that he could not accept an invitation as things stood. In particular, he wanted witness statements taken from his colleagues. This was relayed to Mr Johnson who emailed Mr Webb directly on 31 March, the day before the hearing, to insist that he attend:

> "This is not optional but a reasonable management request in accordance with the Company's Disciplinary Policy."

37. He added that he had spoken to the Investigating Manager (Mr MerrellDominguez) who had confirmed that there were no other witnesses:

> "If however you disagree with this and believe that a key element has been missed then you can submit this as part of your explanation at the disciplinary hearing and Daniel will conduct any final enquiries necessary before reaching a final decision."

38. He then reiterated that attendance at 1300 on 1 April was compulsory, and that if he did not attend a decision would be taken in his absence.

39. Mr Webb responded by saying that no meeting had yet been set, and that Mr Bennett had simply proposed a time. He maintained that the investigation had been inadequate, that the other members of staff had witnessed the situation, they had seen him write the report and witnessed the aftermath and so should be interviewed. He was not willing to go along with the disciplinary process in those circumstances. The correspondence between them continued throughout the day with no change in their positions.

40. So, the next day the hearing went ahead without him. Mr Bennett had arranged for a note-taker to be present, in his office at Riverview, so it is not clear why Mr Webb

was only invited to be present by telephone. Ahead of the meeting Mr Webb sent over his witness statement of five pages, setting out his position in more detail. He even spoke to Mr Bennett by telephone beforehand to explain that he would not be attending and that he would send this written submission.

41. It is a long statement, but the main point was still that statements should have been taken from his colleagues. It went on to describe the incident itself, and HH coming towards him. This time however he said that he did not push HH, he simply held his arms out, passively, and the outcome was only the effect of HH's force in running at him; he was in a crisis situation, there was an explosive movement towards him by HH, he had no time to respond, he was confronting a violent situation and reacted in line with his training.

42. Mr Bennett then carried out a paper review of the evidence and wrote up his outcome letter, which was approved by Mr Johnson. This letter (of four pages) mentions that he received this statement but makes no further reference to it. It quoted the main points from the Incident Report Form, described the proper approach from his training and from HH's Positive Behaviour Support Paperwork, then set out the more telling admissions made in the investigation meeting, about being wound up and about there being no witnesses. There was no engagement with Mr Webb's complaint about the lack of other witness evidence. It noted the bruise, which was held to have resulted from this incident, and said that the proper approach would have been to ask one of his colleagues to take over to enable him to calm down. One feature highlighted was the lack of any apparent remorse or reflection on how the incident should have been handled. The failure to engage in the disciplinary process was also regarded as a failure to comply with a reasonable management instruction and so his conduct as a whole was taken to be a gross breach of trust and confidence, for which he was summarily dismissed, with effect from Monday 6 April 2020. It ended by advising him of his right to appeal within five working days. The appeal manager was a Ms Elizabeth Black, whose job title was Peripatetic Manager.

The appeal stage

43. Mr Webb emailed her at the email address provided on the Thursday of that week, 9 April. His email did not state expressly that he was writing to appeal against his dismissal but it opened by quoting the words of the outcome letter:

> "You have the right of appeal against our decision and should you wish to do so, you should write to Elizabeth Black, Peripatetic Manager you can do this by emailing ElizabethBlack@priorygroup.com within five working days of receipt of this letter giving the full reasons as to why you believe the action taken was either inappropriate or too severe."

44. He followed this with:

> "Dear Elizabeth Black

I would like to return to work as soon as possible. The company has been most insistent on not following procedures. I should have been communicated with by official letter as stated in the disciplinary procedure and this has not been forthcoming. DB asserts that they have sent a 1st class mailing on Monday by recorded delivery, but it has not emerged.

Yours sincerely

Michael Webb"

45. This was ignored. He followed it up with a further email stating:

> Until I know that this is a good address to contact you on, I cannot send more information that might breach confidentiality, and so as such I have had to make tentative communication with you about a seemingly trivial issue you could check for yourself.
>
> Please do contact me to prove you exist on this email, so I can forward to you information and it's concern that actually warrants a full professional response."

46. The request to prove she existed was not sarcastic. Mr Webb refuses to accept that she does exist although he agrees he had previously met someone purporting to be her. He approached the CQC for confirmation of her existence, and logged on to the company website to post a query asking to contact her regarding his appeal against dismissal.

47. We are satisfied that she does exist, but once again she ignored his email. In fact, she forwarded it to Mr Johnson for an explanation on 14 April:

> "Hi Chris,
>
> I received this email below, not sure if it is related or just a phishing exercise? Is this an ex employee?"

48. Later that day, he emailed Mr Webb to say:

> "I have been provided with a copy of your recent email addressed to my colleague, Liz Black. I note from the contents that there is nothing in particular that you have asked us to respond to however please note that if you are dissatisfied with the decision following the disciplinary process then you may submit an appeal in accordance with the timeframe stipulated.
>
> Liz is not designated to hear any appeal so there is no requirement for you to address any further correspondence to her.

49. By then, we note, the deadline for an appeal had passed. Mr Webb wrote back to Mr Johnson thus:

> "I am the light of the world as are you Chris ! Do you not have anyone more senior and uninvolved in the process I can appeal to apart from the almighty?"

50. Mr Johnson declined to respond any further, save to reiterate that:

> "…your dismissal was confirmed in writing and you were given the right of appeal, including the name of the person to appeal to and the deadline for doing so…. If you intend to appeal you must specify clear grounds as to why you disagree with the decision within the stipulated deadline. Please note that if the deadline has passed then any appeal is unlikely to be heard as per the Company's Disciplinary Policy"

51. Clearly Mr Johnson was unaware that the deadline had long passed, or that Ms Black was the appeal manager, even though he was passed a copy of the outcome letter for approval. Hence Mr Webb's chance to appeal was lost. He interpreted the last statement (as do we) to the effect that there was no point appealing out of time.

What actually happened?

52. So far we have described the process followed by the company. It is that process which is central to the question of whether or not the dismissal was fair, and we have found, for reasons set out below, that it was in some respects unfair. Having done so, it is necessary to go on to consider other questions, in particular whether Mr Webb was in breach of contract (and so entitled to his notice pay as a minimum) and what difference a fair procedure would have made – known as the Polkey question. That involves making findings as to what happened on the evening of 21 February 2020.

53. As already noted, in his statement for the disciplinary hearing Mr Webb attempted to put some distance between his admission in the original Incident Report Form that he had pushed HH, suggesting instead that he merely put his arms out, that HH attacked him in some way, and that he could do nothing else. In his various written submissions since then he has continued that process, seeking to distance himself further and further. In the Particulars of Claim he said this:

> "The incident happened in the hall, all other doors are locked, with only staff access. I wrote up the incident as best as I could, but I did not fully witness it. I wanted it reenacted so that we could work out what had happened. I asked my line manager to do this on the form I filed. There is no reason not to."

54. This was a theme of his evidence to us, that he could not really say what happened, and there would need to be some sort of re-enactment to find out. There is, in his own bundle, an appeal submission for Elizabeth Black which he wrote but did not send. This denies any use of physical violence and says that he did show remorse, that his Incident Report Form was

> "… by free admission, an apology and a fulsome one that said sorry properly, by seeking to learn from any mistakes and seeking the best outcomes for HH. I was content to risk the dangers of reporting, though there should be none, because I thought that my concern would be taken seriously in the right way, not simply used as an excuse to fire me."

55. There is in fact no apology in that form, although it is certainly fair to point out that he chose to report this incident against himself. He then said that HH assaulted him, that it was a real shock, and it took quite a bit of time to admit that to himself (p.28). This is repeated in his letter to the head of the DBS service. He denied that HH hit the doorframe, let alone with force and even denied stating in the investigation meeting that this had happened (p.55). He denied that the bruise was caused in this incident, suggesting instead that HH might have been abused by someone else that evening and this was a cover up (p.54). At other points he said that no force was used, that he gently put his hands on HH's shoulders and said "No" (p.60).

56. Memory is notoriously fallible, especially when people go over events again and again, often re-imagining them as they would like things to have been. That seems to be the case here. We have to assess things as best we can on the balance of probabilities. There is simply no real reason to doubt the clear statements in the Incident Report Form and in the later investigation meeting. The witness statement of Mr Howe is also a significant piece of evidence. They are quite consistent with each other, and with the bruise. The situation appears to have been a very demanding one, with HH constantly demanding attention from Mr Webb by tapping or hitting him. He was also having to deal with RG and his constant vomiting. At some point Mr Webb had had enough and got up to leave. As he explained to us, he left the lounge and went out into the hall, on his way out through the door to get some fresh air and time alone. Before leaving he attempted to convey clearly to HH that he did not want to be followed, putting his hands on HH's shoulders and saying "no" to him firmly, but HH did follow him. Before Mr Webb got to the door HH was behind him in the hall, demanding more attention. There were just the two of them. He was wound up, and turned back to deal with HH. We have to conclude that his reserves of patience were exhausted, and in that instant he expressed his frustration by pushing HH away. He may well have used more force than he intended. HH must have been taken by surprise and staggered back a few steps into the door post, bruising his back. HH then started shrieking and Mr Howe, who saw him in the doorway, came over to try to defuse the situation. Mr Webb then wrote it up in the prescribed form, rather than attempt to conceal anything. That, or something very similar, is what we conclude occurred here.

Applicable Law

Unfair Dismissal

57. This important right is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98, the employer has first to show a fair reason for the dismissal, in this case conduct. Then by s.98(4)

> …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.

58. The respondent is a sizeable concern. According to the Management Report there were 46 staff at Eastleigh, but it is part of a much wider network. It is a highly regulated sector with detailed policies to follow in such cases, and given the HR support available a high standard of fairness is to be expected.

59. In considering the fairness of the dismissal the question is not so much whether Mr Webb was guilty of the misconduct, but - broadly speaking – whether it was reasonable of the company to conclude that he was, and that he should be dismissed as a result. As is well established from the case of British Home Stores Ltd v Burchell [1978] ICR 303, that question can be broken down further as follows:

a. Was there a genuine belief on the part of the decision-maker that Mr Webb did what was alleged?

b. Was that belief reached on reasonable grounds?

c. Was it formed after a reasonable investigation?

d. Was the decision to dismiss within the range of reasonable responses open to an employer in the circumstances?

60. This "range of reasonable responses" test reflects the fact that one employer might reasonably take one view, whereas another might with equal reason take another. Tribunals are cautioned very strictly against substituting their view of the seriousness of an offence for that of the decision maker. This applies not just to the reasonableness of the decision to dismiss but also to the process followed in coming to that conclusion. If a failing is identified in the disciplinary process it is necessary to ask whether the approach taken was outside that range, i.e. whether it complied with the objective standards of the reasonable employer: Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111

61. Procedural fairness is nevertheless an important aspect and in considering it tribunals are required to take into account the guidance in the ACAS Code of Practice for Disciplinary and Grievance Procedures (2015).

62. However, it is also well established that where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation at all. In Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT, the claimant was employed as a residential social worker in a children's home. During a row, he spat at one of the children. He admitted doing

so at the disciplinary hearing and was dismissed. The Employment Appeal Tribunal said that it was not always necessary to apply the test in Burchell where there was no real conflict on the facts. Therefore, it was not necessary for the employer to interview the boy with whom the employee had the altercation.

63. That case is in some respects very similar to the present one, although set in a children's home rather than one for vulnerable adults. However, the essential principle is simply that where conduct is admitted, little further may be needed by way of investigation. Here, there is a dispute over what occurred, and over the degree of provocation involved, and there is certainly no suggestion that HH should have been interviewed.

64. The Polkey test referred to above refers to the case of Polkey v AE Dayton Services Ltd [1987] UKHL 8, when the House of Lords confirmed that procedural fairness is an integral part of the reasonableness test, and that where an employer fails to take an appropriate procedural step (applying the range of reasonable responses test) the tribunal is not permitted to ask whether it would have made any difference to the outcome: this may be relevant to the issue of compensation but not to whether the dismissal was fair.

65. If the dismissal was unfair we also have to consider whether Mr Webb contributed to his dismissal by his conduct. This requires the company to prove, on the balance of probabilities, that he actually committed the alleged misconduct.

66. There was little mention at this hearing of the other claims raised, but the relevant issues were all set out in the second case management order and we will refer to them as necessary in setting out our conclusions below. As a footnote, the unlawful deduction from wages claim related to holiday pay and Mr Webb accepted that this had been paid.

Conclusions

67. We accept that the reason for dismissal was Mr Webb's conduct and that Mr Bennett had an honest belief that he was guilty. Any suggestion that this was a cover-up or that there was some ulterior motive is just speculation on Mr Webb's part.

68. There were also reasonable grounds for that belief, given the information given by Mr Webb in the Incident Report Form and in his investigation meeting. The main concern, raised repeatedly by Mr Webb, was over the adequacy of the investigation.

69. The failure to interview the two other members of staff on duty that night seems to us an obvious shortcoming. They may not have been witnesses to the actual push, but they were there or in the vicinity throughout the build-up and could have given evidence about HH's behaviour, the other sources of tension that evening, Mr Webb's attempts to placate or engage with HH, and confirmed that he had left the lounge in an attempt to distance himself from the situation, very much as recommended by Mr Bennett in the outcome letter. It is not at all clear to us why

that was not done. Given that Mr Howe's statement was short and handwritten it seems that he volunteered it, but he could still have been invited to an investigation meeting in the same way as Mr Webb and asked for his recollection. The tone of his short statement reveals that he would have been supportive. All this is in accordance with the advice from Mr Johnson at the time that those with relevant evidence should be interviewed and their evidence disclosed to Mr Webb. We have to ask whether this is outside the range of reasonable responses or approaches open to an employer in the circumstances. There is some merit in Mr Johnson's advice that given the delay they could proceed with the hearing and then do any further investigation that was requested, but the fact is that it was requested, repeatedly, and became a stumbling block to an effective disciplinary hearing. In those circumstances it seems to us unreasonable to persist in that approach, and that also seems implicit in the advice Mr Johnson gave at the time.

70. The second significant failing concerns the arrangements for the disciplinary hearing. Again, it is not clear why it was arranged by telephone. Clearly this was during lockdown, but the Home was open as usual and a note-taker was physically present in the room. Anyone whose employment depended on making a favourable impression would prefer to attend in person, and conversely it is very much easier to tell someone over the phone that they are dismissed rather than face to face. The company's own disciplinary policy goes into some detail about how such hearings should be conducted, reinforcing the view that this is an important aspect of fairness.

71. That however is a relatively minor matter compared with the decision to go ahead with the hearing in Mr Webb's absence. It was the respondent who had cancelled the first hearing, and it is always good practice to adjourn a hearing at least once if

an employee is unable or unwilling to attend. The ACAS Guide states that:

> "There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting… Employers will need to consider all the facts and come to a reasonable decision on how to proceed.
>
> …
>
> Where an employee continues to be unavailable to attend a meeting the employer may conclude that a decision will be made on the evidence available." [Emphasis added]

72. In this case, an additional warning was given that a failure to attend would be a separate act of misconduct, although that is not part of the disciplinary policy, which only states that if the employee refuses to answer questions he should be told that a decision will be made on the evidence available. Here, Mr Webb's concerns were perfectly understandable, and as Mr Johnson acknowledged in his internal advice the safest course of action was to put it off and carry out those further interviews. Some further effort might at least have been made to persuade him that the need for further investigations would be considered at the hearing. However, there is

nothing to suggest that Mr Bennett ever considered that course of action. In our view the refusal to adjourn the hearing was also outside the range of reasonable responses.

73. Having made the decision to proceed in his absence, it was all the more important to pay close attention to his written submissions, which emphasised this very point, but again there was no engagement with it. It is hard to know what Mr Bennett made of the other assertions to the effect that there was no push. He was entitled to form the same view that we have, that this was not consistent with his earlier statements and was not reliable, but he could at least have alluded to those points and explained why he thought so.

74. Then there is the appeal stage, which became something of a farce. The importance of the appeal is again emphasised in the disciplinary policy, which explains that it may be adjourned for further investigations to be carried out if need be. The ACAS Guide states that the opportunity to appeal is essential to natural justice. Having held the disciplinary hearing in his absence it was all the more important to ensure that Mr Webb had an effective right of appeal. Giving him the name of Elizabeth Black, not informing her of this, then telling Mr Webb that she was not the person in question, and not to contact her, involves a baffling series of failures. The upshot was that Mr Webb was simply dismissed on paper with no effective hearing and on this ground alone the dismissal has to be regarded as procedurally unfair. Again, it is outside the range of reasonable responses.

The Polkey Issue

75. What difference would a fair procedure have made? It is of course a matter of some speculation. It involves trying to reconstruct events had they been handled more thoroughly, with an in-person hearing. That also means that the investigation had included the obvious step of interviewing the two other members of staff to see what they had to say, so there would be no reason for Mr Webb to refuse to attend. Those two statements were likely, it appears to us, to be supportive or at least neutral about the build up to events in the hallway, and would have provided a strong degree of mitigation. He would also have had the benefit of advice from a colleague or trade union member.

76. The mitigating factors which appear to us to potentially make a difference to the outcome are these:

   a. the presence of any remorse;

   b. the fact that Mr Webb reported his own misconduct, which occurred out of sight of any witnesses;

   c. the fact that he walked away from the incident in order to diffuse the situation;

d. the degree of provocation; and

e. personal factors such as his experience, his length of service and his state of health or state of mind on the evening in question.

77. Of these, the first is perhaps the most significant. Any advice from a union representative might well have been for Mr Webb to apologise and express some remorse. Mr Webb's position has been that he has expressed remorse by filling in the Incident Report Form. That may show some concern for HH but it is not really the same as an expression of remorse. During the hearing the Tribunal asked Mr Webb what he would have said, had he gone to the disciplinary hearing, and his answer was essentially that he would have said the same as he had said at this hearing. But his evidence and submissions did not include any real expression of remorse, i.e. an acceptance of responsibility. His main position now is that he did not do anything wrong.

78. Hence we cannot be confident that he would have expressed any remorse at the time. Over the month or so since the incident he seems to have re-worked events in his head, and even then his written submissions concentrated on attempting to persuade Mr Bennett that he had not done anything wrong, that he was in a crisis situation, that HH went for him and that he reacted instinctively, in line with his training. In the same way he has been very reluctant to accept that he caused this bruise to HH.

79. That is not to take away from the second factor here, which is that he did report himself rather than seeking to cover things up. That showed at the time that he was very conscious of the seriousness of the situation, and a professional concern

for HH. This consideration does not seem to feature at all in Mr Bennett's conclusions.

80. Nor does the fact that he was walking away from the source of tension. Indeed the outcome letter says that he should have asked one of his colleagues to take over so that he could go and calm down. That is exactly what he was doing.

81. There was also little obvious consideration of the degree of provocation, as shown by the reluctance to interview any other potential witnesses to the build-up. This seems to us an obviously important aspect, which has been downplayed or overlooked. Perhaps Mr Webb was reluctant to place too much weight on it himself since it leads to the conclusion that he did lose his temper, something he wanted to avoid admitting at the hearing stage, but it is the obvious context surrounding the offence.

82. Personal factors should also have played a part. Again, it is not clear to what extent, if any, his record, or his vacant state of mind that evening was taken into consideration. There were other manifestations of mental ill health at the time of the appeal hearing, particularly with regard to his emails about Elizabeth Black and the

suggestion that she did not exist. All this might reasonably have called for some further exploration, and led in turn to the conclusion that his mental health played a part.

83. We note too that the sanction of dismissal was selected in part in reliance on the fact that he had failed without reasonable excuse to attend the disciplinary hearing. That does not seem to us to be a legitimate aggravating feature in the circumstances.

84. Balancing all this as best we can, we assess the chance of a different outcome, had a fair procedure been followed, as 25%. That reflects the fact that such a push is regarded as gross misconduct in the disciplinary policy and he was no longer admitting to having done it, despite the evidence in the form of his own admission, yet on the other hand there was clear provocation, an attempt to remove himself from the scene, self-reporting of the incident and the other mitigation referred to above. In short, dismissal is most likely to have been the result but that is by no means certain.

85. We make no separate deduction for contributory fault. This figure already reflects fully the extent to which he was responsible for the incident, and on that basis we also reduce the basic award to 25%

86. There is also scope to increase compensation for a failure to comply with the ACAS Code of Practice, by up to 25%. That Code requires a disciplinary hearing and – a vital component – an appeal hearing. Without going over our previous conclusions at any length, we conclude that the basic procedural failures were such that an uplift of 15% is appropriate here, even allowing for the fact that Mr Webb declined to attend the disciplinary hearing.

87. The combination of the 25% Polkey award and this uplift (i.e. adding 15% of 25%) is a total award of 28.75% of the usual compensatory award.

88. It follows too that the claim of wrongful dismissal must be rejected, on the basis that the respondent was entitled to dismiss for gross misconduct in the circumstances we have found, even though, for the reasons already given, there is a 25% chance that they would have chosen not to do so.

Discrimination

89. Turning to the other complaints made, these can be dealt with more briefly. There are several complaints of discrimination, but there is no evidence to show that Mr Bennett knew either that Mr Webb is a Christian or that he is of Jewish ancestry. That is an essential component of claims of harassment and discrimination. It was not mentioned in either of the witness statements or in any questions at this hearing. In fact neither point appears in any of the documents in the claimant's bundle, apart from the Particulars of Claim which raise this allegation. On that basis alone, the complaints based on those protected characteristics must be dismissed.

90. Mr Bennett was of course aware that Mr Webb is male, and it is suggested that he made stereotypical assumptions that a male carer would be more likely to act in a violent or aggressive way. Again, there is nothing to support that, and the question of his sex was not raised on either side at this hearing. There is no reason to believe that Mr Bennett reached his conclusion that a forcible push was involved on the basis of any prejudicial assumption; it was based on Mr Webb's own account in the Incident Report Form, and matches our own conclusions. Hence we cannot see that he was treated less favourably or harassed on that basis. A female member of staff who completed such a form, giving those answers in interviewed, and where the service user had a resulting bruise would, we are confident, have been treated in the same way.

Whistleblowing

91. The basis of the whistleblowing claim is that the Incident Report Form itself contained a protected disclosure. According to the case management order, the disclosure was that HH's behaviour was unusual in that he was trying to impose his will by physical means. It is not based on a disclosure that Mr Webb had himself done anything wrong. The Incident Report Form is quoted above. This is almost the entirety of the entries by Mr Webb, and taken from his typed transcript of the form which appears in his own bundle. There is nothing in that form to indicate that HH was using force. The main passage, once again, states:

> "HH pursued me to hall. Kept seeking attention. I pushed him away. He didn't get it. I said 'NO' and pushed him away. I was quite forceful though as I was wound up by now. GB had also been very grabby as well in the same period. HH stayed vertical but moved several feet towards the doorway + rebounded into doorframe which he used to steady himself. HH upset but not so much he flew into more of a fit."

92. The conduct of HH described here is that he pursued Mr Webb to the hall, seeking attention. The reference to GB being "grabby as well" indicates that HH was or had been grabby too, but that falls some way short of attempting to impose his will by physical means. Then, after the push, he flew into more of a fit. None of this suggests that Mr Webb was at any risk of physical harm from Mr Webb.

93. A qualifying disclosure is defined at section 43B Employment Rights Act 1996 and requires information that tends to show (looking at the potential categories here) either:

   a. that a criminal offence has been committed, is being committed or is likely to be committed,

   b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; or

   c. that the health or safety of any individual has been, is being or is likely to be endangered.

94. We cannot see that this form indicates that HH had committed a criminal offence, such as assault, or that he or the company was acting illegally, or that Mr Webb's own health and safety had been at risk. Later on, as already documented, he did advance the claim that he was attacked by HH, but that is not the way in which the case was put at the preliminary hearing, and hence the case that we have to decide. Hence the complaints based on protected disclosures must also be dismissed. Given our conclusions on the harassment and detriment claims, there is no need to go on to consider time limits.

95. It follows that the only complaint to succeed is of unfair dismissal, and it remains to assess compensation. Separate directions will be given for a remedy hearing.

Employment Judge Fowell
Date 27 April 2022
JUDGMENT & REASONS SENT TO THE PARTIES ON
11 July 2022 By Mr J McCormick

For the Tribunal Office