



EMPLOYMENT TRIBUNALS

Claimant: Mr David Doonan

Respondent: The Shrewsbury Christian Centre Association
(The Art)

Heard at: Birmingham (Remotely) via CVP **On:** 23-25 March 2022

Before: Employment Judge Steward

Representation

Claimant: In person

Respondent: Mr A. Johns, Counsel

JUDGMENT

The Claimant's claim for automatic unfair dismissal fails.

REASONS

1. The Claimant was employed by the Respondent between April 2019 and 15 October 2019 as a Manager.
2. The Claimant's ET1 was presented in time and brought complaints for unfair dismissal and failure to pay notice pay. In his ET1, the Claimant states that he was contacted by Karen Higgins on the 12 October 2019 by telephone, who informed him not to attend work on Monday as he was going to be dismissed on the Tuesday for gross misconduct. On the 15 October 2019, the Claimant received a letter from Karen Higgins dismissing the Claimant for gross misconduct and giving 5-reasons or examples of the Claimant's behaviour which constituted gross misconduct (see page 13 of the ET1 and the letter of dismissal which is found at pages 108-109 in the bundle).
3. The original ET1 did not raise any issue that the dismissal of the Claimant was automatically unfair for Health and Safety reasons. The Tribunal

wrote to the Claimant and informed him that he could not make a claim for unfair dismissal as he did not have the 2-year qualifying period. The Claimant then, at the request of Employment Judge Meichen provided Further and Better Particulars of his claim which was dated 9 March 2020 in which he raised Health and Safety with regard to some of the 5-complaints of gross misconduct. In his letter, the Claimant states "I have not stated before that there were Health and Safety issues as I thought that it was implicit and obvious. The reason I was dismissed was because I have raised Health & Safety issues and the Charity did not like that fact". It would appear that the Tribunal wrote to the Claimant again on the 15 April 2020 and Employment Judge Harding sought Further and Better Particulars of the occasions the Claimant raised Health and Safety issues. The Claimant responded on the 20 April 2020 with 12-points or occasions where Health and Safety was raised by him. A Hearing took place on the 6 October 2020 before Employment Judge Meichen to consider whether the Claimant should be allowed to amend his claim based on the Further and Better Particulars which were provided on the 20 April 2020. It was claimed at the Hearing that the reason the Claimant says he was dismissed, failed within either Section 101(A) or Section 101(C) of the Employment Rights Act 1996. The matters which the Claimant says are the reasons for his dismissal in either of these subsections can be found at paragraphs 3-11 of the Claimant's Further and Better Particulars dated the 20 April 2020. The Respondent had throughout submitted that the Claimant was fairly dismissed by reasons of conduct. At the Hearing, the Claimant represented himself and the Respondent was represented by Mr Johns of Counsel. I heard the Claimant give evidence and considered his written submissions. I heard the Respondent's 3-witnesses, Karen Higgins, Camilla Bruce and Ian Somerville give evidence and I was assisted by Mr Johns' submissions. I read the bundle in preparation for the Hearing twice.

The Law

4. Section 100 of the Employment Rights Act 1996 states and in particular I will read Section 101(A) and Section 101(C). Section 101(A) makes the following points in relation to the Health and Safety cases. "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 principle reason for that dismissal is that (A) having been designated by the employer to carry out activities in connection with preventing or reducing risk to Health and Safety at work the employee carried out or proposed to carry out any such activities and (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 employers attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. In order for the Claimant to be successful in his claim, he must establish on the balance of probabilities that the prohibited reason as alluded to in Section 101(A) or (C) is the principle reason for the dismissal. A claim for automatic unfair dismissal will fail if the prohibited reason is mere the subsidiary or indirect reason for the dismissal. The burden is on the Claimant and the standard approved is on the balance of probabilities.

Finding of Fact

5. As the Burden of Proof lies with the Claimant, we have to examine the reasons he says Sections 101(A) and Section 101(C) are engaged and show that these prohibited reasons are the principle reason, or the only sole reason for his dismissal. Therefore, my attention is automatically drawn to [page 29 and 30] in the bundle, namely the Claimant's Further and Better Particulars as ordered by Employment Judge Harding and of course the same details were contained within the body of the Claimants and final witness statement for the purposes of this Hearing. Looking at and focusing very much in relation to the documentation at [page 29 and 30] in the bundle, which were the Claimant's Further and Better Particulars, in relation to paragraph 1, the Respondents accept at paragraph 4 [page 35] in the further grant of resistance that the Claimant's job description gave him responsibility for Health and Safety matters at Shrewsbury Art. In relation to paragraph 2 of the Claimant's Further and Better Particulars, I am not sure that this takes the claim any further. There is no suggestion here that the Claimant is making reference pursuant to Section 101(A) and was going to propose or carry out any act with regards to Health and Safety as per Section 101(C) and to bring to his employer's attention circumstances that were harmful to Health and Safety. Nothing was raised by the Claimant to the Trustees on these issues. In relation to paragraph 3 of the Claimant's Further and Better Particulars, this is referred to as the clients carrying knives and gives details of requests made by the Claimant for body armour. I will consider this in conjunction with paragraph 5 of the Claimant's Further and Better Particulars, where the Claimant says at a Trustee meeting on the 15 May 2019, he requested a doorman from Taybar Security Ltd to be employed. The Respondents claim that no such request for body armour was ever made. In my view, the actual fact of whether body armour was or was not requested is really immaterial, but I do find it unlikely that such a request within 1-month of the Claimant's employment starting, had not led to a documented response. The Charity's role was to support homeless and vulnerable people and improve their lives. It is unlikely to want to operate in an environment where staff are clearly set apart from its clients in a manner which highlights a potential lack of trust. Such a request in my view, would have been I think, documented and discussed. It wasn't, and it cannot be said to be a reason that invokes Section 101(A) or (C) of the Employment Rights Act 1996 as clearly there were many incidences post April 2019 where the Claimant is praised for the work that he was carrying out at the time by the Respondents and the Trustees. As I have said, I mentioned paragraph 3 of the Claimant's Further and Better Particulars of Claim in conjunction with paragraph 5. This was the Claimant's request for a security man from Taybar. This request was agreed by the Trustees. There was a delay in putting the security man in place, but the contract was expanded by the Respondents for a further 5-months, indeed when the Claimant gave evidence, he stated the security man was in place when he left his employment. I find that this was an example of the Claimant making a request for a security guard, which clearly was for Health & Safety reasons, but it appears that the Respondent were happy to provide this and indeed in the Trustee's minutes of the meeting on the 3 July 2019, they state the addition of extra security means we will breach our set budgets for this year, but it was agreed that all were necessary and

desirable. There is no evidence to suggest that this request was a reason, let alone the principle reason for dismissal. In relation to paragraph 4 of the Claimant's Further and Better Particulars dated 20 April 2019. This deals with the Claimant's request for a new door with safety glass. The Claimant says that this was declined. It was declined at the meeting on the 15 May 2019, the minutes of this meeting though, reveal that at [page 75] within the bundle "directly from those minutes that the door was being fitted with a window". So, that was only 14-days after this meeting that the Claimant received an email from, I think it was Patrick Playfair which states at [page 76] "I must congratulate you and the staff and volunteers involved in the refurbishment of 10(CF) and as always David, I trust this is an accurate record of our meeting and thank you again for what you are already doing to improve the management of the Ark and bringing people on board. Indeed at the meeting on the 3 July 2019, the Claimant is described as "doing a great job and making good progress". The overriding impression is that up to September 2019, the Respondents were pleased with the progress that the Claimant was making and there is no suggestion that the Claimant's Health and Safety activities are proposals for causing the Respondent any issues. The Claimant had brought issues of Health and Safety to the attention of the Respondent and it appears that they have acted on them in a positive manner. Indeed, at the meeting on the 18 September 2019, consideration was being given to replacing the Taybar Security with a permanent salaried member of staff. Thereafter, Karen Higgins raised issues of concern in an email on the 18 September 2019 to Patrick Playfair and Ian Somerville amongst others about the Claimant, but this was purely with regard to his conduct. There was no reference whatsoever with respect to concerns in respect of Health and Safety. Karen Higgins raised further concerns in an email on the 8 October 2019 to include erratic mood swings, derogatory comments towards staff, volunteers and clients. It is not necessary for me to spend time trying to decide the factual matrix of what the Claimant was or wasn't doing, but the clear impression is that from the documentation that the Respondents were becoming concerned about the Claimant's conduct and not his attempts to propose or carry out Health and Safety activities or report potentially harmful Health and Safety concerns to the Respondent.

6. In relation to point 6 of the Claimant's Further and Better Particulars, namely the installation of decking in the courtyard and it was apparent to me that the Respondents were happy to incur this expenditure. The Claimant accepted this when I asked him whether the Respondents supported such measures.
7. In relation to point 7, in the Claimant's Further and Better Particulars, a washing machine was installed in the courtyard and a weatherproof cabinet was also provided. It was conceded that the Treasurer Mr Somerville did query the additional costs, but it was still provided for. Now this was in August 2019 when the Respondent still provided the Claimant with full support. It was clearly an implementation that was suggested by the Claimant from a Health and Safety perspective, although I don't find any evidence that this was a reason for the Claimant's ultimate dismissal.
8. In relation to point 9, in the Claimant's Further and Better Particulars, this is the reference to the removal of the dog as a potential trip hazard.

Whether the Claimant removed the dog or not, is again not really necessary for me to determine, however, I do note that at [page 13] in the bundle, the Claimant says “I tried to guide the dog by its collar to the courtyard as it was a trip hazard” and again this is repeated at [page 25] in the bundle. However, in the Claimant’s Further and Better Particulars, he states “I tried to move it, but was unable to, a volunteer removed it”. In his oral evidence, the Claimant says, “he didn’t remove the dog, a volunteer removed it”. Two people have in fact already tripped over it. In the bundle at [pages 122-123] it is a statement from Miriam Turner who is an Outreach Worker. She notes that a previous incident with a dog on the 4 or 5 June 2019, but then outlines what happened on the 3 July 2019. She talks of the dog being almost a therapy dog and was much loved and she also outlines what happened on this occasion, which caused upset to volunteers and to clients. Those who were not called as a witness, I can still attach some weight to her statement. In my view, the Claimant wanted the dog removed as he felt it shouldn’t have been physically where it was. He may have perceived the dog as a trip hazard, or simply he didn’t want a dog in or on the premises, but I also do accept the incident causes stress to the volunteers and clients given the manner of the Claimant during this particular incident. Regardless, there is no record of this incident and it occurred at a time when the Respondent gave the Claimant full support and was happy with the Claimant’s progress, I find that the incident came to light later when the Respondents were unhappy with the Claimant’s conduct. I do not find it was an incident the Respondent’s used to dismiss the Claimant from a Health and Safety perspective but was an example of the Claimant’s approach that they found to be unacceptable.

9. Item 10 of the Claimants Further and Better Particulars, I simply do not find that these were used as a reason by the Respondents to dismiss the Claimant.

10. With regard to Item 11, I accept this was clearly a Health and Safety issue. It appears that the Claimant tried to rectify the problem in May 2019 and again in September 2019, the Claimant did not rectify the problem and a few days before his dismissal he attempted to rectify the problem again using varnish and paints. The Respondents had already installed the decking at expense. The Respondents were concerned that the slipping hazard had been highlighted in May 2019 but was still an issue in October 2019. The issue was not that the Claimant had raised it as a Health and Safety issue pursuant to Section 101(A) or (C) and was dismissed as a result, but that the problem had not been resolved by the Claimants over a number of months. It was a Health and Safety issue but not the reason or part of the series of reasons that the Respondent used to dismiss the Claimant for. The Claimant has not relied on the “hoody incident” in his Further and Better Particulars or in his final statement, so I do not make any specific findings on this, but I will comment on it in due course.

Conclusions

11. As will be apparent from the above, I have not found on the balance of probabilities that the Claimant was dismissed because of prohibited reasons under Section 101 subsection (A) or subsection (C) of the ERA 1996 was the principle reason. In my view, the Respondents were happy with the work that the Claimant was carrying out as a Manager in the early part of the employment. However it would appear that over time, the Claimant's attitude and conduct became a concern and there are a number of examples as follows: -
- a) At [page 93] in the bundle, Tom Taylor's email dated 19 August 2019 raising concerns about old people skills to the manager.
 - b) At [page 97] Karen Higgins' email stating that feedback from clients and volunteers was showing the Claimant having a lack of people skills, want and empathy and the Claimant's view that he was "too old to change the way I am". That particular aspect not being challenged by the Claimant when Miss Higgins gave live oral evidence.
 - c) [Page 101] The email from Karen Higgins dated 8 October 2019 again, outlining more concerns regarding the Claimants approach and again Miss Higgins is quoted as saying "I spent 30mins on the phone to a very upset Rose, we will lose good staff, Miriam has also identified as much to me".
 - d) [Page 102] The email from Emily Bell to Karen Higgins amongst others outlining conversations that she had had with Miriam, Wendy and Rose.
 - e) Statement of Helen Fletcher regarding the "hoody incident" which is dated 15 November 2019 and is found at [page 121] again outlines from the Respondent's perspective of the approach that the Claimant took in relation to that particular issue and again
 - f) The statement of Miriam Turner dated November 2019 raising various concerns and that can be found at [page 122-123].
 - g) The minutes of meetings do not raise any issues with Health and Safety that the Claimant was undertaking. Indeed decking and handrails were requested and were provided. A security guard was provided and the Respondents wanted to make this a permanent fixture likewise a washing machine and drier, were also provided for the courtyard". It seems clear that by September, issues over the Claimant's conduct and perhaps his approach to management were becoming apparent. Upon investigation, volunteers disclosed concerning behaviour from their perspective and the situation deteriorated quite rapidly as the Trustees uncovered further concerns. Staff were unhappy and there was a distinct possibility that the Ark would lose valued members of staff if action wasn't taken and of course what is key in any case like this is what the thought process was in relation to the individuals who took the decision to dismiss the Claimant.

- h) The Claimant was dismissed for issues of gross misconduct. He was not dismissed because of prohibited reasons under Section 101(A) and (C) as the principle reason and I do not accept that Section 101(A) and (C) is in fact engaged at all. The Claimant never raised Health and Safety issues or Section 101(A) or (C) in his ET1 and only relied on this when the Tribunal made it clear that he did not have sufficient service of bringing a claim for unfair dismissal in the normal way. It is for the Claimant to show on the balance of probabilities that his dismissal was for a prohibited reason under Section 101 subsection (A) or subsection (C) of the ERA 1996. He must show this prohibited reason was the sole or principle reason for the dismissal. I do not find that he has discharged that burden which belongs to him and consequently his claim for automatic unfair dismissal must fail. As with any claim for notice pay, given the manner of that dismissal.

Employment Judge Steward
23 June 2022