



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Edwards

v

East of England Ambulance Service NHS Trust

Heard at: Watford Employment Tribunal
(by CVP for Bury St Edmunds Employment Tribunal)

On: 7, 8, 9, and 10 March 2023
Before: Employment Judge Forde

Appearances

For the Claimant: In person

For the Respondent: Miss L Veale, Counsel

JUDGMENT

1. The claimant's claim of unfair dismissal is well founded and succeeds.

REASONS

Introduction

1. By way of a claim form received on 13 May 2022, the claimant pursues a claim of unfair dismissal arising from his dismissal by the respondent on 17 February 2022.

Parties

2. The claimant was employed most recently as a Senior Paramedic. His employment started on 7 November 2004 and ended on 17 February 2022.
3. The respondent is an NHS Trust responsible for providing 24 hours access to accident and emergency services for those in need of emergency treatment and transport in Bedfordshire, Hertfordshire, Essex, Norfolk, Suffolk and Cambridgeshire.
4. In his role as a Senior Paramedic, the claimant was responsible for driving and staffing ambulances, responding to emergency 999 calls, assessing patients, and providing emergency treatment. The claimant was dismissed for gross misconduct for physically assaulting a patient. The issue for the tribunal for the tribunal to determine in this claim was whether the claimant's

dismissal was unfair. In the circumstances of this case, unfairness amounts to an assessment as to whether or not the claimant was dismissed for a potentially fair reason within s.98 Employment Rights Act 1996 (ERA). The respondent relies on conduct. Thereafter, if the reason was conduct, did the respondent have a genuine belief in the claimant's guilt, base its belief of the claimant's guilt on reasonable grounds and carry out a fair investigation. Thereafter, the tribunal would have to consider whether the claimant's dismissal fell within the band of reasonable responses open to a reasonable employer in the circumstances. Lastly, the tribunal would have to consider whether or not the respondent followed a fair procedure in dismissing the claimant.

5. The claimant claims that he has been unfairly dismissed. For the purposes of this hearing, the tribunal must determine what was the principal reason for the claimant's dismissal and whether it was a potentially fair reason under s.98(1) and (2) of the ERA.
6. If so, was the dismissal fair or unfair within the meaning of s.98(4).

Findings of fact

7. The relevant findings of fact are as follows. Where I have to resolve any conflicts of evidence, I indicate how I have done so at the material point. Available to me and the parties through the course of the hearing were three bundles, namely a main bundle and two supplementary bundles which were of 12 and 3 pages respectively. In addition, witness statements were prepared on behalf of the claimant, Mr Ashford who was the dismissing officer and Mrs Huggins who heard the appeal of the claimant's dismissal
8. It is admitted, and I find, that the claimant was dismissed for gross misconduct by the respondent. The circumstances that gave rise to that dismissal are as follows:
 - 8.1 On 18/19 August 2021 the claimant was working a night shift with a colleague, Daniel Johnson. When I say "colleague" I mean this in the loosest sense of the word; the claimant and Mr Johnson had not worked together previously and had not known each other prior to the evening in question. An unusual nuance in this case is that the claimant asserts that he had a friendship with a women who it is understood was Mr Johnson's partner at the time of the incident concerning these proceedings.
 - 8.2 Together, travelling by ambulance, the two men serviced a number of emergency calls. The incident which gives rise to these proceedings was a call involving a 14-year-old male patient who is reported to have consumed excess alcohol. The patient was described as "paralytic" and I have no doubt that the patient was so drunk that there was considerable concern over his safety and health, hence the call that led to the attendance of the claimant and Mr Johnson.

- 8.3 From the claimant's evidence both men carried out what is known as a Dynamic Risk Assessment. The purpose behind a Dynamic Risk Assessment is to assess the potential risk to the paramedics attending on a patient including physical harm. It is the claimant's case that the DRA he carried out assessed the risk to be low. It was not in dispute that the clinical lead had determined that the patient needed transferring into hospital given his age and intoxicated state.
- 8.4 The claimant's case is that a trolley was brought into the house and that Mr Johnson, as clinical lead, was securing the trolley belt at the feet end whereas the claimant had responsibility for securing the patient to the trolley across his chest. Whilst both men were attending to their duties in this regard, the claimant was struck by the patient. Following this, the claimant made contact with the boy. The claimant's case is that the patient struck the claimant on the upper lip and nose. He describes this as being "entirely unexpected but immediately painful". Thereafter, the claimant accepts that he reacted and whilst not entirely certain of the extent of his reaction he explains that his reaction was impulsive, and reactionary; in other words, it was an instantaneous reflex reaction and one which was to protect himself from further blows from the patient. There was no one else in the room at the time this occurred.
- 8.5 Thereafter, the patient was transferred to hospital together with an appropriate adult with Mr Johnson travelling in the rear of the vehicle as is customary due to his role as clinical lead.
- 8.6 On arrival at hospital, Mr Johnson reported to the nurse at the handover that the claimant had been assaulted.
- 8.7 Once they had finished their shift the claimant and Mr Johnson reported that the claimant had been assaulted to the Single Point of Contact (SPOC) [page 276-278]. It was explained that the patient struck the claimant in the face, that the matter had been reported on the respondent's internal reporting system and that Mr Johnson had completed the safeguarding referral. No mention was made by either the claimant or Mr Johnson that would equate to an account that Mr Johnson subsequently communicated namely that the claimant had assaulted the child in a premeditated and intentional attack.
- 8.8 Following two further accounts by Mr Johnson on 20 and 21 August 2021 the claimant received a letter from the respondent informing him that he had been suspended pending an investigation based on the allegations that the claimant had assaulted the patient.
- 8.9 An investigation was undertaken in line with the respondent's disciplinary policy. Marc Dixon was appointed as the investigating officer. The claimant was invited to a formal investigatory meeting via letter dated 20 September 2021. The meeting took place on 27 September 2021. By contrast, Mr Johnson provided a series of short,

typed of answers to a questionnaire on which I shall refer to later in this judgment: Those answers were provided on 16 November 2021.

- 8.10 An investigation report was produced on 20 December 2021. A decision had been reached to progress the matter to a disciplinary hearing which took place on 9 February 2022. The hearing was chaired by Mr Rob Ashford, supported by Nick Smith, and Jen Ladbrooke, HR Manager. The claimant was provided with the investigating report plus a number of supporting documents but as I will point out in due course, not all documents had been reviewed by the investigating officer and provided to the disciplinary hearing participants including the claimant.
- 8.11 The hearing was convened to consider the following allegations:
- 8.11.1 Whilst on shift on 19 August 2021 in the claimant's capacity as a Senior Paramedic, the claimant attended to a vulnerable male patient aged 14. An incident occurred whereby the claimant reacted to being struck by the patient and proceeded to commit a physical assault on the patient. The claimant also failed to report this within the Datix he submitted at the time of the offence.
 - 8.11.2 The claimant had abused his position of trust and his professional boundaries as an employee of the East of England Ambulance Service NHS Trust
 - 8.11.3 The claimant's actions potentially brought the Trust into serious disrepute by his inappropriate actions (ie his actions had the potential to damage public confidence in the Trust).
 - 8.11.4 The claimant had breached his contractual HCPC registration obligation to maintain professionalism in an out of the workplace, specifically s.37 of his contract of employment, and s.9.1 of the HCPC Standards of Conduct, Performance of Ethics.
- 8.12 The claimant was accompanied by his union representative, Mr Michael Rampling.
- 8.13 The outcome of the disciplinary hearing was communicated to the claimant via a letter dated 17 February 2022. The panel found all of the allegations proven and considered that the approved sanction was dismissal for gross misconduct effective from that date.
- 8.14 The claimant submitted an appeal against his decision on 22 February 2022. The appeal panel was chaired by Mrs Huggins who gave evidence to the tribunal. That panel xxx the same decision as Mr Ashford's panel and ratified the claimant's dismissal.

The issues

9. Turning to the issues, it was agreed that under s.98(1) of ERA 1996, the tribunal is required to determine whether the claimant's dismissal was for a potentially fair reason. The respondent asserts conduct.
10. In cases of conduct, it is clear law, consideration must be given to s.98(4) ERA 1996. The burden of proof is on the respondent to prove the reason for the dismissal. Thereafter, the case of British Home Stores Ltd v Burchell [1980] ICR 303 sets out a threefold test in determining the reasonableness of a misconduct dismissal:
 - 10.1 Whether the employer had a genuine belief that the employee was guilty of misconduct;
 - 10.2 Whether the employer had reasonable grounds upon which to sustain that belief;
 - 10.3 At the stage at which the employer formed that belief on those grounds, whether it had carried out as much investigation into the matter as was reasonable in all of the circumstances.
11. It is the claimant's case that it is the third ground of the Burchell test which undermines the respondent's position that it carried out a fair and reasonable investigation in all of the circumstances. The claimant puts his case in a number of basis:
 - In respect of the scripted answer from Mr Johnson the claimant's criticisms are essentially that the evidence that Mr Johnson provided within this document was untested. In addition to the core allegation, Mr Johnson made other allegations which the claimant asserted were untrue. By extension, and by failing to test Mr Johnson's evidence and thereby failing to consider the credibility of Mr Johnson as a witness, the claimant said that the respondent fell into error. The claimant asserts that were the respondent to test a number of clearly unsupported allegations against him it would have considered the veracity and XXX of what Mr Johnson has said in totality. In other words, what Mr Johnson had to say in respect of the core allegation of assault against the patient would have been considered in a different light. Accordingly, the claimant says that the respondent fell into error.
 - It was not disputed that Mr Johnson spoke to a manager, Mr Paddy, who in turn produced an email summarising Mr Johnson's account. That email is dated 20 August 2021. Although it is not Mr Johnson's direct account, it is an account of what Mr Johnson is said to have told Mr Paddy. The claimant asserts that it contains a number of material inaccuracies, namely:

“I was informed that whilst on the DSA, the patient threw his arm backwards due to him being intoxicated and caught Peter's face in the process, with the word “brushing” used. I was then informed by Daniel that Peter took 4-5 seconds

before making a clenched fist, raising his fist and bringing it down on the child's face with the intent to cause harm.

Daniel then told me that the child automatically replied, not quoted but along the lines of "why have you hit me, man?". The child was conveyed to West Sussex Hospital."

12. The claimant's criticism of this account is that:
 - 12.1 It describes the blow that the claimant is said to have inflicted on the patient as a clearly premeditated one involving a clenched fist, and
 - 12.2 That the claimant had received nothing more than a light touch as indicated by using the word "brushing".
 - 12.3 Mr Johnson sent an email dated 21 August 2021 entitled "Statement request". In that email, it describes the claimant as starting his shift late and showing "utter disregard" to Mr Johnson, something that the claimant denied in evidence. Second, Mr Johnson asserted that the claimant had been on his fourth or fifth consecutive night shift and was doing so in an attempt to receive incentivised pay. In evidence this was denied by the claimant who was able to point to a document within the bundle which showed that it was his third night shift. Further, the claimant asserted that he loved his job, enjoyed his work and pointed to 18 years previous exemplary service in order to support that contention.
 - 12.4 Mr Johnson described that the claimant "drove his vehicle in excess of all speed limits". Again, this was denied by the claimant who pointed out that he is an advanced driver on cars, motorcycles and heavy goods vehicles and takes pride in driving in accordance with the law.
 - 12.5 That the claimant stopped the ambulance whilst driving on blue lights to scream at a member of the public (referred to at the hearing as the "road rage" allegation).
 - 12.6 The essential allegation of an intentional, premeditated strike on a vulnerable child as well as documenting some remarks which clearly called into question the claimant's criticisms which again were denied by the claimant.
13. Due to difficulties which the respondent asserts arose due to the fact that it was not possible to schedule Mr Johnson for a face-to-face interview with Mr Dixon, a questionnaire was produced to enable Mr Johnson to answer a number of questions. I set out the key questions and answers to the questionnaire as follows:
 - "Q3: What is your understating of the alleged incident that took place between Peter Edwards and the 14-year-old patient to whom you both attended due to intoxication with alcohol on 19 August 2021" (please give any details you can recall, including the incident/s you witnessed; who was involved in

the incident; date; who else may have witness; did you raise it with anyone, any known actions taken, etc”

14. In answer:

“...PE did not advise the individual of his actions whilst manhandling him onto a stretcher, at which point he was brushed by a flailing arm of a paralytic child who was moaning “get off me bruv”.

To which PE did not react to, waiting several seconds, registering an angry look, then striking the child with a blow to the face in an up down motion.”

15. The claimant is also said to have engaged in “several minutes of audible ramblings in anger, finally being asked if he was in a correct frame of mind to drive us onwards to hospital, after being ejected from the ambulance back to de-escalate any further situations”.
16. The claimant disputed in its entirety the content of this answer and pointed to the fact that this account was at variance to the accounts provided on 19, 20 and 21 August. When asked to explain how the patient assaulted the claimant, Mr Johnson responded that “the blow was a limp, bent arm in a waving motion”. In answer to a question as to whether or not Mr Johnson had seen the claimant abuse the patient or any other persons at any time, Mr Johnson repeated the allegations of the road rage incident. Describing the details of the core allegations, he repeated the detail of what he had said previously, namely that it was as a result of a premeditated, intentional blow with a clenched fist.
17. Notably at question 9 on the questionnaire which asks Mr Johnson to set out any action taken as a result of him reporting the incident, he asserted that he has seen the claimant attempting to flag him down whilst on duty, from which I inferred that Mr Johnson was saying the claimant had wanted to speak to him about reports made about him. Again, the claimant disputes all that Mr Johnson has said.
18. In response to a question as to whether or not Mr Johnson was aware of anyone else raising any concerns about the claimant, Mr Johnson responded, “I am aware of several people intimidated by PE however unwilling to complaint”. The claimant makes the point that this is unsubstantiated allegation, unsupported by any evidence whatsoever, and made by someone for the first and only time on 19 August 2021.
19. In respect of question 14 of the questionnaire, Mr Johnson was asked to add anything further he felt relevant to the investigation. His response was “I strongly believe that PE was well beyond his bandwidth that day, only worked this day fir [sic] and incentivized rate of pay”. As I have already stated above, the claimant provided evidence to the tribunal which contradicted what Mr Johnson had to say on this here.
20. As part of his review dated 20 December 2021, Mr Dixon chose to include what he termed as “DJ’s statement”. It is unclear whether these included the email dated 21 August 2021. Mr Dixon did not give evidence to the

tribunal nor did he provide a statement. In submissions, Ms Veale on behalf of the respondent asked me not to draw any inference from the fact of Mr Dixon's lack of attendance or evidence.

21. However, no explanation was provided to me as to why Mr Dixon was not attending the tribunal to give evidence or why he had not prepared a witness statement to set what he did and why he did it. It was clear to me and I find that the evidence that Mr Dixon accumulated as part of his investigation played a critical and determinative part in the decisions reached by Mr Ashford and his panel and which was subsequently ratified by Mrs Huggins and her panel.
22. It is my finding that Mr Dixon did not pay adequate mind to the myriad, satellite allegations made against the claimant by Mr Johnson some of which such as the road rage incident and driving at speed were so serious as to warrant separate attention of their own right. That failure on the part of Mr Dixon meant that he failed to consider the totality of the evidence that Mr Johnson provided to the disciplinary process that the claimant was subjected to. I find that Mr Dixon's failure to address his mind to all of the things that Mr Johnson had to say about the claimant meant that he failed to weigh up the credibility of Mr Johnson as a witness and by extension, the accuracy and veracity of Mr Johnson's account.
23. It may well be the case that Mr Dixon did consider that there were allegations raised by Mr Johnson that did not merit further investigation but again I can only speculate around this point as there is no reasoning or rationale given in this regard. It follows, that I find that Mr Dixon's failure to weigh up Mr Johnson's evidence and to not provide a reasoning behind his decision to focus only on what Mr Johnson had to say amounts to unreasonableness within the disciplinary process which infected the entirety of the process going forward. I can only speculate as to why that was the case but, as I say, Mr Dixon did not attend the hearing nor did he provide any evidence. I find that the failure was compounded by the failure to challenge and test the allegations that Mr Johnson made against the claimant.
24. In terms of findings on the core issue, Mr Dixon explains that while the timelines discussed by both the claimant and Mr Johnson were consistent there was a clear inconsistency between the account as to the core incident. Crucially, Mr Dixon found that the claimant had been hit by the patient's flailing arm (see paragraph 3.1.9 of page 125), that there was evidence of poor communication and manhandling skills by the claimant (see paragraph 4.1.4) and that there is evidence of assault and verbal assault (4.1.5 and 4.1.6), and of the road rage incident (4.1.7). Nowhere within Mr Dixon's findings is there a rationale or a reason as to why Mr Johnson's most recent accounts are preferred as opposed to his initial accounts of nothing untoward happening in so far as the claimant was concerned. Moreover, he does not explain why he prefers the account of a flailing arm hitting the claimant as opposed to a punch as the claimant described and Mr Johnson himself described during the course of the SPOC call (see above).

25. I pause here to make reference to a document known as the Patient Care Record which itself is dated 19 August 2021 and had been completed by Mr Johnson. It is noteworthy that this document had been requested by the claimant during the course of his disciplinary process and it was not provided to him during that process despite him making a subject access request. However, it was disclosed in the days leading up to the full merits hearing. That document records Mr Johnson writing the following in respect of what had occurred in so far as the core incident is concerned:

“PT shouted what are you doing to me bruv plus punched 10788958 (c) in the mouth”

before describing how the situation was de-escalated. Nowhere is it mentioned that the claimant assaulted the patient.

26. As I have said, the matter preceded to a disciplinary hearing before Mr Ashford. That hearing was attended by the claimant, Mr Dixon, Mr Ashford and Ms Ladbrooke as well as Mr Wayland, Safeguarding Officer. It is noteworthy that Mr Wayland had access to the patient care record and was as able to speak to that document's content prior to the meeting. It is the respondent's evidence that Mr Wayland only had access to this document. The claimant disputes that but has no evidence to support his view. I accept the respondent's evidence in this regard.
27. During the meeting a number of points were raised. First of all, the claimant raised concerns with regards to what he saw as the delay in scheduling the disciplinary hearing. The respondent submitted that the reason for the delay lay with the difficulty it had in scheduling a meeting with Mr Johnson. In submission, Ms Veale set out an explanation as to why the Trust had difficulties in scheduling a meeting with Mr Johnson, namely because Mr Johnson was undertaking a number of shifts which did not coincide with the availability of Mr Dixon. However, I have difficulty in understanding that submission as the matter at hand, namely the continued employment of a long-standing employee was at stake and Mr Johnson's credibility required testing. Second, the claimant raised concerns with regards to the use of the questionnaire to interrogate Mr Johnson and one which contained a number of leading questions. Third, the existence of Mr Paddy's email (see above) was shared with the claimant for the first time. Fourth, there was reference made to contact received from the local authority due to the safeguarding report made by Mr Johnson in respect of the patient.
28. During the course of the hearing Mr Wayland was asked to comment in regard to the patient care record. Mr Wayland responds:
- “I have opened the PCR, it states that PE was assault [sic], it talks about the assault on the patient and an injury also the SPOC referral”.
29. I am not aware of the point being raised in either submission or evidence that the PCR contained details of the assault on the patient.

30. Shortly after Mr Wayland's intervention the claimant pointed out that Mr Johnson described patient's assault on him as resulting from a flailing arm whilst the claimant says punched. It is noteworthy that nowhere within the disciplinary meeting notes does Mr Wayland state what the PCR has to say about this. Given that he was the only person who had sight of the document I find that Mr Wayland's failure here to set the record straight was a serious omission and therefore a serious procedural defect that arose in this phase of the process, namely the failure to disclose and review the patient care record. Mr Wayland states that he had considered disclosure of the patient care record but had determined that it was "irrelevant".
31. Mr Ashford set out his decision to dismiss the claimant in an outcome letter dated 17 February 2022. In reaching his decision Mr Ashford relied on the evidence of Mr Dixon and Mr Dave Allen. That evidence determined that the claimant had reacted in retaliation to a punch from a flailing arm and had reached that conclusion following an intervention from Mr Wayland that there was a red mark on the patient meaning that the clear inference was that the mark had been cause by the claimant.
32. Mr Ashford described the claimant's account, one of an instant reflex type as forming part of his mitigation when it was in fact his case.
33. The panel considered the fact that the claimant did not recall the incident in precise detail and relied upon Mr Johnson's evidence. That much is clear from the outcome letter and therefore I do not consider Ms Veale's submission that the panel had considered the credibility and accuracy of Mr Johnson's account and, having weighed up the evidence, had reached a "third way" decision in terms of what had happened on the night. It is absolutely clear that to me and I find that the panel had adopted Mr Johnson's account. If I am wrong and Ms Veale is right, I would remain of the same view given that the outcome lacks any reasoning or rationale to explain how the panel reached their view as to how the patient was in contact with the claimant.
34. The panel upheld the decision without paying any mind to the credibility of Mr Johnson. The inconsistency within the four accounts that he provided, the effect on his credibility as a witness in relation to the satellite allegations of misconduct levelled at the claimant none of which were capable of being evidenced, and the obvious lack of consistency around those accounts. I find the failure to consider the totality of Mr Johnson's evidence and weigh up his credibility as a witness to have been a serious error. I find that Mr Johnson, provided, either directly or via Mr Paddy a serious of accounts which lack credibility. I consider Mr Johnson to have been an unreliable historian and I consider that there are a number of obvious red flags to this issue that should have prompted a closer scrutiny of the accounts that he provided but were ignored throughout the disciplinary process.
35. By contrast, over the course of two days, I have had the benefit of hearing evidence from the claimant who I consider to be an honest witness of integrity; he was prepared to answer questions openly and honestly and

directly. I accept the claimant's account of what happened on 18/19 August 2021.

Appeal

36. The appeal was conducted by Mrs Huggins. The appeal upheld the claimant's dismissal. Ten minutes before the appeal started the claimant was informed that Mr Johnson was in attendance and he would be available to be questioned. I find that this is not a circumstance that could be described as procedurally fair. Notwithstanding, the claimant's dismissal was upheld on the basis that the claimant's criticisms as to Mr Dixon's investigation and its quality were not upheld. The appeal panel fell into the same error as Mr Ashford's panel had, compounded by the obvious procedural unfairness of not allowing the claimant more notice of Mr Johnson's attendance. I do not agree that the claimant had the chance to cure the defects of the dismissal by pursuing the appeal. The claimant was beset by the same problems and the appeal panel's unwillingness to agree to his request for a renewed investigation.
37. Accordingly, I find that the claimant was unfairly dismissed.

Polkey and contribution

38. Because of my findings as regards the claimant's evidence which I accept in its entirety and in respect of Mr Johnson's lack of credibility, I declined to make any reduction to the claimant's award.

Adjustment for breach of the Acas Code

39. I considered that the respondent's failure to ensure that Mr Johnson was available for interview and in attendance at the disciplinary hearing as being unreasonable. It did not do enough to ensure Mr Johnson could have attended on either occasion. In addition, I find that the delay that occurred as a result of the difficulties that the respondent said to have had in securing Mr Johnson's attendance on various occasions as being capable of amounting to a breach of the Acas Code. Accordingly, I order a ten per cent uplift on the claimant's award.

Remedy

40. The issue of remedy was due to be determined on the fourth and final day of the hearing, namely 10 March. However, a number of issues arose during the course of the day which prevented that hearing taking place. Accordingly, the hearing has been rescheduled to take place on Tuesday 21 March 2023 via CVP. The hearing will start at 10am.

Employment Judge Forde
Date: 16th March 2023

Case Number: 3305933/2022

Sent to the parties on: 16th March 2023
For the Tribunal Office: GDJ