EMPLOYMENT TRIBUNALS

Claimant: Ms R Gbortsui

Respondent: The Disabilities Trust

Heard at: Manchester **On:** 16,17 and 18 November 2022

Before: Employment Judge Cookson
Mrs C Jammeh (by CVP)
Mr BJ McCaughey

REPRESENTATION:

Claimant: Mr Ebikake (solicitor)
Respondent: Mr J Horan (counsel)

JUDGMENT having been sent to the parties on 12 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following written reasons are provided:

REASONS

Introduction

1. The claimant is 61 years of age. She describes herself as a black woman. She worked for the respondent from 4 October 2015 until 18 December 2021as a rehabilitation support worker. She brought a claim for unfair dismissal and direct race discrimination via a claim form lodged on 17 March 2021 after early conciliation was undertaken between 1 and 9 February 2021.

2. The respondent is a specialist charity providing support to individuals with a number of complex needs, including acquired brain injury, autism and physical disabilities. In relation to the location of services where the claimant worked, support is provided in a care home which is gated to provide secure accommodation for the service users. Because of the nature of the disabilities it is necessary to limit the freedom for some or all of the service users to wander and this is significant to what happened in this case.

Documents considered in reaching our judgment

3. In reaching our judgment we considered the following
    a. A bundle of documents which runs to some 256 pages,
    b. The evidence contained in witness statements for the respondent from
        i. Mr Jones (the team leader);
        ii. Ms Shaw (the investigating officer)
        iii. Ms Bayliss-Wareing (one of the dismissing officers);
        iv. Ms Tunstall (one of the appeal panel);

        together with their oral evidence,

    c. The evidence given by the claimant in her witness statement and in her oral evidence

    d. Oral submissions made by both representatives on behalf of the parties.

Findings of fact

4. We have made my findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities taking into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We have not made findings of fact in relation to every matter which was contested in evidence before us, simply those which were material to the determination of the legal issues in this case.

5. It is material to the facts in this case that the claimant had been given a final written warning sleeping on duty to last for 18 months and it is not disputed that this warning was live at that time of the incidents in this case. The letter explaining that warning made clear that other similar misconduct could result in dismissal and the claimant confirmed that she understood that.

6. In October 2020 there was a problem with the gate to the care home. The landlord had to remove it for repairs. This created a potential issue for service user security which was resolved by the landlord providing funding for an additional support worker to watch the gate. This is done via CCTV covering the gate and the carpark. That was a change to the usual arrangement in relation to the safe operation of the gate, which is set out in the respondent's induction manual. The tribunal accepts that the respondent was entitled to put in place what it considered to be appropriate arrangements and to issue instructions to the staff consistent with those arrangements, including by varying the standard staff instructions from time to time. The terms of the induction manual were not contractual and they were entitled to do that. It is clear that the claimant disagrees with what was done by the respondent in this regard but there is no suggestion that she (or anyone else) raised any objection or any safety concerns at the time.

7. On 17 October 2020 there was an incident with a servicer user, J, who had left the site when a bank worker was supposed to be watching the CCTV of the gate. This had resulted in a review and the assistant manager had undertaken a risk assessment on 19 October 2020 which identified the need for certain additional safeguards to be in place moving forwards.

8. On 2 November 2020 the team leader Craig Jones undertook the usual handover to the night shift which included the claimant. During the day there are a range of staff on site including three team leaders, but at night this is reduced to only a small number of care workers, usually a team of four. However while the gate was a problem this was increased to five in light of the additional funding provided by the landlord.

9. It is worth making the point that we are satisfied that the respondent was entitled to decide how to manage the risks of service users wandering or something else happening. The claimant is critical of the decisions made, but we find these were operational decisions the respondent was entitled to make and expect its staff to abide by.

10. During the evening of 2 November, while the claimant was attaching the CCTV, a number of buzzers went off. The claimant was concerned about the buzzers and that too long was being taken to answer them. She told us that it went against her training and instinct as a care worker to leave them ringing and despite the instruction she had been given not to respond to buzzers and to watch the gate, the claimant left the CCTV room and went to seek help. The claimant says that took a second or a few seconds but the panel found that even on her account that cannot be right. She says she went out of the room, shouted for help, spoke to someone in the kitchen about the need to answer a buzzer in a particular room and then returned to the CCTV room. On any account that cannot have taken "a second or two", and we conclude that claimant's evidence about that is not reliable. In addition the claimant did not raise this at the time with Ms Shaw during the subsequent investigation or during the disciplinary and grievance hearings so understandably had not been investigated by the respondent.

11. Unfortunately at some point while the claimant was responsible for watching the CCTV the service user J exited the building and wandered off. It was not in dispute that J is extremely vulnerable. She was wearing night clothes and it is likely that she had nothing on her feet because when she was later returned by the police she was wearing a large pair of men's sliders which the respondent's staff did not recognise and which the respondent assumed had belonged to or come from one of the police officers.

12. An investigation was begun promptly into what happened. The claimant provided an initial statement via email and was also interviewed by Ms Shaw. Notes of that interview were prepared and agreed by the claimant at the time. In the course of cross-examination the claimant appeared to seek to dispute the accuracy of those notes but Ms Shaw had not been challenged about that in her cross examination and we found no basis for finding that the notes are inaccurate.

13. What the claimant is recorded is saying about her duties is consistent with Mr Jones's statement about what he had told the claimant and the terms of the risk assessment.

14. Ms Shaw also interviewed other members of staff on duty that night. She briefly viewed the CCTV footage but told us that she did not spend a great deal on time on this because the claimant had seemed to accept responsibility on the basis of the exchange above. We accept that on the basis of that admission, Ms Shaw's perception was that no further investigation was necessary.

15. As the evidence was that one of the buzzers the claimant heard was the fire door alarm, Ms Shaw concluded that it seems likely that J had opened the fire door shortly before the claimant left the CCTV screen and that while the claimant was away from the CCTV room, J had walked through the unsecured gate. We accept that was a reasonable conclusion.

16. Ms Shaw and the other respondent witnesses were not able to tell us precisely when J went through the gate, nor do we know precisely when the claimant left the CCTV room. Mr Ebikake was critical of that. He suggested that that the CCTV footage which had been deleted by the respondent should have been disclosed and viewed in the course of these proceedings. However we accept that based on what she had told about by other witnesses and based on the claimant's own admissions during the investigation process, on the information available to her at the time, Ms Shaw had reasonably believed that J had left the site while the claimant was responsible for watching the CCTV but was away from the room in breach of the instructions she had been given.

17. On the basis of her investigations Ms Shaw recommended that an allegation of misconduct should result in disciplinary action The allegation recorded was that on the night of Monday 2 November 2020 the claimant neglected to complete her allocated task of monitoring the CCTV system, resulting in a service user absconding, putting them at risk of harm. Ms Shaw's investigation report identified potential mitigation in that the claimant had said that she had instinctively to help service users because there were buzzers going off and the report notes that the claimant was especially concerned about one service user with significantly impaired mobility. However Ms Shaw concluded that there was no evidence which contradicted the allegation in light of the admissions made by the claimant in the course of the investigation in particular her acceptance that she knew that her duties at the time had been simply to watch the CCTV and she had been told not to leave her post to respond to buzzers.

18. The disciplinary allegation was considered by Ms Bayliss-Wareing at a disciplinary hearing along with another manager. We are satisfied that the disciplinary hearing was conducted in a fair and reasonable manner. On the basis that the claimant had acknowledged she was knew about and understand the CCTV instructions, that she had accepted that a vulnerable person had left the site whilst she was on duty, that that had been negligent

and carried a risk harm to service user J the disciplinary managers concluded that the seriousness of the incident warranted a warning. However, the claimant was already subject to a final written warning which remained live so the sanction was increased to dismissal with notice in accordance with the respondent's procedures.

19. We accept that it was clear that the disciplining managers took into account the mitigation which the claimant had offered at the time about feeling duty bound to respond to the unanswered buzzers and her remorse was acknowledged, but they decided that in light of the explicit nature of the instructions given by Mr Jones that mitigation did not justify a lesser penalty. The claimant was dismissed with effect from 18 December 2020.

20. The claimant appealed on 6 January. Her appeal set out a number of grounds. In essence she criticised the arrangements put in place for the gate, that she had acted instinctively to the buzzers and despite what she had been told about leaving the CCTV room the buzzers justified her leaving and she repeated that the fire door had been faulty and that the service user had been able to take advantage of that. The claimant suggested that she had been made a scapegoat for organisational failure. No suggestion of discrimination was made.

21. The appeal was considered on 14 January by Ms Tunstall and another manager. The claimant's ground of appeal were considered. One of the issues discussed was whether the fire door was working. We accept the evidence of the minutes that this issue was taken seriously and the door was examined. The alarm was found to be in good working order and that was accepted at the time by the claimant at the time. The appeal panel rejected the appeal. The reasons for their decision were provided to the claimant on 22 January. The tribunal panel are satisfied that the appeal process was fairly conducted and the claimant's grounds given genuine consideration which is shown by the detailed outcome letter.

The Law

Relevant Law – Unfair Dismissal

22. Section 94 of the Employment Rights Act 1996 confers on employees with the necassry qualifying service, the right not to be unfairly dismissed. Enforcement of the right is by way of a complaint to the Tribunal under section 111. An employee must show that they were dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant within section 95(1)(a) of the ERA.

23. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for dismissal under section 98(2). Second, if the respondent shows that it had a potentially fair reason for dismissal, the Tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

24. In this case the respondent says it dismissed the claimant because it believed that she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2).

25. In determining the reason for a dismissal, the tribunal may only take account of those facts (or beliefs) that were known to the employer at the time of the dismissal. This means that no account will be taken of matters coming to light or occurring after the dismissal has taken place — *W Devis and Sons Ltd v Atkins* 1977 ICR 662, HL.

26. If there is a conduct reason, the employer must show that:

    a. it believed the employee was guilty of misconduct,
    b. it had in mind reasonable grounds upon which to sustain that belief, and
    c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
    d. This means that the employer need not have conclusive direct proof of the employee's misconduct — only a genuine and reasonable belief, reasonably tested.

27. In terms of the investigation that a respondent is required to undertake, a proportionate investigation is required – that is one which is reasonable response to the circumstances. In that context an admission is significant, indeed it may be that little purpose is served by an investigation where the misconduct is admitted — *Royal Society for the Protection of Birds v Croucher* 1984 ICR 604, EAT.

28. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case. The Tribunal must decide whether the dismissal of the employer was a reasonable response to the misconduct.

29. Reasonable employers will follow principles of natural justice, with decision makers approaching questions in an openminded and fair way, so a decision should not be taken until all the evidence has been considered, decisions must not be pre-judged and the decision maker must be unbiased and acting as impartially as possible. There should also be an impartial appeal before a manager with the authority to overturn the original decision. These principles are reflected in the ACAS Code of Practice.

30. All aspects of the case including the investigation, the grounds for belief, the penalty imposed and the procedure followed, must be taken into account in deciding whether the employer acted reasonably or unreasonably, and in assessing that we must decide whether the employer acted within the range of

reasonable responses to the reason for dismissal open to an employer in the circumstances. It is immaterial how we would have handled events or what decision we would have made.

Discrimination

31. s13 Equality Act (Direct discrimination)

"(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

32. s136 Equality Act

"(1)This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3)But subsection (2) does not apply if A shows that A did not contravene the provision."

33. Direct evidence of discrimination is rare and employment tribunals frequently have to infer discrimination from their findings of material facts. We recognise the difficulty in proving discrimination, but the law requires the claimant to show some facts which *could* suggest that there was discriminatory reason for the treatment but the claimant does not have to prove discrimination.

34. Lord Justice Mummery explained this in Madarassy v Nomura International plc 2007 ICR 867, CA *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

Discussion and conclusions

35. It was the investigation that was the primary focus of Mr Ebikake's criticisms of the respondent in his submissions. In essence he said the respondent had failed to carry out a proper investigation because it could not prove that the claimant's negligence had directly resulted in the service user leaving the site. However that submission fails to take account of the fact that the claimant had admitted that she had left the site and her own evidence of about the buzzers going off supported the managers belief that this was precisely the time J had left. As Mr Horan pointed out, the respondent did not have to prove that to us that the claimant's negligence had resulted in the service user, only that they had a reasonably belief that the claimant was guilty of misconduct.

36. In this case we were entirely satisfied that the employer has met each of the elements of a fair dismissal referred to above and we accepted Mr Horan's submissions about that. A fair investigation had been conducted which the employer wase entitled to conclude was proportionate in light of the claimant's admission. There was fair disciplinary hearing and the penalty was one which was appropriate in the circumstances. It was clear that the claimant's mitigation had been taken into account. Her misconduct had resulted in a warning and she was only dismissed because she was subject to a final written warning. This employer had taken a measured approach. The claimant had failed on her own case failed to follow the express instructions she had been given and even if she did so for good reasons, many employers would treat that itself as gross misconduct. However this claimant was not dismissed for gross misconduct. The penalty applied was a warning. She was only dismissed because she was already on a final warning which was still live. If she had been subject to the final warning she would not have lost her job.

37. In terms of the race discrimination case it was acknowledged by the claimant and Mr Ebikake that the claimant had failed to suggest any facts which could suggest discrimination in the course of evidence. The basis of her discrimination claim seemed to be that she thought that she had been treated unfairly and because of her protected characteristic of race and the fact the decision makers were white, that meant she had had been the victim of discrimination. This fails to address the essential requirement of the Equality Act that the claimant must show facts which suggest there could be discrimination.

38. in any event we found no unfairness in the case. We noted that the claimant had referred in her claim form to another employee, a bank worker who was not dismissed for leaving the CCTV room. We considered the claimant's evidence about that but we were satisfied that there are clear and material reasons why that person was not an appropriate comparator such that any inference of discrimination could be drawn from it. First it was the incident involving that worker that had given risen to the revised risk assessment and clearer instructions to staff about leaving the room. The incident had led to express warning to staff about the seriousness of leaving watching CCTV duties and it was after that the claimant had left her CCTV station. The tribunal panel were satisfied that if the bank worker had done the same thing again or if a white member of staff had done something similar to the claimant they too would have been disciplined. Second there is no suggestion that person was not subject to some form of disciplinary warning in any event and there was no suggestion that they had been on a final warning and not dismissed. The circumstances of the claimant's case and the bank worker's were materially different.

39. The unanimous judgment of the Tribunal is that the claimant's claims of unfair dismissal under the Employment Rights Act 1996 and of race discrimination under sections 13 of the Equality Act 2010 are not well founded and are dismissed.

40. It is noted here that the respondent had indicated an intention to pursue costs at this hearing but their application was subsequently withdrawn.

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Employment Judge Cookson

31 March 2023

JUDGMENT SENT TO THE PARTIES ON

4 April 2023

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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