



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms T Britcher

**Respondent:** Hastings & Rother Voluntary Association for the Blind

**Heard at:** London South (by CVP)

**On:** 3-4 January 2023

**Before:** Employment Judge Kumar

## Representation

Claimant: Mr Arnold, counsel

Respondent: Ms Ajibade, senior litigation consultant

**JUDGMENT** having been sent to the parties on **12 January 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. The claimant was employed by the respondent as a Registered Care Home Manager from 24 January 2018 until 17 February 2022.
2. The claimant claims that she was unfairly dismissed within section 98 of the Employment Rights Act 1996 and wrongful dismissal.

## The evidence

3. The claimant, Mrs Britcher, gave evidence on her own behalf. Mrs F Farrier-Twist, CEO, Mr T Novis, treasurer, and Mr T Bell, a care assistant, gave evidence on behalf of the respondent. The hearing took place by CVP. Owing to technical difficulties the respondent's witnesses were unable to join by video and gave evidence by audio link with the agreement of the parties.
4. The tribunal was referred during the hearing to documents within a bundle of 417 pages and a supplemental bundle of 15 pages.

5. Mr Arnold provided the tribunal with a document setting out legal principles and written closing submissions. Both Mr Arnold and Ms Ajibade provided the tribunal with oral closing submissions.

### **Issues for the tribunal to decide**

6. The list of issues for the tribunal to decide was agreed as follows:

#### *Unfair dismissal*

1. Was the claimant dismissed?
2. Was the reason (or principal reason) for the claimant's dismissal a statutorily fair reason, namely conduct?
3. Did the dismissing officer have a genuine belief in the claimant's misconduct?
4. Was that genuine belief sustained on reasonable grounds?
5. Did the respondent carry out as much investigation into each of the allegations as was reasonable in the circumstances?
6. Was the procedure to dismiss the claimant fair?
7. Was the decision to dismiss within the range of reasonable responses?

#### *Wrongful dismissal*

8. Was the claimant dismissed without notice in circumstances where she was entitled to notice?

#### *Remedy*

9. To what remedy is the claimant entitled?
  10. Should the tribunal reduce any financial award it makes by reference to contributory fault on the part of the claimant?
  11. Should there be any uplift for breaches of the ACAS Code?
  12. Should the claimant receive notice pay?
7. It was agreed that I would consider liability and then go on to consider remedy if I found for the claimant, save that in making my determination on liability I would also consider whether there were breaches of the ACAS Code.

### **Findings of fact**

8. The claimant, Mrs Britcher, was employed by the respondent, Hastings & Rother Voluntary Association for the Blind, as a Registered Care Home Manager from 24 January 2018 until 17 February 2022. The claimant had worked in the care sector for the past 30 years and in management for the past 10 years. The respondent was a charity which provides specialist care to individuals with a visual impairment. The claimant worked at Healey House, in St Leonards-on-Sea, a residential care home operated by the respondent.
9. Until August 2021 the claimant had a close working relationship with the CEO of the respondent, Mrs Farrier-Twist. In addition to a close working relationship the claimant and Mrs Farrier-Twist also had a friendship outside of work which included having dinner together as friends. This relationship soured from around August 2021.

10. The claimant had managerial responsibilities towards more junior staff within the care home. Some of the members of staff had formed a friendship group outside of work. These included Ms N Gerrish and her daughter Ms L Rogers. The claimant was of the view that some of this group would on occasion act unprofessionally or in an immature or insubordinate manner.
11. On 25 June 2021 a meeting took place between the claimant and Ms Rogers. Ms Rogers had recently handed in her notice and was due to finish work on 7 July 2021. The claimant had agreed with Mrs Farrier-Twist that it would be preferable for Ms Rogers to leave sooner on full-pay in order to avoid an uncomfortable atmosphere at work. The claimant informed Ms Rogers of this decision during the meeting which then became heated with Ms Rogers raising her voice and the claimant raising her voice in response. The raised voices were heard by some other members of staff.
12. On 28 June 2021 the CQC received an anonymous complaint that the claimant had been discriminatory towards younger members of staff. The CQC complaint was investigated on behalf of the respondent by Mrs Farrier-Twist who did not uphold the complaint. A copy of her investigation dated 7 July 2021 appeared within the bundle and showed largely positive feedback from staff and residents in respect of the claimant. It also noted difficulties that there had been in relation to Ms Rogers. Mrs Farrier-Twist concluded in her summary 'I, personally, have a close working relationship with [the claimant] and we speak most days. I am aware of issues with younger staff and following my investigations have had all of the concerns I had confirmed' [104]. As such, Mrs Farrier-Twist shared the claimant's views about the attitude of some of the more junior members of staff.
13. On 30 June 2021 a grievance was raised in respect of the claimant by Ms Rogers. As a result of the grievance the claimant attended a fact-finding meeting on 27 July 2021. The claimant did not receive prior notice of this meeting which was conducted by Mrs Farrier-Twist with Mr P Diegan, deputy manager, also present to take notes, although the claimant was never provided with the notes of this meeting.
14. On 2 August 2021, Mrs Farrier-Twist gave a letter to the claimant inviting her to a disciplinary hearing the following day. The letter informed her that the purpose of the meeting was 'to discuss concerns regarding your capability and conduct'. The letter stated that the claimant was alleged to have made comments of a bullying/harassing nature to Ms Rogers on 25 July 2021 [sic] and that if these allegations were substantiated the respondent would regard them as conduct. The letter also stated that the claimant may be given a verbal warning, a written warning or a final written warning.
15. The claimant was provided with two statements made by Ms J Fleming, an administrator, and Mr T Bell, a care assistant, both of which supported the allegation that the claimant had raised her voice to Ms Rogers on 25 June 2021. The claimant was told that Mr Diegan had also provided a statement which did not support the allegation that the claimant had raised her voice to Ms Rogers but the claimant was not provided with a copy of that statement and was subsequently told by Mr Diegan that he had deleted it

from his computer. A fourth statement given by another staff member, Ms C Mills, but subsequently withdrawn, referred to both Mr Rogers and the claimant raising their voices, but the claimant doing so in a professional and acceptable manner in order to be heard.

16. The claimant asked to postpone the disciplinary meeting so that she could consult her union representative. Mrs Farrier-Twist was not well-pleased by the claimant's request as she thought she was being difficult. This was evident from her oral evidence in which she said 'a normal person would have just come to the meeting when someone is taking a note'. The claimant said that Mrs Farrier-Twist in response to her request to postpone the meeting threw her arms in the air and said 'do what you want. I don't care.' Mrs Farrier-Twist accepted that she had said 'do what you want' but denied that she had overreacted. I prefer the claimant's evidence on this point and find that Mrs Farrier-Twist took umbrage with the claimant's request to postpone the meeting and raised her voice and was excitable in her interaction which the claimant perceived as aggressive. When giving her oral evidence about this conversation Mrs Farrier-Twist was again excitable and spoke fast. She accepted that she talks 'quite loudly'. Such was Mrs Farrier-Twist's overreaction to the claimant's reasonable request to postpone the meeting that the claimant subsequently recorded a further conversation that took place between them slightly later on the same day without Mrs Farrier-Twist's knowledge or consent. The claimant says that she recorded the conversation because she was concerned that allegations were being made against her and because of Mrs Farrier-Twist's aggressive reaction towards her in their earlier interaction. I accept that these were her reasons for recording the conversation.
17. Of note within the transcript of the recording (the accuracy of which was not challenged by the respondent) is an exchange between the claimant and Mrs Farrier-Twist in which Mrs Farrier-Twist referred to the claimant being 'set up' by 'the group'. I find that by 'the group' Mrs Farrier-Twist is referring to the more junior members of staff that both she and the claimant perceived as having an unprofessional attitude. I further find that Mrs Farrier-Twist was of the view that the allegations made against the claimant were baseless and were an attempt to set the claimant up by more junior members of staff.
18. On 6 August 2021 the claimant received a letter from Mr Patmore inviting her to a rescheduled meeting. The meeting in this letter was described as a 'disciplinary investigation'.
19. At the rescheduled meeting the claimant played the recording of her interaction with Mrs Farrier-Twist. The outcome of this meeting was that no further action was taken.
20. Subsequent to this meeting and Mrs Farrier-Twist learning that she had been covertly recorded by the claimant, allegations of misconduct against the claimant mounted. It is clear that communication between Mrs Farrier-Twist and the claimant had broken down to such an extent that Mrs Farrier-Twist made a request to the claimant to confirm if some of the resident rooms were 'ready' in writing. This resulted in a misunderstanding as to what the claimant was being asked to do and gave rise to a further allegation of misconduct.

21. The respondent received a further referral from the CQC about the claimant and also a complaint from the relative of a resident. The complaints raised were similar to those that had been raised against the claimant by 'the group' referred to by Mrs Farrier-Twist in the transcript of the recording. The claimant was aware that the resident's relative was friendly with members of the group of junior staff members who had tried to set her up and that both Ms Rogers and her mother, Ms Gerrish, and that they had both visited her home.
22. On 24 August 2021 the respondent wrote to the claimant informing her that she had been suspended. A formal disciplinary meeting eventually took place on 2 February 2022. In the intervening period the claimant raised grievances against the respondent which were investigated. One finding in respect of the claimant's grievances was upheld.
23. By the time of the disciplinary meeting, a catalogue of alleged misconduct had been built up. The claimant faced the following allegations at the disciplinary meeting as set out in the respondent's letter dated 21 January 2022:
- 1) That she willfully and knowingly covertly recorded Mrs Farrier-Twist during a conversation on 3 August 2021;
  - 2) That she behaved in a manner not appropriate of an employee towards a niece of a resident of the home;
  - 3) That she knowingly informed Mrs Farrier-Twist that a number of rooms were ready to receive new guests when, upon further inspection by Mrs. Farrier-Twist, they were not;
  - 4) That she did not action a missing carpet threshold for Room 10, a trip hazard under Health & Safety;
  - 5) That she did not ensure a damaged and ripped chair was removed from a bathroom which had the potential to cause injury or breach infection control guidelines;
  - 6) That she set up a fictitious Facebook account using her company email address without authorization to spy on her daughter.
24. The first five allegations were said by the respondent to amount to gross misconduct if found to be substantiated and the sixth to serious misconduct.

25. The disciplinary hearing was carried out on the respondent's behalf by a consultant from Peninsula Face2Face, a professional HR support service. Findings were made against the claimant and she was dismissed by a letter from Mr T Novis dated 17 February 2022. The letter informed her that the reasons for her dismissal

*“-That you have taken part in activities that cause the organisation to lose faith in your integrity. Further particulars being that you knowingly informed the CEO Fieona Farrier-Twist that a number of rooms were ready to receive new guests when upon further inspection by Fieona Farrier-Twist they were not. It is agreed that you did not action a missing carpet threshold for room ten which would be deemed under Health & Safety as a trip hazard. The organisation believes that you have fundamentally breached your contractual terms in respect of gross negligence and dereliction of duty, which is classed as gross misconduct by stating rooms were ready when there was a trip hazard in a setting such as this where residents are blind.*

*-It was further found that you admitted to setting up a fictitious Facebook account using your Company email address without authorization to spy on your daughter, this is a breach of the Company Email and Internet Policy and/ or Use of Social Networking Sites.”*

26. It is of note that the second allegation which had previously been asserted by the respondent to amount to serious misconduct had now been 'upgraded' to gross misconduct.

27. On 22 February 2022 the claimant appealed her dismissal. An appeal hearing took place on 17 March 2022, again conducted by a Peninsula Face2Face consultant. The report produced concluded that dismissal was not in within the band of reasonable responses and recommended that the claimant be reinstated and issued with a final written warning.

28. On 20 April 2022 the claimant wrote to respondent (and to the Peninsula consultant) informing it that she wished to withdraw her appeal. At this time she had been advised by Peninsula that the likely outcome of her appeal was that she would be reinstated but she had not received confirmation from the respondent of this fact.

29. On 13 May 2022 the respondent by a letter incorrectly dated 19 May 2022 wrote to the claimant informing her that she had been reinstated and providing her with a written warning.

### **Legal principles relevant to the claims**

30. Section 94 Employment Rights Act 1996 (“ERA”) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95, but the respondent must show the reason for dismissing the claimant (within section 95(1)(a) ERA).

31. Section 95(1)(a) provides that an employee is dismissed by his employer if (subject to subsection 2 which is not relevant in this case) the contract under

which he is employed is terminated by the employer (whether with or without notice).

32. The Court of Appeal explained in **Folkestone Nursing Home Limited v Patel [2019] ICR 273** that ‘if an appeal [against dismissal] is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout.’

33. The EAT in **Marangakis v Iceland Foods Ltd [2022] EAT 161** confirmed that “If a person appeals against dismissal, succeeds in the appeal and is reinstated, the original dismissal “disappears”, with the consequence that it cannot then found a claim of unfair dismissal”.

34. Section 98 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 the dismissal within s98(2).

*“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

.....

35. Where the employer has shown that it has a potentially fair reason for dismissal the second stage is for the tribunal to consider whether the dismissal was fair or unfair having regard to the reason shown by the employer. This according to section 98(4)

*(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.”*

36. Where, as it this case, the reason the employer advances for dismissal is one of conduct the tribunal is to be guided by the EAT judgment in **British Homes Stores v Burchell 1978 IRLR 379 EAT**, being mindful that the employer must show that he had a genuine belief in the employee’s guilt, held on reasonable grounds, after reasonable investigation. The Court of Appeal in **Sainsbury’s Supermarket Ltd v Hitt 2003 IRLR 23 CA** confirmed that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

37. In accordance with the Employment Appeal Tribunal’s guidance in **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**, the tribunal must be mindful in

reaching its conclusions, not to substitute its own view of what the appropriate sanction should have been for that of the respondent's and that it should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the particular circumstances of the case.

38. The ACAS Code sets out the standard of reasonableness and fairness for handling disciplinary issues and grievances. The code suggests that in disciplinary matters, the employer should carry out an investigation, inform the employee, hold a meeting within a reasonable timescale with the employee, at which the employee may be accompanied and at which the employee should have the opportunity to respond and then the employer should decide on appropriate action and give the employee an opportunity to appeal. The employee should be clearly informed of the allegation and the disciplinary action must be appropriate to the misconduct.

## **Conclusions**

### *Was the claimant dismissed?*

39. The first matter I have to decide is whether the claimant's was dismissed. The burden is on the claimant to show there was a dismissal. The dispute hinges on whether the claimant withdrew her appeal against dismissal for gross misconduct by way of an email sent at 08.28 on 20 April 2022. The email was sent to Mr A Patmore, chairman of the respondent, and to Mr A Harris, a consultant from Peninsula, who had conducted the appeal hearing on behalf of the respondent.
40. It is agreed that if I find that the appeal was withdrawn by the claimant it follows that the dismissal by the respondent on 22 February 2022 amounts to a dismissal. Whereas if I find that the email of 20 April did not have the effect of withdrawing the claimant's appeal against dismissal then there was no dismissal. In **Maragakis v Iceland Foods Ltd** the claimant was found not to have been dismissed as whilst she had indicated she did not want to work for the respondent she had not withdrawn her appeal against her dismissal. HHJ Tayler, rejecting the claimant's assertion that by saying she did not want to return to work for Iceland she was objectively and inequivalently withdrawing from her appeal, observed "On an objective analysis of the words she used, the claimant stated she did not want to return to work for the respondent rather than that she wanted to withdraw her appeal. Without requiring an excessive level of formality she could have said 'I withdraw my appeal' if that had been what she wanted to do."
41. I therefore turn to the email of 20 April 2022 and whether on an objective analysis it withdrew the claimant's appeal.
42. The first sentence of that email reads 'I would like to formally put on record that I am withdrawing my appeal against dismissal and substituting a formal grievance in its place, based on all the same facts.' On any view that is a clear and unequivocal statement and were that the end of it I assume there would be no dispute on this issue. However the claimant then goes on to state "If you reinstate me, I expect to be paid to date and if I am given a



further unfair sanction such as a warning, I will claim constructive unfair dismissal as the current allegations are based on a flawed investigation.”

43. The respondent submits that when looked at objectively the email gives the impression that reinstatement was still an option in the claimant’s mind. My finding is that the proper construction of the claimant’s email, objectively viewed is nonetheless a clear and unequivocal withdrawal of her appeal. I do not consider the subsequent reference to reinstatement to alter that in any way. Whilst it might suggest that the claimant believed the respondent could reinstate her even in the face of her withdrawing her appeal, it does not negate the effect of the preceding clear and unequivocal statement.
44. Even when viewed as a whole it is clear from the email that the claimant had no intention of returning to work for the respondent even if it were on offer. She confirmed this in her oral evidence.
45. My conclusion on this issue is therefore that the claimant was dismissed by the respondent on 22 February 2022.

*Was the reason (or principal reason) for the claimant’s dismissal a statutorily fair reason, namely conduct?*

46. The respondent’s case is that the reason for the claimant’s dismissal was misconduct. The claimant’s case is that the real reason for the dismissal was the breakdown in the relationship between the claimant and Mrs Farrier-Twist.
47. The claimant moreover avers that the dismissal could not have been on account of conduct since on the respondent’s own case the conduct only warranted the lesser sanction of a written warning.
48. The dismissing officer was Mr Novis. He was the author of the letter dismissing the claimant and the letter stated that it was his decision. However, Mr Novis’ witness statement did not address the decision-making process. When asked about this in cross-examination, Mr Novis explained that he did not consider he needed to address the decision-making process as he simply followed Peninsula’s recommendation to dismiss the claimant. The respondent’s case is therefore essentially that the responsibility of the decision-making process was abrogated to a Peninsula as a third party and Mr Novis simply rubber stamped the recommendation. The Peninsula consultant who wrote the report recommending dismissal was not a witness before the tribunal. Another Peninsula consultant reviewed the disciplinary process on appeal and reached the conclusion that the report was flawed and the decision to dismiss was outside of the range of reasonable responses.
49. I am therefore unable to conclude that Mr Novis engaged in the decision making process at all beyond rubber-stamping the Peninsula recommendation. Accordingly I am unable to find that he had a genuine belief in the claimant’s misconduct or that if he his belief was genuine that it was sustained on reasonable grounds.

50. **London Borough of Brent v Finch EAT 0418/11** is authority for the principle that if an employee wishes to cast doubt on an employer's seemingly fair reason for dismissal, he or she must adduce some evidence in this regard. I consider that the claimant has in this case adduced sufficient evidence to cast doubt on the seemingly fair reason for dismissal. There is clear evidence that there was a breakdown in the relationship between Mrs Farrier-Twist and the claimant in the latter part of her employment. This was accepted in evidence by Mrs Farrier-Twist. It was also accepted by Mr Novis, the dismissing officer, that he was aware of the breakdown in the relationship and that Mrs Farrier-Twist was involved in decision making processes, although he subsequently asserted that Mrs Farrier-Twist had not been involved in the decision to dismiss the claimant.

51. It is evident that the relationship between the claimant and Mrs Farrier-Twist had broken down on both sides. The claimant was concerned that Mrs Farrier-Twist would not produce a witness statement from Mr Deigan regarding the incident on 25 June 2021, had called a disciplinary hearing on one day's notice and had over-reacted when the claimant had expressed a wish to involve a union representative in the meeting. Such was the level of the claimant's concern about Mrs Farrier-Twist's overreaction she recorded her next interaction with her. Mrs Farrier-Twist was, on her own admission, very upset that the claimant had recorded her without her knowledge.

52. I am unable to conclude that the respondent has discharged its burden of showing that the principal reason for dismissal was the claimant's conduct. Having determined that the respondent has not established misconduct was the reason for dismissal I am not required to make a finding in respect of what the principal reason for dismissal was **Hertz (UK) Ltd v Ferrao EAT 0570/05**. Nonetheless I find on the balance of probabilities that the principal reason for the claimant's dismissal was the breakdown in the relationship between herself and Mrs Farrier-Twist.

53. The respondent not having established a potentially fair reason I am not required to go on to consider the test under s98(4) ERA.

#### *Wrongful dismissal*

54. The respondent's argument in respect of wrongful dismissal relied solely upon its assertion that there had been no dismissal by virtue of its attempt to reinstate the claimant. I have found that the claimant was dismissed. There is no dispute that if dismissed the claimant was dismissed without notice and I therefore find that she was wrongfully dismissed.

#### *Breaches of ACAS code of conduct*

55. I find that there were breaches of the ACAS code of conduct. The invites to the various investigation meetings were at short notice, not giving the claimant sufficient opportunity to prepare. Moreover the invites failed to specify properly the case that the claimant was to meet. Thirdly the claimant was not provided with copies of all the evidence relied upon.

56. I further conclude that the decision to dismiss the claimant was pre-decided and the fact that she had been notified as a leaver to the NHS on 11 January 2021 whilst she was suspended but prior to her dismissal was compelling evidence this was the case.

57. Having identified significant failures on the part of the respondent in terms of its obligations under the ACAS Code and whilst taking into account the size of the respondent I nonetheless find that the respondent's failures were unreasonable. In all the circumstances I consider it just and equitable that there is an uplift to the compensatory award of 15%.

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Employment Judge **Kumar**

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Date **14 April 2023**

REASONS SENT TO THE PARTIES ON  
Date **21 April 2023**

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FOR THE TRIBUNAL OFFICE