EMPLOYMENT TRIBUNALS

Claimant: Mr Y Getcheffsky

Respondent: Derbyshire Federation for Mental Health

Heard at: Manchester (by CVP) On: 22 December 2023 and 29 January 2024

Before: Employment Judge Leach

REPRESENTATION:

Claimant: Mr Jenson (Claimant's partner)
Respondent: Mr Mahmood (Consultant)

JUDGMENT having been given on 29 January 2024 and sent to the parties on 5 February 2024 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. This case is about the claimant's dismissal by the respondent and particularly whether it was fair or unfair in accordance with section 98 of the Employment Rights Act 1996.

Evidence

2. I heard evidence from Mrs Williams, the respondent's Chief Executive Officer, and from the claimant. The claimant also provided statements for Mr Jenson (his partner and representative) as well as a former colleague called Miss Tyler but at the beginning of the hearing, and at stages throughout the hearing, I indicated to the claimant and Mr Jenson that these two witnesses did not appear to be providing evidence relevant to the issues that I needed to consider. Sensibly, Mr Jenson decided not to ask Miss Tyler to give evidence and did not give evidence himself.

3. I was provided with a bundle of documents and references to page numbers below are references to that bundle.

Issues

4. To assist both parties I provided a proposed List of Issues at the start of the hearing to which the parties agreed. This is set out below:

Reason for Dismissal

1. *Has the respondent shown the reason or principal reason for dismissal?*

2. *Was it a potentially fair reason under section 98 Employment Rights Act 1996?*

3. *The respondent says that the reason was misconduct.*

Fairness of dismissal

4. *Applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?*

5. *If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*

5.1 The respondent genuinely believed the claimant had committed misconduct;

5.2 there were reasonable grounds for that belief;

5.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

5.4 the respondent followed a reasonably fair procedure;

5.5 dismissal was within the band of reasonable responses.

Remedy for unfair dismissal

6. *Does the claimant wish to be reinstated to their previous employment?*

7. *Does the claimant wish to be re-engaged to comparable employment or other suitable employment?*

8. *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*

9. *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*

10. *What should the terms of the re-engagement order be?*

11. *What basic award is payable to the claimant, if any?*

12. *Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

13. *If there is a compensatory award, how much should it be? The Tribunal will decide:*

13.1 What financial losses has the dismissal caused the claimant?

13.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

13.3 If not, for what period of loss should the claimant be compensated?

13.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

13.5 If so, should the claimant's compensation be reduced? By how much?

13.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

13.7 Did the respondent or the claimant unreasonably fail to comply with it?

13.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

13.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

13.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

5. I made clear that I would make findings regarding liability as well as on those issues that might result in a reduction to any award made in the event that I found the dismissal to be unfair. Remedy would be considered separately.

Findings of Fact

6. The respondent is a mental health charity and employs about 45 people. From 2015 until his dismissal on 7 June 2023 the claimant was employed as a mental health support worker.

<u>The claimant's dissatisfaction with pay and subsequent grievance.</u>

7. In February 2023 the claimant raised objections about pay levels, including about the reduced differences between the pay of senior support workers like himself and the pay of more junior employees. Those objections were forcefully raised, including through grievance and grievance appeal processes. The claimant considered that he was justified in raising them. The respondent expressed concerns, not about the fact that the claimant had grievances but about the way that he chose to raise and articulate points including in the forum of an open meeting when he voiced criticisms about the level of pay.

8. Much of the claimant's evidence concerned these pay related issues, and the grievance process, I made clear to the parties that it was of limited assistance in helping to determine the issues relevant to the unfair dismissal. However (and this is the extent to which I have decided the grievance process is relevant) I find as follows:-

7.1 the claimant did raise these concerns, he went through a difficult process and it meant that relations between the claimant and his employer were poor at the time that the allegations of misconduct were raised.

7.2 Complaints were made by a service user about the claimant's behaviour; they were not in some way invented to be rid of the claimant. They were unrelated to the pay issues and the grievance.

7.3 The service user's complaints were serious and had to be considered as potential gross misconduct and investigated on that basis.

7.4 The complaints were raised when they were, and the respondent did not and could have influenced the time of the complaints being raised. It was an unfortunate coincidence of timing that the complaints arose when they did, when relations between claimant and respondent were strained.

7.5 In the early stages of the grievance the claimant became ill and commenced a long period of sickness absence. In so far as the claimant's ill health was caused or worsened by the grievance, that was another impact on the disciplinary process.

The complaint about the claimant

9. A complaint was made about the claimant by one of the respondent's service users who was receiving mental health support. During this hearing, the service user was referred to as N183. The complaint was initially raised in early March 2023. N183 spoke with another support worker who had gone to see her. N183 told the support worker that she wanted to change from the claimant to another support worker as she did not think she was receiving support from the respondent. Shortly after this the claimant began a long period of sickness from which he did not return, and N183 was therefore necessarily seen by another support worker.

10. By 31 March 2023 made more specific complaints that N183 had about the claimant's behaviour were recorded. N183 alleged that the claimant had made various comments to her/her children; as follows:-

a. That he said to N183's 15-year-old son that he should have some ribs removed so he could "suck himself off."

b. That he said to N183, in the presence of her 2 children, that he could smell fish and she should close her legs.

c. That he said to N183's 12-year-old son that he should dress up as Santa so that girls will sit on his knee.

11. The document recording these complaints is at pages 188 to 190. The document notes that the complaints were initially made on 3 March 2023. The document itself is signed by N183 and dated 14 April 2023. These is some confusion about dates as I note further below, although it is not disputed that N183 signed the document which recorded the comments allegedly made and that the complaints needed investigating. The date that I have noted in my finding above (31 March 2023) is from a timeline written by Mel Cox the claimant's manager at the time (page 194-196).

12. I note in relation to the third comment that the wording of the allegation appears to have changed in later documents/records. Initially it was reported by the client that there was an allegation that the claimant had told the client's 12-year-old son to dress up as Santa so that girls can sit on his knee, but this appears to have changed in some of the investigatory documents to a potentially more serious allegation that the claimant made a comment about putting Santa's hat on the 12 year old's groin to encourage girls to sit on the hat.

Investigation by Dawn Hall

13. Those serious allegations needed investigating, and the respondent made attempts to engage the claimant in a disciplinary investigation process. The respondent considered obtaining an Occupational Health report, although they did not do so even though the claimant provided permission (albeit somewhat reluctantly) for them to do this. (See for example reference in the respondent's report from page 92, specifically the reference at page 98 as well as references from respondent managers during the grievance and disciplinary process about obtaining an OH referral).

14. The claimant also referred – notably on 25 April 2023 (page 150) - to a psychologist's assessment he had just had. The claimant did not provide a copy of the report of the assessment until after the disciplinary hearing but notably before the dismissal. Whilst there are no notes of the disciplinary hearing itself, it is clear that it was referred to during that hearing as the claimant wrote to the consultant who held the disciplinary hearing (see below) to send her a copy of the report as well as other documents (email from claimant dated 17 May 2023 at page 236).

15. Dawn Hall, the respondent's HR manager carried out an investigation into the complaints. She asked to meet with the claimant and interview him. The claimant said that he was not well enough to attend an "in person" meeting and dismissed the option of a Teams meeting also even though other meetings had taken place by Teams. Dawn Hall gave the claimant an opportunity to provide a written response to investigation queries. In doing so, the respondent effectively provided the claimant with a blank sheet of paper for his response, setting out the allegations and asking for his version of events (21/4/23 - page 145) The claimant's reply (perhaps understandably at that stage) was simply to deny that the allegations occurred (24/4/23 - page 146)

16. An investigation report was produced by Dawn Hall. It considered the claimant's brief response in denying the allegations. In the investigation report, Dawn Hall notes that she reviewed client N183' file and there was no indication that N183 made things up (para 7.3 of the investigation report at page 185). The report attaches (appendix F) a statement from Melanie Cox which is really an explanation of her long working relationship with the claimant and what she perceives to be difficulties sometimes with the claimant and working with him. She notes the claimant sometimes expresses strong feelings and is insistent that he is right. She notes that it comes across that sometimes the claimant can be a difficult work colleague. Most of the statement does not deal specifically with the allegations of misconduct – the allegations themselves are touched on at the end of the statement but there is no information that would have helped take the investigation further. Mel Cox comments/opinions in the statement appear to be more focussed on managing the claimant on his return to work following sickness.

> *Unfortunately, since Yuri has been on sick leave it has come to light that certain clients have not been happy with the support he has been providing. He has become too familiar / confident with the clients and this has resulted in him being unprofessional and inappropriate in the support he has been providing. Yuri can be quite pushy and consistent in his approach to achieve goals and this has prompted one client to make a complaint stating that she no longer wants him as a worker and that she is glad he is off ill as this gives her a break from him. A further client has made a complaint regarding his behaviour and inappropriate things that he has said to her and her children. His actions have made her uncomfortable and she has therefore requested that Yuri be removed permanently from support. Due to sickness these issues have not been discussed with Yuri. I would have some concerns in how best to approach the subjects without Yuri getting overly defensive. Yuri does not respond well to criticism.*
>
> *Yuri is a likable and fun character but can struggle at times. When he is "on form" he is respectful, motivated, enthusiastic and client focused making line managing him easier. Unfortunately when Yuri is not "on form" he can be inappropriate, disrespectful, forgetful and disengage in relation to his working role, making it very difficult to manage him.*

17. There are also notes of an interview between Melanie Cox and the respondent's HR manager, Dawn Hall that took place on 26 April 2023. The notes are in the body of the investigation report itself at pages 183-4). The notes record that Melanie Cox commented that in her opinion, the claimant made the offensive remarks that caused the complaint, and the respondent would need to be careful about how they addressed in the claimant's return to work, The notes record that Melanie Cox provided reasons for this view to be the client herself having nothing to gain and also Melanie Cox's own opinion of the claimant, that having worked with him for a number of years and heard comments made under the banner of "banter" she was sure that he would have made the offensive comments. There is no evidence that this opinion was tested or challenged at any stage of the disciplinary process.

18. According to Dawn Hall's investigation report, this was an important component in her conclusion that she was "*inclined to uphold the client N183's allegations"* (see conclusion section – and particularly para 9.3 at page 186). Jumping forward to the dismissal decision maker, Sharon Williams gave evidence that the opinion of Mel Cox was also an important part of her decision to dismiss the claimant.

19. Dawn Hall's conclusions also mentioned another complaint made by a client (this client was identified as N189) against the claimant although during the course of the disciplinary process this other client withdrew her complaint and the matter was not referred to in the following stages.

The disciplinary hearing and decision

20. Dawn Hall's report and appendices were provided to the claimant. They resulted in the respondent setting up a disciplinary hearing. The arrangements for the disciplinary hearing were unusual. An external consultant (Consultant) conducted a disciplinary hearing with the claimant. An outcome report was provided by the Consultant (which is from page 283), the conclusion to the report was a recommendation of dismissal. That recommendation then went to Sharon Williams, the respondent's Chief Executive Officer who considered the written report and

decided to act on the recommendation. The Chief Executive Officer did not at that stage (for example) conduct her own hearing – she did not meet with the claimant or anybody else in relation to the disciplinary allegations. She read the outcome report and acted on the recommendation by dismissing the claimant. I note next some specific issues and findings about these stages:-

21. Claimant's non-attendance at Investigation Meeting

a. The respondent was aware that the claimant was absent due to sickness. By letter dated 18 April 2023 the respondent (Dawn Hall) asked the claimant to confirm whether he would agree to being referred for an Occupational Health assessment. In fact the claimant had already agreed to this (in earlier correspondence) in relation to his absence. He confirmed his agreement subsequently (2 May 2023 – reference at page 98). Having considered the claimant's evidence, I am satisfied that his health was poor in April 2023 and that it affected his ability to participate in the disciplinary investigation (this finding is supported by a mental health report dated 13 April 2023 – pages 248-250).

b. Initially the claimant simply denied the allegations. He had been unable to attend an investigatory meeting due to his ill health. The respondent should have acted on the claimant's consent to attend on an occupational health adviser for an assessment on ability to participate in the investigation or considered delaying the investigation. Points well made at the disciplinary hearing might have been made at an earlier stage and prompted more investigation.

c. The Outcome Report concludes *"having given full and thorough consideration to the information presented, WLI* (that is a reference to the Consultant) *recommends that YG is dismissed from their employment without notice*. The report does not explain why (or on the basis of what evidence) that conclusion was reached. I note the conclusion here (and absence of explanation about the conclusion) because the part of the report that comments on the claimant not attending an investigation meeting indicates that the consultant accepted Dawn Hall's evidence that various options had been provided for the claimant to attend an investigation meeting – and indicates that the consultant concluded that the claimant was unreasonable/uncooperative in not attending a meeting. Shortly after the disciplinary meeting and well before the date of the outcome report (30 May) the claimant had provided the consultant with a copy of the mental health report dated 13 April 2023 referred to above. On its face this supports the claimant's position about not attending the investigation meeting, yet is not mentioned in the Outcome Report. It appears to have been ignored by the Consultant who instead was critical about the claimant not attending an investigation meeting:

> *WLI considers that YG did not attend the Investigation meeting as he stated that he was suffering with a mental health condition. (Document 8.d sick notes) but notes that the Employer made reasonable adjustments for this, and the Investigation was*

conducted via written submissions. WLI notes that YG replied to this with very little information by way of an explanation for the client complaint.

d. It is clear from the evidence provided by Mrs Williams that her decision followed a review of the consultant's report and attachments and an acceptance of the Consultant's conclusions. The decision to dismiss must therefore have taken soe account of the stated lack of cooperation and absence of detail (other than a bare denial) from the claimant at the investigation stage.

e. I find that the claimant's inability to attend an investigation meeting and the brevity of his written response was a factor that counted against him in the eyes of the Consultant and a factor (although far from the only factor) contributing to her decision to recommend dismissal.

22. <u>Opinion of Mel Cox.</u>

a. The Consultant (and then Sharon Williams) placed considerable weight on the opinion of Mel Cox. The statement from Mel Cox and the meeting notes between Mel Cox and Dawn Hall had been shared with the claimant. The outcome report shows that he provided his own response to the opinion of Mel cox. The claimant's response included.

i. That he had raised with Mel Cox issues regarding client N183 and she should have file notes/ emails. (reference at page 300).

ii. That he had known Mel Cox for 8 years and to compare what she might have heard as "office banter" with how the claimant would behave on a client visit is unfair

iii. That Mel Cox had not been with the claimant on a client visit.

iv. That there were inconsistencies with dates – particularly comparing the timeline that Mel Cox had provided with the date of the complaint form from N183.

v. That the respondent had a system of logging calls/visits to clients and the relevant extracts from the respondent's logs had not been provided

b. Following the disciplinary hearing, the claimant sent various documents to the Consultant (236-268) including a series of 1;1 supervision reports for the claimant. Some of these have been signed off by Mel Cox and some by another manager. The reports indicate that the claimant's work (including work with the respondent's service users) is of a high quality. There is no hint of any concerns about the claimant's behaviour whilst in work. It is clear from the reports that the claimant does sometimes challenge service users but this is reported in a positive way. For example 25/5/21 (page 260) "Yuri is not afraid to challenge claimant's behaviours and is assertive when needed. Yuri is very client focussed and wants to actively support clients to achieve what is best for them."

c. Whilst the consultant returned to Mel Cox (by email) to raise some issues arising from her discussion with the claimant, it is remarkable that she did not raise with her the apparent inconsistency between her opinion, the misconduct allegation and the positive supervision reports over the years. There may have been other supervision reports (not provided by the claimant but presumably on the respondent's systems or in their files) but these were not looked at either by Dawn Hall or the consultant (or Sharon Williams).

23. Change in Client medication.

a. The claimant informed the Consultant that N183 had been in the process of changing her medication for psychosis. There is no record of this being followed up by the Consultant or anybody else.

24. Information not provided to the claimant.

a. At the point that Sharon Williams decided to dismiss the claimant for the alleged misconduct she was aware of a previous occasion when N183s account had not been accepted. She provided the following evidence in the statement prepared for this Tribunal.

> *"There are confidential circumstances concerning the client which cannot be disclosed where the client had been through a difficult process and statutory authorities had not accepted her account. I was given a verbal account of these matters regarding the client concerned which substantiated how difficult it would have been for the client to have taken this action of making a formal complaint."*

b. At the hearing Mrs Williams gave evidence that her knowledge of the previous incident was not the only factor that made her decide to dismiss, but it was a factor.

c. Whilst undoubtedly confidential, it is information that could and should have been shared with the claimant on a confidential basis and with Dawn Hall for the purpose of her investigations and the Consultant in relation to her outcome report. The circumstances referred to have not been disclosed.

25. N183's social worker not asked to participate in investigation.

a. The respondent supports clients/service users in a particular local authority area. The service users (or many of them) are also supported directly by the local authority's social services team and have a social worker assigned to them. N183 had a social worker. The social worker was not asked to contribute to the investigation and was not contacted by the Consultant.

b. During the disciplinary hearing, the claimant provided information to the consultant as follows:-

> *"if you look at N183 now, this client is prone, definitely prone to lie, sacks all her support workers on a regular basis. She sacked her social worker on a regular basis. If you needed confirmation of that you could actually speak to her social worker."*

c. It is also apparent from the Outcome Report (para 34) that the relevant social worker had emailed the respondent, requesting information about the incident although a copy of the email referred to was not included in the bundle for this hearing.

Further investigation

26. During the claimant's meeting with the Consultant, he raised concerns about the timeline and dates of documents. There are some anomalies. A complaint form called a verbal complaint is dated 14 April 2023. That is the form that sets out the offensive comments made (page 142). But it refers to a complaint date of 3 March 2023 which is the date when N183 first asked for a new mental health support worker in place of the claimant.

27. This date is potentially very important as one of the reasons why Dawn Hall (then the Consultant and, in turn, Mrs Williams) decided to believe N183 is that by the time she raised the detail of her complaints, she had already been told that she would have a new support worker. However if the first date when the details of the complaints provided was 3 March, that would not apply.

28. The Consultant sent an email to Mel Cox following her meeting with the claimant. She asked Mel Cox some questions (although, as noted earlier, she did not raise with her the issue of the Supervision reports). The question relating to the anomalies in dates was as follows:-

> *"Could you tell me who completed the verbal complaint form for N183 on 3 March and explain why this was not signed by N183 until 14 April 2023 and included the formal complaint?"*

29. Mel Cox replied as follows:

> *The verbal complaint in relation to Inappropriate language was officially taken on 31 March. Unfortunately Nicola appears to have put this on the complaint form as 03/03/23. I believe this is a genuine mistake made by Nicola, she does have dyslexia, particularly around numbers and the date also coincides with the date of N183s previous concerns, when I removed Yuri from support. On 03/03/23 Nicola had previously discussed with N183 concerns around Yuri not providing the support she felt she needed. On 06/03/23 I contacted the client and discussed this with her. This situation was resolved on the day by myself by removing Yuri from support with immediate effect. Client Nl83 was happy with this outcome, therefore no complaint form was completed this time.*
>
> *It had been arranged for the official written complaint to be completed on N183's following support visit with Nicola Conway on 7 April 2023. Nicola knows this client the best and I felt the client would be more at ease and comfortable doing this with her. Unfortunately N183 cancelled her next 2 support visits with Nicola (7 and 10 April) as she was away staying with family. The written complaint was taken and signed on Friday 14 April.*

30. It is apparent from this response that Mel Cox set out her own view as to what happened, her own view about when the comments were first raised by N183. Neither the Consultant nor Dawn Hall nor Mel Cox, followed this up with Nicola even though that was an easy step to have taken.

Right of Appeal

31. The claimant was offered a right of appeal and decided not to. His reasons for not appealing were that (1) he had by then lost all confidence in the respondent, (2) that he was ill (3) that an appeal would have been hopeless as was shown when he appealed the grievance outcome. And (4) that he had also decided by then to go down the ACAS and the Employment Tribunal route. He gave evidence that he thought the appeal process would be a "kangaroo court."

32. I note here that the claimant's grievance appeal was heard and considered by an independent trustee of the respondent (the vice chair of the trustees) and that they did in one respect uphold the claimant's appeal (outcome letter at pages 280 to 282).

Report of Safeguarding concerns

33. Ms Williams gave evidence that as the allegations against the claimant involved children, the respondent had no option but to report their findings to Child Safeguarding (which I understand to be the relevant person at the local authority). Ms Williams also gave evidence that she understands that a decision was taken by the local authority not to take matters further against the claimant.

The Law

34. The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for misconduct; see section 98 (1) ERA. If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. If the respondent does prove that it held that genuine belief and that it dismissed the claimant for that reason, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal under section 98 (4) ERA.

35. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him.

36. In considering the question of reasonableness, the Tribunal should have regard to the decisions in ***British Home Stores v. Burchell* [1980] ICR 303 EAT**; ***Iceland Frozen Foods Limited v. Jones* [1993] ICR 17 EAT**; ***Foley v. Post Office and Midland Bank plc v. Madden*** **[2000] IRLR 82 CA** as well as ***Sainsburys Supermarkets Limited v, Hitt [2003] IRLR 23 CA*** (the "Sainsbury case").

37. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief having carried out as much investigation into the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh.

Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

38. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

Investigation

39. In relation to the adequacy of investigation, I note the following guidance :-

a. *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole"* **Shrestha v. Genesis Housing Association Limited [2015] IRLR 399;**

b. In relation to a misconduct dismissal *"the employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which it may lack the means."* **Santamera v. Express Cargo Forwarding [2003] IRLR 273.**

40. I also note (and have taken account of) the ACAS Code of Practice on Disciplinary and Grievance Procedures and the ACAS Guide on Discipline and Grievances at work 2015.

41. The extent of a fair investigation and the form that a fair investigation may take does vary according to the particular circumstances, but what clear is that where the consequences are potentially very serious as far as a claimant is concerned, then there will be a need to ensure a more thorough investigation.

42. The following is an extract from the ACAS Guide to Discipline and Grievances at Work: *"The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against."* This extract is consistent with the Judgment of the Employment Appeal Tribunal in **A v B EAT/1167/01**.

Potential reductions to awards.

43. When determining compensation for unfair dismissal, employment tribunals must apply s123 ERA.

> *"s123(1) ….the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant n consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

….

S123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

44. Compensation is reduced under just and equitable principles under s123(1) in 2 broad categories of cases:-

c. Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.

d. Where it is just and equitable to apply a "Polkey" reduction (applying the case of **Polkey v. AE Dayton Services Limited 1988 AC 344)**.

Both categories potentially apply here.

45. Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant's conduct before the dismissal.

ACAS code of practice

46. Section 207(A)(3) Trade Union and Labour Relations (Consolidation) Act 1992 provides as follows.

If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employee has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

47. The ACAS Code of Practice on Disciplinary and Grievance Procedures (the most recent version dating from 2015) is a relevant code of practice for the purposes of section 207A above.

48. Paragraph 26 of the ACAS Code requires that employees who consider that disciplinary action against them has been wrongly decided or is unjust, should appeal the decision.

Conclusions

49. Set out below are my conclusions to the various issues identified.

1. *Has the respondent shown the reason or principal reason for dismissal?*

2. *Was it a potentially fair reason under section 98 Employment Rights Act 1996?*

3. *The respondent says that the reason was misconduct.*

Conclusion to issues 1-3

50. The respondent has shown that the reason for dismissal was misconduct. It is necessary therefore to consider whether the dismissal was fair.

Fairness of dismissal

> *4. Applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?*
>
> *5. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*
>
> *a. The respondent genuinely believed the claimant had committed misconduct;*
>
> *b. there were reasonable grounds for that belief;*
>
> *c. at the time the belief was formed the respondent had carried out a reasonable investigation;*
>
> *d. the respondent followed a reasonably fair procedure;*
>
> *e. dismissal was within the band of reasonable responses.*

Conclusions to issues 4 and 5.

51. The investigation was not sufficiently thorough. As such, whilst satisfied that the respondent's decision maker (Mrs Williams) genuinely believed the claimant had committed misconduct, there were not reasonable grounds for that belief and a reasonably fair procedure had not been followed. The dismissal was unfair. These are my reasons.

52. It has always been clear in this case that the allegations are very serious. If the respondent reasonably believed that the allegations were true then probably the only appropriate disciplinary sanction was the claimant's summary dismissal. In addition:-

a. The complaints against the claimant also potentially had ramifications beyond the dismissal. The finding could have resulted in the claimant not being able to work in this area again.

b. The decision as to whether or not the complaints were true essentially came down to whether N183 was believed or the claimant was believed.

53. Whilst the respondent was not expected to carry out a forensic or quasi-judicial investigation, given the seriousness of the complaints, it needed to be reasonably thorough. It also needed to consider any evidence that might support one person's version over the other, even if that was not definitive evidence. A fair procedure and reasonably thorough investigation would (and should in this case) have taken account of the following:-

The claimant's health

54. The respondent should have been in no doubt that the claimant was unwell. The respondent mentioned on a number of occasions in both the grievance and disciplinary internal procedures the possibility of an Occupational Health referral. They could and should have made that referral. That may (or may not) have recommended a delay to the disciplinary procedures to allow the claimant's health to improve, or other possible changes.

55. If it had still been considered appropriate to proceed by written enquiries of the claimant, then questions or follow-up questions should have been asked. Had the claimant been asked specific questions I have little doubt that he would have provided more information. An employee in these circumstances is not without any responsibility to assist in his or her defence, but the prime responsibility to ensure a fair investigation is on the respondent. The respondent should have asked specific questions – questions such as: have you got a view about why the client would make something like this up? Can you provide information about your last few visits? Were there any issues with your working relationship with N183?

56. It is clear that the brevity of the claimant's written response was a factor that counted against him at the investigation stage, at the stage of the Consultant's Outcome Report and therefore Mrs Williams' decision to dismiss. Obtaining specific responses from the claimant would have avoided those concerns and may also have ensured that other enquiries were made.

Visit Records

57. There was no review of the records concerning the claimant's visits to N183.

58. Given that the alleged events were supposed to have occurred in December 2022 and February 2023 it may have helped to understand whether there were any issues relating to the claimant's attendances. It was known that the claimant could challenge clients – a factor that was welcomed by the respondent (see performance reports referred to earlier). An obvious investigative step would have been to review these and share them with the claimant.

N183's social worker

59. The relevant social worker was not asked to assist with the investigation. It is possible that the social worker would been able to provide information as part of the investigation. It is possible that the social worker had more information for example about the change in medication and any impact that had on N183; about previous complaints raised; previous occasions when N183 was shown to have been untruthful and so on. This would have been an obvious investigative step to take and a potentially helpful one.

Opinion of Melanie Cox

60. It is apparent that the opinion of Melanie Cox held much sway at every decision-making stage yet at no time (as I have noted) was Melanie Cox asked to explain the reasons why she believed that the claimant made the comments. That evidence was not sufficiently tested. There is a marked contrast between Melanie Cox's view that she provided during the investigation, and the performance reports that the claimant provided. I also note that it was not really for the claimant to provide those; the respondent should have considered looking at those particularly in light of Melanie Cox's opinion. Those appraisals were glowing and on their face appear to contradict Melanie Cox's concerns that the claimant could have behaved so unprofessionally in December 2022 and February 2023. Although the claimant provided copies of some of his performance reports, little attention was given to them.

Inconsistency of dates

61. It would have been easy to ask Nicola about the date when N183 first made the particular complaints about offensive comments. That step should have been taken.

Concerns known to Mrs Williams only.

62. The final issue regarding the inadequacy of the investigation is the concerns raised by Sharon Williams in her own evidence (that this client had not been believed before). This evidence needed consideration at the investigation stage and the stage of the Outcome Report. It appears that neither the Consultant nor Dawn Hall knew about the previous incident concerning N183 or, if they did, did not mention it. It also appears that this previous issue (or at least Mrs Williams' understanding of the previous issue was taken in to account by Mrs Williams in deciding to dismiss the claimant. The claimant was not aware of the previous issue that was taken into account by Mrs Williams.

Issues 13.4 to 13.10 - concerning reductions to any award made.

> *13.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
>
> *13.5 If so, should the claimant's compensation be reduced? By how much?*
>
> *13.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
>
> *13.7 Did the respondent or the claimant unreasonably fail to comply with it?*
>
> *13.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*
>
> *13.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?*
>
> *13.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

63. Having decided that the dismissal is unfair I then considered whether I should be taking account of the possibility that, had those procedural irregularities not occurred the dismissal would have happened anyway (issues 13.4 and 13.5)

64. My difficulty in considering whether a percentage reduction should be applied under Polkey, is the significance of the omissions from the investigation I simply cannot say that the dismissal may or would have occurred anyway. Without those omissions, the claimant may have continued in employment. I have not in this case been provided with any evidence about what points would have been made had (for example) Melanie Cox been required to explain her position in relation to the claimant and her assumption of his guilt; about what further details may have emerged from the confidential circumstances referred to by Sharon Williams, about what information the social worker may have provided. I have decided that it would not be appropriate to make a "Polkey" type reduction to the compensatory award. .

65. I have also considered whether I should make a reduction because the claimant contributed in some way to his dismissal (issues 13.9 and 13.10). The case presented by the respondent is about the fairness of the dismissal – specifically the process followed. It was not at any stage put to the claimant that he did what was alleged. Even if it had been (and on the assumption that he denied that he had made the offensive comments) the same irregularities that have been identified in the investigation would have resulted in me finding that I could not, on the evidence available and on the balance of probabilities, have concluded that the claimant did make the offensive comments or that there was a percentage chance that he did.

66. A key aspect of the claimant's conduct that <u>might</u> have contributed to his dismissal is him not raising an appeal. There were points that were well made by the claimant in this hearing with the benefit of the support and hard work of his partner. They could have been raised in an internal appeal. The claimant was offered a right of appeal and he chose not to. It is appropriate therefore to consider issues 13.6-13.8 and whether a reduction in the compensatory award should be made.

67. I do not accept the reasonableness of the claimant's view that the appeal against the grievance effectively showed a kangaroo court (as he put it) so that he had no confidence in this employer and the way it might deal with an appeal. The claimant is well aware that the respondent is a charity with independent trustees. Independent trustees would have heard and decided on an appeal. Further, his grievance appeal was to some extent (albeit a small extent) upheld. I have decided that it was unreasonable for the claimant not to have engaged in that internal appeal process as well as or in parallel with going down the ACAS and Employment Tribunal route.

68. For those reasons I have decided that it is just and equitable to apply a reduction in the compensatory aware close to the maximum 25% reduction that I can apply under section 207(A) Trade Union and Labour Relations (Consolidation) Act 1992. A reduction of 20% will be applied.

Employment Judge Leach

Date: 4 March 2024

REASONS SENT TO THE PARTIES ON

Date: 8 March 2024

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FOR THE TRIBUNAL OFFICE

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