



EMPLOYMENT TRIBUNALS

Claimant: Mr I. Nunez Lesende

Respondent: St Mungo Community Housing Association

Heard at: London Central **On:** 11-13 September 2024

Before: Employment Judge Leonard-Johnston

Representation

Claimant: In person

Respondent: Ms. G Nicholls (counsel)

JUDGMENT

1. The claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. Judgement having been reserved; the reasons are as follows.
2. By a claim form presented on 20 May 2024, the claimant, Mr Lesende, complains of unfair dismissal. He claims he was unfairly dismissed for gross misconduct following an incident that occurred on 31 August 2023. The respondent says that the claimant was fairly dismissed after a fair and reasonable disciplinary process, for reasons relating to his conduct.

Hearing

3. The hearing was a face-to-face hearing at London Central Employment Tribunal. I received a hearing bundle of 349 pages, and additional documents were served throughout the hearing to no objection. I received four witness statements, in addition to the claim, Hannah Faulkner, the investigating officer ("HF"), Matthew Bawden, the dismissing officer ("MB") and David Fisher ("DF") who heard the appeal against the dismissal. All the witnesses gave evidence at the hearing in English. English is not

the claimant's first language but he has lived and worked in the UK for many years and I was satisfied that he was able to fully understand the proceedings.

4. I have taken into account the witness statements, all the evidence I have heard and all the evidence in the bundle that I was referred to and have considered it even if it is not expressly referred to in this judgment. References below in brackets are references to page numbers in the main bundle.
5. The hearing was limited to liability. Although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I agreed with the parties that I would consider them at this stage.

Preliminary Issues

6. I was aware at the outset that the claimant suffers from mental health disabilities including PTSD and bipolar disorder and I put adjustments in place to support the claimant throughout the hearing. I gave the claimant opportunities to regularly take breaks, which he did throughout the hearing when he became overwhelmed.
7. At the start of the hearing, before I rose to read the witness statements, there was an application by the claimant to refuse to admit the CCTV footage. He said that this was on the basis that he considered the respondent's use of the CCTV to be a data breach and that they should not have used it in disciplinary proceedings. I asked the claimant to further clarify his application after the break. Upon return, the claimant confirmed that he was happy for the CCTV footage to be admitted but his point was that it was a data breach and unlawful for them to use it in a disciplinary. I confirmed that this Tribunal is not concerned with making decisions about whether the respondent is in breach of data protection laws in breach of UK GDPR. The claimant confirmed that he had made a complaint to Information Commissioner's Office.
8. Two CCTV videos were played in the hearing room before witness evidence commenced.

Legal framework

9. Section 94 of the **Employment Rights Act 1996** 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. In this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 4 March 2019. Section 98 of the 1996 Act 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 section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
10. In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).
11. 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.

12. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**.
13. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.
14. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

Issues for the Tribunal to decide

15. *What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996?*

The respondent asserted that it was a reason relating to the claimant's conduct. This was not in dispute because the claimant accepted during the hearing that his behaviour fell within the definition of gross misconduct in the respondent's disciplinary policy.

16. *Did the respondent act reasonably in treating the reason as sufficient to dismiss, in particular:*

- 16.1. *Did it have a genuine belief based on reasonable grounds that the claimant was guilty of the misconduct alleged.*

This was not in dispute given that the claimant admitted that his behaviour fell within the definition of gross misconduct in the respondent's disciplinary policy.

- 16.2. *Whether the respondent had carried out a reasonable investigation.*

The claimant raised a number of points that he says were unfair. They can be summarised as; failures to gather all relevant evidence including all CCTV and witness evidence, failure to attend the site of the incident, failure to take into account the claimant's appraisals and character and that the process had predetermined outcomes. The claimant did not point to any specific part of the respondent's disciplinary procedure or the ACAS Code of Conduct on disciplinary and grievances that he said the respondent was in breach of.

- 16.3. *Whether the dismissal was in the range of reasonable responses.*

The claimant's case is that the dismissal was unduly harsh taking into account his good record of employment, his disability and the stresses he was under at the time.

17. *If the dismissal was procedurally unfair, whether the claimant would have been dismissed if a fair procedure had been carried out.*

18. *Whether the claimant contributed by his conduct to his dismissal.*

Factual Findings

19. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.
20. The respondent is a not-for-profit community housing association working to prevent homelessness and promoting recovery across England. The claimant was employed by the respondent as the Service Manager of The Lodge and he commenced his employment in 10 March 2010. The Lodge is different to other service provision in that it is comparable to a hotel system for long-term living. All residents are considered vulnerable adults. Maintaining appropriate levels of staff conduct is crucial to ensure that the respondent is able to support the respondent's vulnerable clients.
21. The claimant is extremely proud of the good work that he and others did at the Lodge. It was never in dispute that the claimant was a good employee before the incident on 31 August 2023. From the evidence I saw, the claimant cared deeply about the service and its clients, and went above and beyond to support people in residence.

The 31 August 2023 incident

22. On 31 August 2023 the claimant was involved in an altercation in the entrance corridor to the Lodge with a client, who I will refer to as "MM" but who is also referred to in the documents as "client 1". The claimant was in a dispute with MM because the claimant believed that MM was committing benefits fraud and was also in significant arrears of rent to the respondent. The claimant says that in the office at the Lodge they had a discussion lasting approximately 20-30 minutes during which MM was verbally abusive towards the claimant. The claimant said that MM was being offensive, saying that he (the claimant) was a nobody and that the claimant would not be able to do anything about the situation he was in. This was accepted by the respondent. The respondent accepted that behaviour of clients of the Lodge can be challenging and difficult, and they have policies and procedures in place to enable staff to deal with difficult behaviour. The claimant said that the abusive way that MM spoke to him in the office was triggering for him because of his difficult background. The claimant asked MM many times to leave the office, and MM was standing by the door, which the claimant says blocked the claimant's exit from the office. MM did leave once but came back to show the claimant a letter from the respondent relating to his rent arrears.

23. There was a dispute as to whether MM was aggressive towards the claimant whilst in the office (over and above being verbally abusive which is accepted) prior to the key incident which occurred in the entrance corridor. The claimant says that MM was aggressive and intimidating and that caused him to feel trapped and caused him to act in self-defence. During the investigation, the investigating officer HF asked another staff member ("AA") what she had witnessed. AA told HF [57] that:

"I was in the office with Ivan and Client 1, and Ivan was asking Client 1 to go to the Job Centre, but client was refusing. He doesn't need to, don't want to, doesn't have to. He wasn't aggressive but was very animated and elevated in mood. I had to leave the office. Ivan asked client to leave the office, Ivan was ushering him out I was coming back in. I went on the phone, but I couldn't hear what he had said, but Ivan looked like he was getting angry. Said client wasn't aggressive but was very animated and elevated in mood. Contradicts the C's evidence that he felt trapped and needed to defend himself, note that AA wasn't in the office the whole time."

24. AA goes on to say that MM was not being abusive in her presence but that he had been verbally aggressive before and was rude to AA after the incident. There was no

suggestion from the claimant that AA would not be telling the truth to HF but I note that AA was not present for the entire time that the claimant and MM were in the office. I note that the claimant's evidence was consistent in his initial statement to HF and in his witness statement before me in that he said MM was abusive and offensive in the office but he did not mention that MM was physically intimidating or aggressive. I find that MM acted in a rude and offensive manner to the claimant, but was not physically aggressive or intimidating in the office.

25. MM and the claimant then left the office, going along a narrow corridor through a door that opened on to the wider entrance corridor. The CCTV footage (video 1), shows what happened next. MM walked out through the door first and then turned around to talk to the claimant and was gesticulating with his hands. The claimant then exited the doorway with his head forward and leaning towards MM and he was talking forcefully at MM. MM took a couple of steps backwards. The claimant stepped forward into MM's personal space and MM put his left arm up in a defensive manner. The claimant then turned and walked back towards the door through which they had come. He stood in the doorframe whilst MM continued talking. The claimant then stepped forward and "squared up to MM". By that I mean he had his chest out and chin forward and moved his body forward so that his body was touching MM. MM again raised his left arm to push the claimant away and immediately turned towards the front door and started to walk away. The claimant again turned away to walk through the first doorway back to the office but when MM was a few metres away, close to the front door, the claimant turned back and followed him down the corridor. They were both standing at the closed front door arguing and the claimant opened the front door. At this point the claimant says he was spat on but that can't be seen from the video (see further below). The claimant then reached his left arm up and grabbed MM's shoulder/neck area roughly and with some force pushed MM out of the door on to the front pavement.
26. The second CCTV footage (video 2) is taken from outside the building and shows the moment that the claimant pushes MM outside and confirms that he had his hand on MM's neck/shoulder area and pushed him outside with force.
27. From the CCTV footage, I find that the claimant elevated the conflict into a physical one. The claimant had the opportunity to refuse to follow MM through the door into the entrance corridor, if he was feeling threatened, but he did not. After the pair had come through the door into the entrance corridor, the claimant twice turned away from MM but then squared up to him and pursued MM down the corridor, where he then grabbed MM by the neck roughly and pushed him. The claimant had multiple opportunities and exits available to remove himself from the situation in the entrance corridor but did not do so. On the claimant's evidence he and MM were on their way to the Job Centre in order to resolve the benefits situation which he would not have done if he genuinely felt intimidated. I do not accept that the claimant felt physically threatened by MM in the office or in the entrance corridor. I find that the claimant lost his temper with MM because of the argument in the office.
28. As to whether the claimant was spat on immediately before he pushed MM out of the door, whilst I cannot see that from the CCTV, I find that the claimant is telling the truth about this. It may not have been deliberate on the part of MM as the discussion was very heated at this point, but I accept that the claimant felt something wet on his cheek, which contributed to his reaction to push MM out of the door.
29. There was a dispute about what happened outside but that did not form part of the dismissal decision [281] which was based on what happened in the entrance corridor. Accordingly I make no findings about what happened once the claimant and MM had left the building. The police and an ambulance were called.
30. I find that the claimant was aware of the correct procedures for dealing with a difficult client but chose not to follow them. His evidence was that he did not always use

those procedures because to do so would be more likely to result in an eviction and he was proud of his record of limited evictions.

31. The claimant called his line manager (“LS”) directly after the event and she was questioned by HP. A note of the conversation with LS, annexed to the investigation, stated “*he said that he had pushed (MM) out of the Lodge by his head and knows how wrong this was.*” The claimant was suspended on 1 September 2023.

Code of conduct and disciplinary policy

32. The respondent’s disciplinary policy [136] at 6.2, stated that the definition of gross misconduct “*acts which are so serious in their nature that they destroy the mutual relationship of trust and confidence between the employee and the employer and make any further working relationship impossible*”. Examples given are “*Physical, verbal or written abuse, violence or threats of violence made against clients, colleagues or others*”.
33. The respondent’s Code of Conduct [149] states that “*St Mungo’s will not tolerate any of the following forms of behaviour (including through social media): Acts of violence, aggression, threatening behaviour, verbal abuse or malicious cruelty by any member of staff, volunteer or student towards a colleague, client or working contact.*”
34. In evidence the claimant confirmed that he accepted that his behaviour fell within the definition of gross misconduct. I find that the respondent genuinely believed that the claimant committed gross misconduct and they had reasonable grounds for doing so.

The investigation

35. The investigation was handled by HF. HF was sent two CCTV videos but did not request any further CCTV videos, she says because the incident was captured on Videos 1 and 2. She gathered evidence and annexed this to her investigation report [46-63]. The claimant was invited for an online investigation meeting on 11 October 2023. At that meeting the claimant admitted that there was contact between him and MM, although he said he was uncertain of the specifics, mentioning he would need to check the CCTV footage to recall. He said he was not proud of his behaviour and admitted that he may have clipped or tapped the client.
36. The claimant made a complaint both before and at the time of the investigation meeting that it he felt uncomfortable having the meeting online as he prefers to communicate in person. From the minutes of the meeting [48,49] I find that the claimant had a full opportunity to tell his side of the story at the investigation meeting despite it being online and did so. He was given an opportunity to amend the minutes and did so [63]. He provided information about the mitigating factors and explained about his mental health disability, about other factors at work that day that he found difficult (e.g poor performing employees, members of staff sleeping on shifts), a large number of deaths within the service, lack of support from senior managers, racial abuse from clients, and importantly that his father was terminally ill in hospital at that time. When asked about the impact his behaviour had on others he did not answer, but spoke about the positive impact he had had on the service over the years.
37. The investigation report concluded [45];

“From viewing the CCTV, I can see there that was a confrontation with Ivan and Client 1 and that Ivan was physical towards the client. Whilst the CCTV does not have sound, I believe from Ivan’s body language that it he appeared aggressive and confrontational, and the client didn’t.

What happened outside of the service cannot be evidenced from CCTV and there are no accounts from eye witnesses other than Ivan and Client 1, so it is not possible

for me to confirm whether the physical altercation continued outside. However, the CCTV I have viewed clearly shows Ivan being aggressive, using intimidating body language and physically pulling the client by his neck outside inside the service and I believe this is sufficient evidence to support my view that Ivan's behaviour likely escalated further outside. From watching the CCTV, I do not agree with Ivan's suggestion that it was a tap on the head. I believe it was firmer than this and he appears to pull the client by his collar down the corridor.

I believe that Ivan was aware of the expectations regarding how to support clients and that it is not appropriate to make physical contact with a client in this manner. Ivan stated in the formal investigation meeting that he follows all policies and procedures but tries to tailor the approach to fit the client best.

With all of the above in mind, I recommend that this investigation be referred to a hearing due to the alleged gross misconduct that I believe took place..”

38. In her evidence, HF confirmed she had not visited the Lodge because she did not consider it necessary, having viewed the CCTV. She confirmed that she did not collect the CCTV herself, it was sent to her by other colleagues. HF confirmed that she didn't carry out an investigation into MM but confirmed that AA gave her some background into the client. She gave evidence that she didn't investigate the claimant's history, but was aware no he had previous disciplinary action. Her evidence was that more information about the claimant's work history wouldn't have made a difference to her decision to refer for a disciplinary procedure. HF's evidence that her role was to investigate potentially gross misconduct and that when she viewed the CCTV she could confidently say that even if a person had glowing references she still would have referred it to a disciplinary hearing. Further, HF didn't disagree with the claimant that MM could have had a motive against the claimant, and didn't dispute that he was challenging, but her evidence was that it is not uncommon for clients to be rude and aggressive.

39. The Respondent therefore referred this to a disciplinary hearing due to the alleged misconduct that took place.

The disciplinary proceedings

40. The claimant was invited to a formal disciplinary hearing on 14 December 2023. The This meeting went ahead on 21 December 2023 and was chaired by MB and the claimant represented by a union representative. The claimant was given an opportunity to comment on whether he had committed gross misconduct and the claimant at that point said that the incident was a reaction to him being spat at and that the code of conduct did not cover that situation. At the disciplinary hearing the claimant sought to explain his conduct by reference to being spat on, however MB stated his view that the claimant's aggression starts before that point.

41. The claimant was given the opportunity in that hearing to raise his concerns about the process. He told the respondent that he didn't consider it fair to not obtain all the CCTV for that day, which had since been deleted. It was important for the claimant that the respondent see the whole context of the incident including what was said to him in the office. MB clarified that the respondent was accepting the claimant's statement about how abusive and offensive the client was being. The claimant was given opportunities to explain how stress and his underlying disability might have impacted his response that day. He took the opportunity to raise mitigating factors.

42. The respondent terminated the claimant's contract with immediate effect on the grounds of Gross Misconduct. The claimant was informed of this outcome by way of a letter dated 2 February 2024. The Claimant was given the right to appeal this decision.

43. The decision letter [281] dated 2 February 2024 confirms that it was the view of MB that;
- 43.1. There was a clear breach of the code of conduct,
 - 43.2. It was accepted that the claimant felt provoked but his response was not proportionate or in line with the respondent's policies,
 - 43.3. MB did not consider that the claimant was physically trapped or in imminent danger, in fact it was clear that the claimant followed the client.
44. In making his decision MB took into account the following factors in mitigation:
- 44.1. That the claimant felt he not had recent training in managing challenging behaviour.
 - 44.2. That the claimant felt provoked by MM.
 - 44.3. That the claimant had a good record and long length of service.
 - 44.4. That the claimant had an underlying mental health condition and was under stress.
45. MS also considered whether dismissal was the appropriate sanction in the circumstances, or whether a lesser sanction, such as a final written warning with training would be more appropriate. Given the seriousness of the allegation he did not feel that a decision to issue a lesser sanction would fully safeguard our clients.
46. The claimant says that the termination letter didn't properly take into account the difficulty of the situation the claimant was in. However, the letter considers the challenging behaviour of MM and the mitigations raised by claimant.

The appeal

47. The claimant submitted an appeal on 12 February 2024. The Claimant was invited to an appeal meeting on 21 February 2024 which occurred on 24 February 2024 and was chaired by DF. The claimant was accompanied by his trade union representative. The claimant's grounds of appeal included the alleged impartiality of managers during the investigation, the respondent not supporting the claimant's mental health, lack of training and the claimant's honesty, integrity, length of service and remorse. An outcome letter dated 25 March 2024 [312] deals methodically with each of the points raised by the claimant. The claimant himself accepted in evidence that DF dealt with each of his appeal points. DF did not uphold the appeal.
48. DF found that the disciplinary decision was not based on any assumptions of what happened after the incident shown on the CCTV footage but confined to that evidenced through that footage. What may or may not have happened outside the building on 31 August 2023 was not clear and was not held against the claimant. DF concluded that the disciplinary investigation was reasonable and that all internal policies and procedures were complied with, that all the claimant's mitigating evidence was thoroughly considered, however the claimant's behaviour was serious enough to justify his dismissal, particularly because of the need to ensure that the vulnerable clients that the Respondent supports are protected and their wellbeing prioritised. In evidence DF explained that it wasn't in doubt that the claimant was a good employee, but DF felt that his remorse was limited. Whilst the claimant did say sorry, DF had to ask three times what the claimant would do differently in the future and each time the answer was not satisfactory to give him the confidence that he would act differently in the future, nor that he had insight into the impact of his behaviour on clients.

Conclusions

49. I remind myself that I must not substitute my own decision for that of the employer's.
50. I find that the principal reason for the dismissal was gross misconduct and this is a

potentially fair reason under section 98 ERA. The claimant accepted that his behaviour fell within scope of the gross misconduct definition of the disciplinary policy and code of conduct. The respondent considered that the initial behaviour of the claimant “squaring up” to MM would in itself be gross misconduct, let alone the claimant pushing MM out through the door by his neck.

51. I find that the respondent did act reasonably in treating the reason as sufficient to dismiss because it had a genuine belief based on reasonable grounds that the claimant was guilty of the misconduct alleged. Again, it was not in dispute that the claimant physically assaulted a client and that his behaviour fell within the definition of gross misconduct in the respondent’s disciplinary policy. I find that the respondent genuinely believed that the claimant’s behaviour was sufficiently serious to dismiss, particularly based on the evidence relating to the importance the respondent places on its duty to safeguard its service users.
52. The claimant says that the disciplinary procedure followed was not reasonable however I find that the respondent carried out a reasonable investigation. A reasonable investigation does not have to be a perfect investigation and the level of inquiry required depends on the circumstances of the case. In **ILEA v Gravett 1988 IRLR 497, EAT**, Mr Justice Wood (then President of the EAT) said that: *‘at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase.’* This is a case in which the behaviour was caught on CCTV and accordingly it would have been reasonable for the respondent to carry out minimal investigation. It nevertheless carried out a thorough investigation, including holding an investigation meeting.
53. I do not consider the failure to gather further CCTV footage was unfair in the circumstances. First, the respondent accepted that the circumstances had been difficult and challenging for the claimant, and second, it would not have changed what was seen on the CCTV footage, which was physical aggression and a physical assault in circumstances where the claimant could have removed himself but did not. Given that the fact of the assault was not in dispute, it would have been disproportionately onerous for the respondent to have gathered and watched all CCTV footage.
54. The claimant states that it was unreasonable for HF to not attend the Lodge in person because she would not be able to understand the full context of the altercation, in particular the narrow corridor leading out from the office to the entrance corridor. I do not consider this unreasonable given the nature of the CCTV footage and the respondent’s acceptance of the behaviour of the client. In any event this was rectified by both MB and DF visiting the Lodge, and being familiar with the lay-out.
55. There is no evidence to indicate that any stage of the disciplinary process was biased or predetermined. The investigating officer, disciplinary officer and appeal officer were all in appropriate positions of seniority and the claimant had no evidence to suggest they had an alternative agenda in carrying out their roles. Each of them considered the mitigating circumstances carefully. That the outcome was dismissal was reflective of the serious nature of the misconduct, not the lack of impartiality and objectiveness of the disciplinary proceedings.
56. In relation to the whether the dismissal was in the range of reasonable responses, the claimant’s case is that the dismissal was unduly harsh taking into account his good record of employment, his good character, his disability and the stresses he was under at the time.

57. I note that alternative sanctions were considered and that the termination letter [290] stated;

“I have also considered whether dismissal is the appropriate sanction in the circumstances, or whether a lesser sanction, such as a final written warning with training would be more appropriate. Given the seriousness of the allegation and my conclusion, I do not feel that a decision to issue a lesser sanction would fully safeguard our clients.”

58. It is understandable that in light of the claimant’s years of service and his and commitment to the Lodge and its residents, it is upsetting for him to have been terminated for what he says was a momentary lapse in judgment. However, I find that in light of the serious nature of the misconduct the termination of his employment was soundly within the range of reasonable responses. This is even more so in the respondent’s specific case because of the importance it places on the wellbeing of its service users, and the respondents’ position that it could no longer trust the claimant not to act that way in the future.

59. The dismissal was reasonable in all the circumstances and the claim is dismissed.

Employment Judge Leonard-Johnston

24 October 2024

JUDGMENT SENT TO THE PARTIES ON

30 October 2024

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FOR THE TRIBUNAL OFFICE