

RM



EMPLOYMENT TRIBUNALS

Claimant: Mr Razzaqul Chowdhury
Respondent: London Borough of Tower Hamlets
Heard at: East London Hearing Centre
On: 19 July 2017
Before: Employment Judge Foxwell

Representation

Claimant: Mr P Apraku (Consultant)
Respondent: Mr R Moretto (Counsel)

JUDGMENT

The judgment of the Tribunal is that the claim of unfair dismissal is not well-founded and is dismissed.

REASONS

1 This is the hearing of the Claimant, Mr Razzaqul Chowdhury's claim of unfair dismissal against his former employer, The London Borough of Tower Hamlets. In deciding this case I heard evidence from two witnesses for the Respondent, Mr Luke Adams who at the relevant time was the Divisional Director for Adult Social Care within the Respondent's Adult Services Directorate, and Mr Danny Hassell who is an elected councillor. Mr Adams chaired the panel which decided to dismiss the Claimant and Mr Hassell chaired the panel which heard the appeal. The Claimant gave evidence in support of his claim but called no other witnesses; this is quite usual and I do not draw any inference from the number of witnesses a party calls. In addition to the evidence of these witnesses I considered the documents to which I was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle. Finally, I heard closing submissions from the parties' representatives.

2 Mr Moretto referred me to a number of cases which I have taken into account. He

drew my attention to the decision of the Court of Appeal in *Strouthos v London Underground Ltd* [2004] IRLR 636 and to passages in it referring to the earlier cases of *AEI Cables Ltd v McLay* [1980] IRLR 84 and *London Borough of Harrow v Cunningham* [1996] IRLR 256. Mr Moretto also reminded me of the principles in the cases of *Post Office v Foley* [2000] IRLR 827, *A v B* [2003] IRLR 405 and *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 721 which are all well-known in the context of unfair dismissal claims.

3 The primary issues in any complaint of unfair dismissal are, firstly, whether there was a dismissal at all; that is admitted in this case; and, secondly, the reason for dismissal. Here the burden of proof lies on an employer to prove the reason and that it is one of the potentially fair reasons under Section 98 of the Employment Rights Act 1996. In this case the Respondent asserts that the Claimant was dismissed for misconduct which is a potentially fair reason. If the Respondent establishes that reason it is then for the Tribunal to decide whether it was, in fact, fair to dismiss for that reason. This question which must be decided by reference to the test of fairness contained in Section 98(4) of the 1996 Act and there is no burden of proof on either party in respect of this.

4 The test of fairness does not permit an Employment Tribunal to substitute its own view for that of the employer rather it must assess the reasonableness of the decision to dismiss by reference to the facts as they were reasonably believed to be at the time. In the context of a conduct dismissal it is well established that the questions for a Tribunal in this context are (see *British Homes Stores Ltd v Burchell* [1978] IRLR 379):

- 4.1 Did the employer believe that the employee was guilty of the conduct alleged against him?
- 4.2 If so, was that belief based on reasonable grounds; important components of this are the existence of an adequate investigation and a fair procedure.
- 4.3 Finally, if the answer to the preceding questions is “yes”, was the decision to dismiss within the band of reasonable responses of an employer.

5 Those are the principles that I have applied in this case and against that background I turn to my findings of fact which I make on the balance of probabilities.

6 The Claimant began working for the Respondent in June 1992, initially as a home carer and then as a shelter warden. In 2003 he qualified as a social worker and has worked as a social worker for the Respondent since then. By the time of his dismissal he was regarded as a senior social worker.

7 The Claimant's employment ended on 3 November 2016 at which time he had 24 years' service. The background to his dismissal relates to two service users. One (who I shall call “Service User 1”) was moved from his home to secure accommodation at a place known as Cooper Court. The second (who I shall call “Service User 2”) was the subject of three police notification reports. The Claimant's dismissal relates to how he dealt with these service users but I should start by stating that prior to these incidents he had an unblemished disciplinary record and had been described by his line manager as having a good understanding of the principles in the relevant Care Acts in an appraisal conducted

in January 2016.

8 On the 5 March 2016 the police made the first of three referrals in respect of Service User 2. There had been a burglary at the service user's home but the police were concerned that he was extremely unkempt and appeared, in their opinion, to have mental health issues, possibly dementia. The police wrote in their report, "*the subject is in need of a social services assessment*" (page 83). The Claimant accepts that he received this report through an internal referral within the Respondent on or about 5 March 2016. The second referral is at page 87 and is dated 14 March. The police had attended the service user because of a further burglary which had happened in the early hours of that morning; they suggested that the service user had a mental health condition which would benefit from an assessment. His home was described as unkempt and strongly smelling of faeces. The Claimant accepts that he received this report on or about 14 March 2016. The third report is dated 20 March 2016 and it is common ground that by this time the Claimant was on annual leave; he had return to Bangladesh (his country of origin) to see his elderly mother who was (as I understand it) seriously ill at the time. The relevant reports are therefore those of the 5th and 14th March. It is also common ground (and I find) that the Claimant did not act on those reports when they were received, on the contrary he worked on them when he return from his annual leave on 5 April 2016.

9 The other relevant set of documents concerns Service User 1, a man with serious alcohol and tobacco problems who was at risk of harm because of his heavy smoking and drinking. In September 2015 the Claimant had been assigned this individual as a vulnerable adult. The Claimant believed that Service User 1 required sheltered accommodation and had made some enquiries about this. In April 2016 he prepared an assessment recommending a move to sheltered accommodation. This was returned to him by his line manager, Ms Garrido with comments and a request that the assessment be amended and returned to her (page 99). His manager had not accepted that it was necessarily appropriate to move Service User 1. Nevertheless, on 25 April 2016 Service User 1 was moved from his then home to sheltered accommodation.

10 The Respondent's disciplinary allegations are that the Claimant failed to act when the police safeguarding alerts were received in respect of Service User 2 or to pass them onto others if he could not do so and that he had arranged a placement for Service User 1 in sheltered accommodation without providing the required assessments. Mr Adams told me before such a placement could be approved a robust strategic discussion between the Claimant and his line manager was required together with a support plan based on an assessment of need after a multi-agency discussion, a mental capacity assessment, a risk management plan, a safeguarding plan and a support plan agreed to by the Claimant's manager. It is common ground that none of these things were in place at the time when Service User 1 was moved to the sheltered accommodation. The Claimant's evidence now and then was that he intended to complete "the paperwork" after the move had been achieved and that the important thing from his perspective was that the service user was protected.

11 In any event these matters were first raised with the Claimant by his managers at a meeting on 20 June 2016. On 14 July 2016 he was suspended and a disciplinary investigation commenced. Steven Bethell was appointed as the investigating officer and he interviewed the Claimant and his managers. Mr Bethell's investigation report is dated 17 August 2016. He concluded that there was a case to answer. The Claimant was

invited to a disciplinary hearing on 12 October and notified of his right to be accompanied. He was provided with a copy of the investigation report.

12 The disciplinary hearing took place on 3 November 2016 chaired by Mr Adams. The other member of the panel was Lisa Matthews, a service manager; an HR representative, Kamrun Haleem, was present as was the investigating officer, Mr Bethell, who presented his report. The Claimant was represented by Kathy McTasney from his Trade Union. Two witnesses, Ms Garrido and Ms Davegun, were called to give evidence to the panel; they were managers in the Claimant's department.

13 At the end of the hearing, having paused to deliberate for about 30 minutes, the panel called the Claimant back and informed him that the disciplinary charges were established, that they were regarded as gross misconduct and that he was to be dismissed summarily. This outcome was confirmed in writing on 15 November 2016 and the Claimant notified of his right of appeal.

14 The Claimant appealed and this hearing took place before a panel of councillors on 13 June 2017. This was after the initiation of these proceedings because of the relevant time limits under the Employment Rights Act 1996. The members of the appeal panel were Mr Hassell, the Chair, Peter Golds and Candida Ronald. Mr Adams was there to present the management case on appeal and the Claimant was once again represented by Ms McTasney. Minutes of the hearing are at page 232 onwards in the bundle. The appeal was unsuccessful and the Claimant's dismissal confirmed by letter dated 19 June 2017 (page 177).

15 Key documents are the dismissal and appeal decision letters. The disciplinary panel said in the dismissal letter that they had considered each allegation separately and concluded in respect of Service User 1 that his placement had been done without the appropriate assessment and that this had caused the housing provider concerns about the level of risk to the service user himself and other vulnerable residents. The Claimant's union representative had argued that the Claimant had lacked formal supervision but the panel rejected this, saying that there was good evidence of supervision and that in any event the Claimant was an experienced social worker. As far as Service User 2 was concerned the panel based its conclusion on the fact that the Claimant had asserted at the disciplinary hearing that he had been on holiday when each of the three safeguarding alerts had been received. The panel said that this was plainly incorrect and that they regarded the Claimant's explanation as untruthful. They concluded that for these reasons the Claimant had committed acts of gross misconduct and that dismissal with immediate effect was appropriate.

16 The appeal was not conducted as a rehearing of the disciplinary allegations but a review of the earlier decision-making process. The Claimant had received a full set of documents, including the minutes of the disciplinary hearing, prior to the appeal and he and his union representative had the opportunity to put the points they wished. In the appeal outcome letter Mr Hassell wrote that the panel considered that the lives of two vulnerable service users had been put at risk because of the Claimant's inaction and failure to follow established procedures. In respect of Service User 1 the appeal panel said that not only had the case had not been prioritised when the police reports were received but there had also been a failure to act for approximately six months. They also referred to evidence which suggested that the Claimant had asked a housing association

manager to contact the GP of the service user when he should have done this himself. On first reading this I was concerned that these were references to other issues not the subject of these disciplinary charges but having looked more closely at the documents, it is clear that these are examples relating to Service Users 1 or 2. The appeal panel stated that the reason for dismissal was conduct and that they were satisfied that the Claimant had failed to follow procedures and had been untruthful in his explanation in respect of Service User 2.

17 I turn then to my analysis of those facts and the conclusions that I have reached as a result of them.

18 Firstly, I am satisfied on the evidence that the reason for the Claimant's dismissal was conduct so the employer has established a potentially fair reason for dismissal. Mr Apraku suggested in submissions that the alleged misconduct was a pretext for some other reason, possibly that the decision-makers did not like the Claimant. but there was no evidence to support this.

19 I turn then to the questions which are relevant to the test of fairness.

20 The first is belief: did the employer believe that the Claimant was guilty of the conduct alleged against him? The short answer is "yes" because the conduct was not in dispute. The Claimant had not responded to the safeguarding alerts dated 5 and 14 March 2016 nor had he obtained or prepared the necessary assessments and approvals before Service User 1 was moved to Cooper Court so the basic factual matrix of the allegations was never in dispute.

21 There is a question mark over whether the Claimant was truthful in his account of events to the Respondent and that is particularly marked in respect of Service User 2 where it appears that the Claimant gave three different explanations for not acting upon the police reports. When this was first put to him by Mr Bethell in the investigation he suggested that he had prepared a welfare report; at the disciplinary hearing the minutes show that he said that he had been on holiday when all three safeguarding reports were received; and, finally, at the appeal he said that he did not act upon these reports because he believed the police were dealing with the matter and he was hard pressed with other duties in the days immediately before his trip to Bangladesh. As part of this explanation he said that he was concerned about the health of his elderly mother. The Respondent says that these inconsistencies support the employer's belief that the Claimant was not being straightforward in his account.

22 I had the opportunity to assess the witnesses giving evidence before me today and my assessment is that none of them have been untruthful in their accounts. What the employer reasonably considered to be untruthfulness at the time was in my judgment and with the benefit of the evidence I have heard today, in fact an example of the Claimant misspeaking and misunderstanding when in a position of great stress. For example, the welfare assessment the Claimant told Mr Bethell about in the investigatory meeting was one he had done some weeks before the police referrals but this was not made clear to Mr Bethell. I find that the Claimant was confused about the dates of his annual leave at the disciplinary hearing. None of this, however, is at the heart of the question that I have to look at which is what the employer reasonably believed as a result of the confusing picture that had been painted. In my judgment the employer believed on reasonable grounds that

the Claimant was giving a deliberately misleading account of what had happened even though in truth it was a confused account.

23 I accept that the minutes of the disciplinary meeting are broadly accurate and, in particular, the passage in box 13 at page 148 which suggests that the Claimant said in terms that he had been away when all the police alerts were received. The minutes show that this point was checked at the time. I bear in mind the great stress that employees find themselves under in these circumstances and that has helped me to reach a conclusion about what the Claimant intended to say compared with what he actually said, but it was reasonable for the employer to rely on what he actually said.

24 In all the circumstances I am satisfied that the employer believed, and had reasonable grounds for believing that the Claimant was not being straightforward in his explanation for the two missed safeguarding reports and I am sure that that coloured the view that was taken of other aspects of his case. That is not to underestimate the importance of the omission itself. Having looked at the safeguarding referrals from the police officers and having regard to the exacting standards to which social workers are held it was open to the employer in my judgment to conclude on the evidence that the Claimant had not done what could reasonably be expected of him given his experience as a social worker. This was either to act upon these reports immediately or to refer them on to someone who could if, as he tells me he was, he was overloaded with other work. It is clear that the police were not simply reporting a crime but were asking for social services to take urgent action; that did not happen until the Claimant's return from holiday. He told me that he did not hand that task on to anyone else in his absence.

25 In respect of Service User 1 the documents spoke for themselves: there were no risk assessments and such like prepared in advance of the move to Cooper Court. If there had been it would have been a complete answer to the charge.

26 The real question in this case is whether the decision to dismiss lay within the range of reasonable responses of an employer. I have struggled with this as, on the one hand, the omissions which occurred were serious (the Claimant works in a field where everything he does is likely to be of importance) but, on the other, the Claimant has very long service, an unblemished record and was working under some stress because of his sick, elderly mother. Any employer should take such factors into account. Mr Adams' and Mr Hassell's evidence is that they did consider them but also the inconsistency in his accounts. I do not think that those inconsistencies place this case in the same territory as *AEI Cables v McLay* where there were allegations of financial impropriety and dishonesty but it is nevertheless one where the Claimant gave inconsistent explanations rather than confessing to a mistake at the earliest opportunity. So, if there are gradations of dishonesty, it is not of the most serious kind. I have reminded myself, however, that the test concerns the band of reasonable responses of an employer and I cannot say that the decision to dismiss falls outside this based on the facts as the employer reasonably believed them to be. I consider that the decision is very close to the edge of the band as one can see how easily this could have been dealt with by way of performance management and an appropriate sanction short of dismissal but the views of Mr Adams and Mr Hassell and their panels deserves respect and I accept that they were not ones arrived at lightly.

27 In the circumstances I find that the decision falls within the band of reasonable

responses having regard to the finding of dishonesty and I must therefore conclude that the dismissal was fair.

Employment Judge Foxwell

4th August 2017