



EMPLOYMENT TRIBUNALS

Claimant: Mark Bailey

Respondent: Options Autism (4) Limited

Heard at: Cardiff (CVP)
On: 24 and 25 June 2021
Chambers: 7 July 2021

Before: Employment Judge R Brace

Representation
Claimant: Ms Amanda Hart (Counsel)
Respondent: Mr Dominic Bayne (Counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant was not unfairly dismissed.

WRITTEN REASONS

Background

1. The claim before this Tribunal is one of unfair dismissal arising from the dismissal of the Claimant on grounds of gross misconduct.
2. On the morning of the hearing, the Claimant's representative indicated that the Claimant suffered from anxiety and requested two adjustments: regular breaks and that another individual could sit with the Claimant in support. These adjustments were reasonable in the circumstances, not objected to and were put into place. At all times the individual supporting the Claimant could be viewed on camera.
3. There was a tribunal bundle of 471 pages and on the morning of the first day of the hearing the Claimant's representative indicated that further

documentation had that morning been emailed to the Respondent and the Tribunal. After providing the Respondent with the opportunity to consider that documentation and ensuring that Mr Stryker, the Respondent's witness, could access the additional documentation and the CVP hearing room at the same time, it was agreed that the documents could be added to the Bundle. These were provided with page references 366A-366O.

4. The parties were informed that unless the Tribunal was taken to a document in the bundle it would not read it and that I had not read in detail or at all, the investigation statements of the 17 witnesses that had been used as part of the disciplinary investigation and that the representatives were to draw my attention to specific sections of such evidence and provide me with an opportunity to read such extracts during cross-examination as a result if necessary.
5. The hearing was listed for two days and timetabling was agreed with the parties' representatives. On the basis of that timetabling, it had been anticipated that the evidence could be completed by the beginning of the second day but, due to late presentation of documentation by the Claimant, some additional reading time as a result of that and some CVP connection issues, the evidence was not completed until the afternoon of the second day.
6. The parties were advised that I would initially consider liability and if the Claimant was successful in his claim would then consider remedy. It appeared from the Bundle and witness statements that steps had not been taken by the parties to address remedy and by the morning of the second day of the hearing, additional documents and an updated Schedule of Loss were also provided to the Tribunal and the Respondent.
7. Prior to the commencement of the evidence, the Claimant's representative confirmed that with regard to challenges to fairness, the Claimant was no longer relying on the examples provided in the ET1 Rider at §16a, c, d and/or f.
8. There were some connection issues during the course of the two day hearing but these were resolved with the assistance of the clerk and with participants adjusting their devices and logging back into CVP where connection was poor.

Evidence and Assessment of the evidence

9. I heard evidence from John Stryker, Dismissing Officer and Jill Clark, HR Adviser to the appeal manager, for the Respondent and heard evidence from the Claimant.
10. No evidence was before me from the appeal manager, Clive Coombs, whom I was informed is no longer employed by the Respondent.
11. It is not necessary to reject a witness's evidence, in whole or in part, by regarding the witnesses as unreliable or as not telling the truth. The Tribunal

naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including:

- a. whether the evidence is probable;
 - b. whether it is corroborated by other evidence from witnesses or contemporaneous records of documents;
 - c. how reliable is witness' recall; and
 - d. motive.
12. It is appreciated that this is a difficult case for the Claimant, where the impact of the dismissal is significant in terms of on-going employment particularly within the care sector.
13. Whilst I don't question the Claimant's honesty in these proceedings, I do question his clear recall of the incident in question and considered the Claimant's recall of the events of that day and the subsequent disciplinary hearings, not to be reliable due to the Claimant's own conflicting evidence and the Claimant's own admission that he had difficulty recalling the hearings. However, I did find that John Stryker was a reliable witness and gave his answers clearly and unequivocally.

Facts

Background

14. The Respondent is a company that operates in North Wales providing both specialist residential care and educational services at Kinsale School, for children and young people between 8 and 19 years of age. These pupils and residents have a wide range of complex needs many with autism related disorders. Some of the pupils and residents have low cognitive abilities and challenging behaviour. The Respondent is part of a wider corporate group structure, the Outcomes First Group ("Outcomes Group").
15. To ensure that staff know and understand the individual needs of each person in their care, their triggers and how they can safely and effectively support the person, including different levels of crisis, each young person had an individual file that consists of documents to help inform staff in order to develop and support the individual. These documents included
- a. A clinical report, which is compiled on advice of clinical experts and provides relevant background to the individual child/young person including their diagnosis and involvement in their development;
 - b. A communication plan, explaining the abilities of the person and how best to interact with them;
 - c. A risk assessment, that set out hazards that the young person may pose to themselves and others and the relevant control measures that staff can use to manage those risks safely; and

- d. A positive behaviour support plan (“PBSP”), the purpose of which was to explain the young person’s needs from an educational, social and emotional point of view and how to support that young person. It includes de-escalation techniques appropriate for each person.
16. The Claimant started his employment with the Respondent on 29 July 2009. At the time of his dismissal he had over 11 years’ service, was employed as Team Leader and had held this post since February 2013. He was engaged on terms and conditions set out in a written statement dated 14 February 2013 [50]. At termination of employment on 31 July 2020, he was 46 years of age and was paid an annual salary of approximately £23,434.32.
17. The Job Description for the role of Team Leader set out his job purpose which was to lead supervise and motivate the care team within the House/Flat. It also set out key tasks areas and responsibilities [55].
18. Work in a setting, involving such children and young people, is highly regulated and social care workers, including the Claimant were subject to the following regulatory standards and policy requirements:
- a. The Code of Professional Practice for Social Care Wales [368]; and
 - b. The Respondents Code and Conduct and Ethics Policy [398].
19. Prior to the incident in question the Claimant had a clean disciplinary record and had been nominated for his support of young people.

Incident.

20. On 11 June 2020, the Claimant was involved in an incident with a young person, resident at the Respondent, who is referred to as ‘YP’ throughout these written reasons. The incident ended with the Claimant being punched by the YP and the YP being restrained on the floor by a colleague of the Claimant, a restraint that the Claimant had assisted in. Following the incident, concerns were raised by staff present who had been witness to aspects of the events that day.
21. On 11 June 2020, the day of the incident, the Claimant was suspended by the Respondent’s Head of Service [73] and a referral to the Local Authority Safeguarding Team was made. The Claimant was informed that suspension was not a disciplinary sanction and a Support Person was allocated to him.
22. On the same day, brief written statements were taken from around 17 members of staff, who had witnessed parts of the incident in question and these were recorded on ‘Records of Conversation’ proformas [92-117]. Two witnesses, Eliie Gillgrass and Cody Hughes, were not interviewed that day. It appears that staff were not aware that they had witnessed some of the events and they had not been asked to complete a Record of Conversation. A Record of Conversation was not completed by them until 23 June 2020 [144].

23. A Clinical Report was also obtained in respect of the YP on 15 June 2020, some four days after the incident [125]. The YPs Clinical Report indicated that the Covid-19 restrictions on movement meant that this YP could not visit their family, attend college or take part in offsite activities apart from one form of exercise a day. These were unprecedented times and difficult for them and they were struggling with lockdown and not seeing their family.
24. On 5 July 2020, the Claimant emailed Paul Speed, Registered Manager and Mel Ramm Administration Manager, informing them that he was not '*in a great place*' as he termed it and that the idea of an investigation meeting was making him feel ill [145]. He asked if he could be accompanied by Sue Hughes, informing them that she was aware of his anxiety disorder that he had lived with for several years.

Investigation

25. An investigation commenced on 9 July 2020 to establish whether the Claimant's conduct during the incident with the YP on 11 June 2020 was appropriate and in line with the Respondent's policies, codes of conduct and expectations. Peter Watt, the Registered Manager for another of the Respondent's homes within the Outcomes Group, was appointed investigator.
26. Essentially his investigation took the form of:
- a. Reviewing the Records of Conversations that had been taken on the day in question, and on 23 June 2020;
 - b. over the course of 9 and 10 July 2020, interviewing the Claimant and some 18 members of staff;
 - c. Reviewing the YP's:
 - i. Risk assessment;
 - ii. Positive Behaviour Support Plan;
 - iii. Communication Profile;
 - iv. Care Plan;
 - v. LT Personal Plan;
 - vi. The incident Report, Accident Form and RIDDOR Report; and
 - vii. Email exchanges between the Claimant.
27. By way of relevant information regarding this particular YP, they had began their placement at the Respondent in February 2018 and were approaching their 18th birthday on the day of the incident. They lived with a particular genetic condition, had a mood and anxiety disorder and an intellectual impairment, having a cognitive age of around 8-10 years of age. They weighed around 20 stone and were over 6 feet in height.
28. The YP's risk assessment form, from February 2018 [60], indicated four discrete hazards, which included:
- a. Aggressive/violent behaviour (section 1);
 - b. Use of weapons (Section 2); and
 - c. Verbal abuse (section 4).

29. This indicated that YP had a history of displaying challenging behaviours including violent and aggressive behaviour and absconding, picking up heavy or sharp objects and using them as a weapon (as recently as March 2020) and swearing and threatening staff.
30. The risk assessment form also set out what were referred to as 'Control Measures' to manage the young person's behaviour which included measures of monitoring, using humour, distraction, giving them time to process and to calm before giving further instruction. Staff were informed that the YP could try and push staff to get angry with him but that staff were to stay calm at all times and to give them space.
31. YP's Communication Profile [71] confirmed that they understood simple sentences but needed time and support to understand more complex language and that they sometimes struggled to effectively communicate to staff if they were unhappy or finding something difficult.
32. The person's PBSP [67] also reflected their particular challenging behaviours in detail and proactive strategies were detailed for both the physical and interactive environment [68].

Investigation Report

33. An investigation report was prepared and completed by the investigating officer which is contained in the Bundle at [177]. The Report set out the steps that the investigating officer had taken in his investigation.
34. Section 4 of the Report set out his Conclusions and Recommendations He concluded that :
 - a. The Claimant had failed to follow agreed plans to de-escalate a young person and that the Claimant was the aggressor, resulting in threatening, intimidating behaviour aimed at a young person;
 - b. the balance of probability following the investigation was that the Claimant physically pushed a young person which could constitute an assault and misconduct/gross-misconduct in the workplace.
 - c. Without doubt, the Claimant continued to shout at the young person and used obscene language shouting "*That's Bollocks, [YP]*".

Disciplinary Hearing

35. The Claimant was invited to a disciplinary hearing by way of letter dated 15 July 2020 [205]. Due to the Covid-19 restrictions it was proposed that the disciplinary meeting would take place remotely via Microsoft Teams and the Claimant was assured that this would not affect his statutory rights to be accompanied. The hearing was scheduled to take place on the following Friday 17 July 2020.
36. The letter set out the allegations as follows:

“It is alleged that you failed to follow the positive behaviour support plan for the young person who you were involved in an incident with on 11 June 2020.

It is alleged that your behaviour with the young person was aggressive, intimidating and threatening towards the young person during the incident that took place on 11 June 2020.

It is alleged that you used in-appropriate language when shouting at the young person during the incident on 11 June 2020.

It is alleged that you did not use a safe technique whilst restraining a young person on 11 June 2020.”

37. Enclosed was the disciplinary pack of 49 pieces of documentation that would be referred to at the hearing [206] which included:
- a. Photographs;
 - b. the initial incident report completed on 11 June 2020;
 - c. Records of Conversation taken on 11 June from staff witnessing elements of the incident;
 - d. Records of Conversation of Cody Hughes and Ellie Gillgrass taken on 23 June 2020;
 - e. Riddor report;
 - f. Accident Report;
 - g. Emails exchanged with the Claimant;
 - h. Handover documents and Day Liaison Book;
 - i. Risk Assessment;
 - j. Communication Profile;
 - k. PBSP;
 - l. Statement submitted by the Claimant on 19 July 2020;
 - m. Further witness meeting notes of 9 July and 10 July 2020;
 - n. A copy of the disciplinary policy;
 - o. The Investigation Report.
38. The Claimant was advised that John Stryker, Assistant Headteacher at another of the specialist schools within the Outcomes Group, would chair the disciplinary. The Claimant was advised of his right to be accompanied and that if proven the allegations could constitute gross misconduct and could result in summary dismissal in accordance with the applicable disciplinary policy.
39. The Claimant requested a postponement to enable him to meet with his union representative to go through the disciplinary pack. The Respondent agreed and the disciplinary hearing was reconvened for the following Friday 24 July 2020. Further signed copies of minutes of the meetings with various witnesses were also provided [208].

40. The hearing took place on 24 July 2020 and the Claimant was accompanied by his GMB union representative. Notes were taken by an administrator. A copy of those notes was contained in the Bundle [261] and whilst the notes were not signed by the Claimant, the Claimant was unable to confirm on cross-examination that they were inaccurate. I therefore accepted them as an accurate record of the matters discussed.
41. The Claimant was advised of the outcome by way of letter dated 31 July 2020 [276]. The letter is detailed and really needs to be reproduced in full to do it justice. John Stryker sets out his findings in relation to the incident and his conclusions. The Tribunal incorporates its contents by reference but it might be summarised as follows:
- a. The four allegations were upheld for the reasons stated within the body of the letter
 - b. The mitigation that had been raised by the Claimant was addressed and these mitigation issues related to:
 - i. Potential breach of the GDPR in that the disciplinary pack was hand-delivered;
 - ii. The Records of Conversation and statements taken for the investigation were unsigned
42. John Stryker concluded that the appropriate outcome was dismissal for gross misconduct and that the dismissal took effect from the date of the letter. The Claimant was provided with a right of appeal.
43. On 4 August 2020 the Claimant appealed the decision by way of email [342]. In that email he set out the grounds of his appeal as follows, that:
- a. the sanction of dismissal was excessive;
 - b. several Records of Conversations were not signed by staff and that the timings of the Records of Conversations could not be a true record of events;
 - c. Allegations 1, 2 and 4 were 'evidentially inconsistent'; and
 - d. The Claimant wished to introduce new evidence from witnesses.
44. Clive Coombes, Head of Service, was appointed as disciplinary appeal manager and the Claimant was invited to an appeal hearing on 19 August 2020 [343] and again it was suggested that due to the Covid-19 pandemic, that the meeting take place via Microsoft Teams or if the Claimant wished, written submissions.
45. The meeting took place via Teams as agreed and the Claimant was again accompanied by his GMB union representative. Jill Clark, HR Adviser at Outcomes Group, provided HR support to Clive Coombes and acted as note-taker at the appeal hearing. There were difficulties with the Claimant's audio which led to the Claimant becoming distressed and the hearing was adjourned to 21 August 2020 [349].

46. The Claimant did not attend the re-convened appeal hearing. His union representative did, and confirmed that the Claimant was unable to attend due to anxiety and confirmed that the Claimant would wish for his appeal to be considered on the basis of written submissions that had been sent [287-341]. Later that day, the Claimant's representative email in with a summary of his appeal and points on mitigation which included the following points:
- a. Two witnesses had included criticism of the Claimant's relationship with a work colleague;
 - b. Two witnesses had not been asked to give a statement to the investigating officer;
 - c. A witness, when being interviewed, when trying to give words of support in relation to the Claimant, was '*made to feel irrelevant, bullied and treated as if she were telling untruths*'; and
 - d. The Records of Conversation were not signed off.
47. The email also included further points in mitigation which related to matters relating to:
- a. the individual physical and behavioural characteristics of YP;
 - b. the Claimant's exemplary employment history; and
 - c. the Claimant's anxiety.
48. The appeal was considered on the papers and on 2 September 2020, Clive Coombs set out his decision in writing. Whilst Mr Coombs has not provided evidence to this Tribunal, no longer being employed by the Respondent, I found that the contents of the letter would likely reflect the decision that he made which was that the appeal was not upheld for reasons provided within that letter [352]. The letter confirmed the documentation that had been reviewed and deals specifically with the four grounds of appeal including in particular:
- a. The further statements of Ellie Gillgrass and Cody Hughes [353];
 - b. That the Records of Conversation were not true [354];
 - c. Inconsistencies in the allegations [354]; and
 - d. Mitigation [359].
49. On 1 October 2020 the Claimant entered ACAS Early Conciliation ("EC") and the EC Certificate was issued on 1 November 2020 and on 30 November 2020, the Claimant issued his ET1 claiming unfair dismissal [9].

Submissions

50. The Respondent's Counsel provided a Case Summary at the outset of the hearing and the Claimant's Counsel provided written Closing Submissions on the legal provisions applicable in this case. The Respondent's Counsel confirmed that the legal position was agreed and as set out in those Closing Submissions which are incorporated by reference.
51. Both Counsel had the opportunity to provide additional oral submissions.

Issues and Law

52. The relevant provisions on unfair dismissal are set out in s.98 Employment Rights Act 1996 which provides as follows:

s98 Employment Rights Act 1996

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

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

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

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

(b) relates to the conduct of the employee,

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

53. With unfair dismissal, the Tribunal first has to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal. In this case, it is conceded by the Claimant that he was dismissed for misconduct and that was a potentially fair reason for dismissal.

54. The Tribunal then has to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances (including the respondent's size and administrative resources). This should be determined in accordance with equity and the substantial merits of the case and the burden of proof in this regard is neutral.

55. In considering the question of reasonableness, if I concluded that conduct was the reason for dismissal, then I had to bear in mind the very well-established authorities of BHS v Burchell [1980] ICR 303 EAT, Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; the joined appeals of Foley v Post Office and Midland Bank plc v Madden [2000] IRLR CA and Sainsbury's Supermarkets Limited v Hitt [2003] ICLR 23.

56. In short this requires me to:

- a. focus my enquiry on whether there was a reasonable basis for the respondent's belief and test the reasonableness of the investigation;
- b. I should not put myself in the position of the Respondent and test the reasonableness of their actions by reference to what I, myself, would have done in the same or similar circumstances.
- c. In particular, it is not for me to weigh up the evidence that was before this Respondent at the time of its decision to dismiss (or even indeed the evidence that was before me at the hearing,) and substitute my own conclusions as if I were conducting the process myself. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees, and it is instead my function to determine whether, in the circumstances, this Respondent's decision to dismiss this claimant fell within that band.
- d. I also need to consider whether the sanction of dismissal was appropriate in the circumstances bearing in mind requirement for me to apply the range of reasonable responses test set.

Conclusions

57. As the Claimant has conceded the reason for dismissal is misconduct and that this is a potentially fair reason for dismissal, I move on to my assessment of overall fairness. In considering the section 98(4) ERA 1996 test in the context of **BHS v Burchell** requirements outlined earlier, I deal with these in reverse order, dealing first with the investigation before moving on to the grounds and the belief.

Investigation

58. With regard to the investigation, the range of reasonable responses test applies to the scope of the investigation undertaken by the employer, as it does to the dismissal decision as established in **Sainsbury plc v Hitt**.

59. I was ultimately satisfied that the investigation, in terms of the overall processes adopted by the Respondent, fell within the range of reasonable responses and was a sufficiently independent investigation.

60. Whilst the Claimant's representative has conceded that the Claimant has some hurdle to jump to challenge the reasonableness of the investigation, he does complain that the failure to interview Cody Hughes and Eli Gillgrass on 11 June 2020 led to unfairness in the investigation; that this omission was significant as these witnesses had a good view of the incident.

61. Whilst I accepted that John Stryker had not made specific reference to the evidence of these two individuals, within the body of his dismissal letter and reasons for dismissing the Claimant, I did not consider this a persuasive argument. Rather I concluded that this evidence had been taken into account by him as:
- a. The witnesses had been interviewed on 23 June 2020 [144] and this Record of Conversation was included within the disciplinary pack;
 - b. I accepted John Stryker's live evidence, that he had taken into account their Records of Conversation, provided prior to the disciplinary hearing and included in the disciplinary pack; and
 - c. Whilst the dismissal letter had not included reference to their evidence, likewise it did not include reference to the investigation evidence of many of the witnesses; and
 - d. The Appeal officer dealt with the additional evidence from these two witnesses at the appeal stage as reflected in his appeal outcome letter of 2 September 2020 [352].
62. I did not consider that the failure to take further statements from them undermined the fairness of his investigation more generally as a result.
63. The Claimant also submitted that John Stryker appeared to have extrapolated wider concerns regarding the Claimant's practice and attitude more generally, without undertaking an investigation into the Claimant's wider practice/attitude and/or giving the Claimant an opportunity to address those wider concerns. I did not conclude that this had been the case for the following reasons:
- a. John Stryker was clear in his live evidence that he imposed the sanction of dismissal because of the Claimant's conduct on 11 June 2020 and not because of any wider concerns regarding the Claimant's practice/attitude.
 - b. In response to a question on cross-examination he confirmed that his decision was based on the incident of 11 June 2020 only and that he had no evidence of any more general failures of the Claimant. He was emphatic on this point and I accepted that evidence.
64. In conclusion I did consider that the Respondent had carried out a fair and reasonable investigation which would reach the standard required of a reasonable employer.

Fair hearing

65. Turning to the issue of whether the Claimant had a fair hearing, I also deal with whether the Respondent's belief was held on reasonable grounds. I concluded that the Claimant had received a fair hearing and that the Respondent's belief of the Claimant's misconduct was held on reasonable grounds.
66. I did not reach any conclusion on the evidence before me, and there were no persuasive arguments, that the policies and procedures that were in place to manage the behaviours of young people resident at the Respondent's home, whether by way of the PBSP or otherwise, were contradictory or led to any

unfairness in the hearing itself or in relation to the conclusions of the dismissing officer to the allegations more generally.

67. I concluded that the three findings made by Mr Stryker in relation to the allegation that the Claimant had failed to follow the PBSP, and his further conclusions that the Claimant did not provide the young person with space, had encroached on the person's space in an aggressive manner; and that the Claimant's actions contributed to the person going into crisis were not unreasonable.
68. With regard to the evidence that the Claimant had been aggressive, intimidating and threatening towards the young person, I concluded that the dismissing officer had evidence from a number of independent witnesses, including co-workers of the Claimant, witnesses that had seen the Claimant when interacting with the YP at the point in time that his cap was flicked and the Claimant was punched. Despite the Claimant's denial and whilst there was some contradictory evidence, in particular from Mr Bell who had also dealt directly with the YP that day, John Stryker did have evidence before him, by way of investigation statements, to reach the reasonable conclusion that the Claimant had shouted at, and had been aggressive towards, YP.
69. Further, I concluded that it was reasonable for Mr Stryker not to place as much weight on the statement from Mr Bell as other witnesses, on the basis given in his responses to cross-examination: that due to the nature of the incident, an incident that Mr Bell had been involved in, Mr Bell's recall may not have been as accurate as other witnesses, and his viewpoint may have been impacted by his own feelings of stress and anxiety.
70. I concluded that it was reasonable for him to reach findings on whether the Claimant had been aggressive towards YP on the balance of probabilities based on the range of statements (Mr Stryker's evidence was that it was approximately 10 in total) which supported his conclusion that the Claimant showed aggression and confrontation.
71. With regard to the use of inappropriate language, whilst I accepted that the Claimant had not sought at any time to desist from swearing at the YP, and it was not in dispute that the Claimant had just been assaulted and was shocked, in the circumstances of this case, where an employee is employed to look after and care for these children and young people who are some of the most vulnerable members of our society, and where it is a known risk that such behaviours can be triggered from the young person in their care, the dismissing officer was not unreasonable in concluding that the Claimant's swearing, in response to an apology given by the YP for their own behaviour, was an issue of misconduct.
72. For the avoidance of doubt, I did not conclude that the swearing in isolation was the reason for dismissal in any event but simply part of the overall conduct of the Claimant which led to his dismissal.
73. Finally, dealing with the final allegation, that the Claimant failed to use a safe technique whilst restraining YP, I accepted that within the dismissal letter, the dismissing officer recognized that that the Claimant was not the person who had not been responsible for taking the YP to the floor and did not address his findings in relation to the Claimant's involvement in the restraint, instead focusing on the

steps that had led to YP being restrained and the Claimant's conduct immediately after releasing the YP.

74. Simply on the basis of his findings, as reflected in the dismissal letter, I concluded that it was not reasonable for Mr Stryker to uphold the fourth allegation as drafted. In reaching that particular conclusion however, it does not follow that I concluded that the Respondent has not made out reasonable grounds for belief in the gross misconduct. I accepted Mr Stryker's evidence, given on cross-examination that it was his belief and view that the Claimant should not have been engaging in this physical restraint at all and that his dismissal letter in this regard was less than clear.
75. In those circumstances I am satisfied that reasonable grounds had been made out for the belief in the gross misconduct

Genuine Belief

76. Finally, on the issue of genuineness of the Respondent's belief, did the Respondent reasonably believe that the Claimant committed the misconduct, I find that they did.
77. I concluded that the I was therefore satisfied in overall terms that the **BHS v Burchell** test was made out and that there were grounds following a reasonable investigation to lead to a genuine belief that the Claimant had been guilty of the gross misconduct alleged.

Procedure Generally

78. As regards procedure generally, I find that the procedure followed was reasonable. The Claimant was notified in a letter in advance of the allegations against him; he was advised he could bring a companion; a hearing was held at which he was able to put his case; he was informed of the outcome and his right of appeal.
79. With regard to the appeal, whilst it is unfortunate that the appeal manager has not been available to give live evidence to this Tribunal, I have not drawn any inference from his lack of attendance accepting that he has now left the employment of the Respondent and the Respondent had been unable to contact him to assist.
80. Having reviewed the appeal outcome letter I concluded that the appeal manager did consider the documentation and mitigation points put on behalf of the Claimant and concluded that there was no procedural failing or unfairness resulting from the management of the appeal.

Sanction

81. Finally the question is whether dismissal was a fair sanction; Could a reasonable employer have decided to dismiss for the conduct alleged?
82. Both parties agree that context is all. Although the Claimant had a long record without any previous warnings, the allegations were very serious, even accounting for the lack of findings from John Stryker to underpin his conclusion in relation to

the fourth allegation. Bearing in mind the circumstances of this case, where the Claimant is employed to look after and care for some of the most vulnerable members of our society, and where it is a known risk that aggressive and often violent behaviours can be triggered from the young people in their care, the dismissing officer was not unreasonable in dismissing the Claimant for the Claimant's conduct on 11 June 2020.

83. Taking into account the need to consider the range of reasonable responses test as set out in **Iceland Frozen Foods v Jones**, it could not be said that dismissal was outside the range of reasonable responses.
84. In overall terms therefore my conclusion is that the dismissal was not unfair and the Claimant's claim for unfair dismissal should be dismissed.

Employment Judge R Brace
Date 7 July 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 12 July 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche