



EMPLOYMENT TRIBUNALS

Claimant

Mrs P Kaddu

AND

Respondent

Unified Care Ltd

HEARD AT:

Reading Tribunal via CVP

ON: 11 & 12 November 2021

BEFORE:

Employment Judge Douse (Sitting alone)

Representation

For Claimant: Mr K.Sonaike, Counsel

For Respondent: Mr N. Decker, Legal Consultant

RESERVED JUDGMENT

1. The Claimant's claim that she was unfairly dismissed is not well-founded and accordingly fails
2. The Claimant's claim for notice pay is not well-founded and accordingly fails
3. The Claimant's claim for holiday partially succeeds
4. The Respondent is to pay the Claimant £17.49.

REASONS

Claims and issues

1. The Claimant, by way of a claim form dated 2 April 2021, brought complaints of unfair dismissal, notice pay, and unpaid annual leave.
2. The issues to be determined by me were:

Unfair dismissal

2.1 Did the respondent have a potentially fair reason for dismissing the claimant? The respondent relies on 'conduct' as being the potentially fair reason for the claimant's dismissal, pursuant to s. 98(2)(b) ERA 1996.

2.2 If so, was the respondent's decision to dismiss the claimant reasonable in all of the circumstances of the case, pursuant to s. 98(4) ERA 1996?

2.3 When considering reasonableness of the dismissal for 'conduct' under s.98(4) ERA 1996, the tribunal must consider whether the Burchell test been satisfied, as follows:

2.3.1 Did the respondent believe that the claimant was guilty of the misconduct alleged?

2.3.2 If so, did the respondent have reasonable grounds upon which to sustain that belief?

2.3.3 Did the respondent carry out such investigation as was reasonable in all the circumstances of the case?

2.4 Was the claimant's dismissal substantively fair?

2.5 Was the claimant's dismissal procedurally fair?

2.6 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: ***Polkey v AE Dayton Services Ltd [1987] UKHL 8.***

2.7 would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

2.8 did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Breach of contract - notice pay

2.9 Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct?

2.9.1 if not, how much notice was the Claimant entitled to?

Unpaid annual leave – Working Time Regulations

- 2.10 When the claimant's employment came to an end, was she paid all of the compensation s/he was entitled to under regulation 14 of the Working Time Regulations 1998?

Procedure, documents and evidence heard

3. The case was listed for a 2 day hearing via CVP.
4. On 9 November 2021, by way of an email to the Tribunal, the Claimant requested that the hearing be adjourned as she was without legal representation and she wanted time to find some to represent her. She had been represented up until 20 October 2021.
5. On 10 November 2021, the day before the hearing, the Respondent's representative requested an adjournment on the grounds that the Claimant's lack of representative had impacted on exchange of witness statements and compiling a joint bundle of documents.
6. The adjournment applications were refused by EJ Tobin on 10 November 2021 – the parties were advised that there had been ample time between case management orders and the hearing to resolve these issues.
7. In any event, the Claimant was represented by Mr Decker by the next morning.
8. The Respondent provided a link to an electronic bundle by email after 5pm on 10 November 2021. My attention was taken to a number of these documents as part of me hearing evidence - I refer to this bundle by reference to the relevant page number.
9. To allow the Tribunal time for reading, and for Mr Decker to take instructions from the Claimant, I allocated the morning for reading, determining that evidence would start at 2pm on the first day.
10. To assist Mr Decker further, Mr Sonaiké agreed to reverse the usual order of evidence by conducting his cross-examination of the Claimant first.
11. I heard evidence from the Claimant on her own behalf, and from Mr Shamir Islam and Robert Joseph on behalf of the Respondent.
12. Both of the Respondent's witnesses gave evidence by way of written witness statements that I read in advance of them giving oral evidence.
13. All witnesses were cross-examined.
14. The Claimant was accompanied by a friend on each day, to provide general emotional support. I agreed that we would have regular breaks at convenient moments, and when requested by the Claimant.
15. Due to lack of time, rather than making oral closing submissions the representatives were asked to send written submissions by email to the Tribunal

by 24 November 2021. Mr Sonaike provided written closing submissions in this way.

16. Mr Decker, by way of an email at 1.18pm on 10 December 2021, requested a 1 week extension as he could not provide submissions because his laptop had been sent for repair. Due to administrative email issues, my response that the Claimant could have until 5pm on 17 December 2021 to provide closing submissions was not sent. In any event, nothing was received from Mr Decker prior to the drafting of this judgment.

Findings of fact

17. From the evidence and submissions, I made the following findings of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the witnesses in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
18. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principal findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.
19. The Respondent is a care provider, regulated by the Care Quality Commission (CQC), providing a range of services including supported living.
20. The Claimant was employed as a Support Worker from August 2016, and worked at the Respondent's Vincent Villas site.
21. The purpose of the Claimant's role was included in her job description as:

"...to ensure that service users are provided with a safe, caring and stable environment." [46].
22. This also said that she should:

"have a working knowledge of, and adhere to, all policies, procedures and guidelines" [48].
23. At the time of the matters relevant to this case, the Claimant had a current written warning on her file – this was issued on 10 August 2020 for a conduct matter.

Safeguarding matter

24. The Respondent has a 'Safeguarding Policy', which states:

"All staff members (including bank, agency staff and volunteers) have a responsibility to immediately report any suspected, alleged or actual abuse or harm and assist with any subsequent investigation" [62]

25. The Respondent has an 'Abuse Policy' [208 – 213], which says:

"all our care staff are in a position of trust and any betrayal of this trust will be taken most seriously. Therefore, any member of staff suspected of abuse may be subject to disciplinary procedures. All staff have a duty to report and failure to do so is a serious abdication of responsibility and will also incur disciplinary action" [pg 209]

And

"...all staff have a duty to make known their suspicious of abuse. Failure to do so is a failure in our duty of care. Remember, an individual may not be able to alert anyone themselves, perhaps by a failure to understand that the activity is abuse or through poor communication or through fear" [210]

26. The Claimant confirmed in her evidence that she had seen and was aware of the policies, and had received relevant safeguarding training. On a number of occasions she stated that certain policies weren't within the staff handbook that she had with her, but she confirmed a general understanding of her responsibilities, and additionally referenced her safeguarding knowledge from a separate role within the community.
27. On 17 August 2020, the Claimant was on an 8am – 3pm shift, but as other staff members were running late, she ended up working later.
28. Around 4.30pm that day, the Claimant and another staff member (RD) took a service user (ST) and another service user (SM) to do their supermarket shopping.
29. After the shopping trip, everyone got into a taxi to travel home. The Claimant was in the back row, whilst RD got into the row behind the driver with the 2 service users. RD told ST to put her seatbelt on, which she didn't like so she hit him. RD then hit ST back, and continued to hit for 7-10 times even when the Claimant told him to stop. The Claimant told the Tribunal that there was a policy that staff shouldn't hit service users even if they attacked them – she knew that RD's actions were against the policy.
30. The taxi driver wouldn't take them after this, so they got out and took a bus home. After calming ST down, and putting the shopping away, the Claimant left at around 6pm.
31. The Claimant left work on 17 August without reporting the incident – she said that it was RD's responsibility to report it.

32. On 18 August the Claimant was not working. She did not contact anyone at the Respondent to report the incident from the day before.
33. On 19 August 2020, the Claimant was at work and had a meeting with Prem Radhakisson about an unrelated incident she had reported previously, about another service user wearing inappropriate clothing outside. At the end of this meeting, the Claimant mentioned the incident between RD and ST.
34. On 20 August 2020, the Claimant was working in the afternoon. On that day she also mentioned the incident to the Deputy Manager, Denise Bone.
35. At some point after 20 August, the Claimant says she noticed bruises on ST's arm – she says that she recorded this on the Respondent's online system 'Nourish', but that this later vanished. She also says that she recorded this in the written communications book. The Claimant did not fill in a body map showing where the bruises she had seen were.
36. On 3 September, the Claimant provided a written incident report [231].
37. On 11 September, Prem Radhakisson of the Respondent held an investigation into the incident, which the Claimant attended. She advised that she hadn't made a report at the time because her shift was over.

PPE matter

38. In September 2020, the Respondent introduced a PPE policy, which stated:

“All staff must wear PPE, including face masks at all times when in homes/services/vehicles in line with the guidance on when to use PPE, including in ancillary spaces such as offices in care homes.”

“Although a staff member may have a medical condition, in order to comply with health and safety, there is still a requirement for the worker to wear a mask, there can be no exceptions. The Company will need some medical evidence from the employee's GP that confirms that they cannot wear a face mask due to their medical condition. On receipt of this evidence the company will allow the staff member to be off and claim SSP for the duration of the time they are entitled to SSP”

“If the employee still refuses to wear a face mask, then inform the employee that they cannot continue to work in service without wearing a face mask.”

39. The Claimant was asked to sign the policy on 25 September 2020, but she did not do this until 28 September.
40. The Claimant was concerned about wearing a mask, because her mental health issues meant it affected her breathing. She spoke to her GP who sent her a link to download an exemption card. This did not satisfy the requirement of medical evidence, and the Claimant didn't ask to go onto SSP.

41. After speaking to her GP, the Claimant confirmed she could wear a face shield and signed the Respondent's policy.
42. The Respondent provided the Claimant with a face shield to wear. The Claimant wore this for a couple of days, stating that she had the same issues with the shield as with a mask.
43. The Claimant used a scarf around her mouth and nose, instead of a mask or face shield, which was often hanging around her neck. She said she felt hot with the scarf on, it steamed up her glasses, and she would move her scarf down when talking as she could speak more clearly. The Claimant believed that a scarf was appropriate PPE, and continued to assert this during oral evidence.
44. Various staff members gave accounts to the Respondent of occasions where the Claimant failed to wear PPE.
45. On 30 October Shamir Islam attended the property, and witnessed the Claimant using her scarf instead of shield. He took a video of this, and a photograph still was produced in the bundle.
46. Prem Radhakisson started an investigation into this allegation, and on 5 November he held an investigation meeting with the Claimant.

Disciplinary process

47. The Respondent has a disciplinary policy, including examples of gross misconduct [54], which says:
 - ...f) Breach of health and safety rules that endanger the lives of, or may cause serious injury to employees or any other person*
 - g) Maltreatment of service users, by neglect, omission and/or commission*
 - h) Failure to report an incidence of abuse, or suspected abuse of a service user"*
48. The Respondent wrote to the Claimant on 12 November 2020, inviting her to an in person disciplinary meeting on 26 November 2020, to consider allegations of:
 - 48.1 That she had failed to report the incident on 17th August in line with the company's safeguarding procedures
 - 48.2 That she had not work approved PPE face covering on various days whilst at work
49. On 25 November, the Claimant advised that she couldn't attend and provided a 'Statement of Fitness for Work' from her GP, covering 23 November 2020 to 7 December 2020.
50. The Respondent replied on 2 December 2020, informing that the disciplinary meeting was rescheduled for 16 December 2020. This time the Claimant was

offered a choice of attending in person or via 'Zoom', or she could provide a written statement/answer written questions instead.

51. The Claimant provided a further 'Statement of Fitness for Work' from 9 December 2020.
52. The Claimant did not provide a written statement ahead of the disciplinary meeting, and she did not attend the hearing.
53. On 16 December, the meeting was chaired by Robert Joseph – an independent professional with experience of both the care sector and human resources. He called the Claimant at the start of the meeting, and left her a voicemail asking her to call back.
54. The meeting went ahead without the Claimant. The allegations were considered and minutes recorded [300-302].
55. Mr Joseph concluded that Ms Kaddu had failed to report an incident of alleged abuse at the time that it occurred, although she reported it belatedly, and that she had failed to wear PPE, in breach of the relevant policies.
56. It was decided that the Claimant would be dismissed as both of the proven allegations amounted to gross misconduct - this was confirmed in writing to her on 19 December 2020 [303].
57. The dismissal letter also advised the Claimant of her right to appeal – she did not appeal the decision. She did not submit an appeal.

Holiday pay

58. The Respondent's annual leave period runs from 1 January to 31 December each year, and the Claimant was entitled to 5.6 weeks holiday including public holidays.
59. The Claimant confirmed that she had used all of her 2019 entitlement, and was only concerned about her 2020 annual leave.
60. The Claimant's annual leave entitlement was calculated as 196 hours – based on a 35 hour working week. She had used 14 hours in February 2020 and 77 hours across July and August 2020 - a total of 91 hours [305].
61. The Claimant was dismissed with effect from 19th December 2020, so her pro rata entitlement to holiday pay was 190 hours. She had 99 hours owing at the time of dismissal.
62. The Claimant's payslips [312] show she was paid for 97 hours after the contract was terminated:

62.1 £741.2 (gross) for 85 hours holiday, on 31 December 2020

62.2 £106.92 (gross) for 12 hours holiday. on 31 May 2021

The law

Unfair dismissal – ss. 94 & 98 ERA 1996

63. An employee has the right not to be unfairly dismissed by their employer (s. 94 ERA 1996). It is well established that, in order to successfully defend a claim of unfair dismissal, an employer must be able to show that: (a) there was a fair reason for the dismissal, and (b) the decision to dismiss was reasonable having regard to all the circumstances of the case (ss. 98(1), 98(2) and 98(4) ERA 1996).
64. In ***British Homestores v Burchell [1978] IRLR 379***, the EAT stated a dismissal for reasons relating to conduct will only be fair if:
- (i) The employer believed the employee to be guilty of the misconduct alleged;
 - (ii) The employer had reasonable grounds for sustaining that belief;
 - (iii) At the time the employer held that belief, it had carried out as much investigation as was reasonable.
65. Although the EAT in *Burchell* said it was for the employer to establish that the test was satisfied, it has subsequently been clarified that the burden is neither on the employer or the employee, but is “neutral” (***Boys and Girls Welfare Society v McDonald [1996] IRLR 129 EAT***).
66. When considering whether an employer had a genuine belief based on reasonable grounds, a tribunal must inevitably have regard to the material on which the employer’s purported belief was based. However, the question is not whether the tribunal would have believed the employee to be guilty based on that material, but whether the employer acted reasonably in forming that belief. The question of whether the employer acted reasonably is to be judged objectively.
67. The tribunal must decide whether the employer’s decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (***Iceland Frozen Foods v Jones [1982] IRLR 439***). The range of reasonable responses test applies both to the decision to dismiss and to the investigation (***Sainsbury’s Supermarkets Ltd v Hitt [1003] IRLR 23***). This means that the tribunal has to decide whether the investigation was reasonable, not whether it would have investigated things differently.
68. For the purposes of this test, it is irrelevant whether or not the tribunal would have dismissed the employee if it had been in the employer’s shoes: the tribunal must not “substitute its view” for that of the employer (***Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827***).

Conclusions

69. Having regard to the findings of relevant facts, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Did the respondent have a potentially fair reason for dismissing the claimant?

70. The gross misconduct identified by the Respondent was a potentially fair reason for dismissal. They have satisfied the burden of showing a potentially fair reason.

71. For the avoidance of doubt, even if the gross misconduct had been incorrectly characterised, the specific conduct and existence of an active written warning also form potentially fair reasons.

Was the respondent's decision to dismiss the claimant reasonable in all of the circumstances of the case?

Did the respondent believe that the claimant was guilty of the misconduct alleged?

72. I am satisfied there was a genuine belief that the Claimant had committed the conduct – specifically gross misconduct – alleged, and that this was in the mind of the Respondent during the disciplinary process, including at the point of dismissal.

If so, did the respondent have reasonable grounds upon which to sustain that belief?

73. Plainly there were reasonable grounds for the conclusion that the claimant was guilty of misconduct.

74. The Respondent had a variety of statements regarding both the incident with the service user and repeated failure to wear PPE.

75. In the investigation meeting, the Claimant provided reasons for not following each of the policies, but did not dispute that the relevant incidents had occurred.

Did the respondent carry out such investigation as was reasonable in all the circumstances of the case?

76. I am satisfied that the respondent overall carried out such investigation into the matter as was reasonable.

77. The Claimant was aware of the allegations, had the material on which the Respondent relied on and attended an investigation meeting.

78. She was also invited to attend a disciplinary meeting, and offered an appeal.

Was the claimant's dismissal procedurally fair?

79. The only potential issue raised on behalf of the Claimant was that she had not participated in the disciplinary hearing, as she was too unwell to do so. This was the case for the original disciplinary hearing date.
80. Although the Claimant did have a 'fit certificate' that said she was not well enough to work for the period when the second disciplinary date fell, this does not automatically extend to attending disciplinary meetings. She had not specifically said that she was unable to attend, and/or provide evidence to suggest this. She had also been given a variety of other options that would allow participation even if physical attendance was not possible. The Claimant did not make use of the alternative suggestions.
81. I find that a fair procedure was followed in the circumstances, which complied with both the requirements of the ACAS Code and the general requirements of fairness. The Claimant was called to an investigation, she had the opportunity to attend a disciplinary meeting, and was informed of her right to be accompanied. The Respondent invited the Claimant to meetings at every stage of the process, gave her the right to be accompanied, provided her with copies of the evidence, and gave her every opportunity to explain her position.
82. The Respondent was entitled to proceed with the disciplinary meeting in the Claimant's absence.

Was the claimant's dismissal substantively fair?

83. Having reasonably concluded that there had been gross misconduct, the respondent was within the band of reasonable responses in deciding to dismiss the claimant, rather than for example imposing a lesser disciplinary punishment such as a warning and recommend some form of retraining.
84. Given the vulnerability of the respondent's residents, the statutory registration scheme, and safeguarding requirements both within the respondent's business and generally, I find that in these circumstances dismissal was within the band of responses reasonably open to the respondent when faced with these facts.
85. Accordingly, I find that bearing in mind the size and administrative resources of this employer the claimant's dismissal was fair and reasonable in all the circumstances of the case.

Notice pay

Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct?

86. Having concluded above that the Claimant did an act of gross misconduct, it follows that the Respondent was entitled to dismiss without notice. The Claimant was not entitled to any notice pay.

Holiday pay

When the claimant's employment came to an end, was she paid all of the compensation she was entitled to under regulation 14 of the Working Time Regulations 1998?

87. The Claimant had accrued, but not used 99 hours of leave at the time her employment ended. Between then and the hearing she was paid for 97 hours. Therefore, she was paid for 2 less hours than she was entitled to. This was acknowledged on behalf of the Respondent in closing submissions, and they undertook to pay the outstanding amount.

88. As the claim for unfair dismissal fails, and the Respondent has already undertaken to pay the 2 hours holiday pay, the provisional remedy hearing is cancelled.

Employment Judge K Douse

Dated: ...2 March 2022.....

Sent to the parties on: 3 March 2022

For the Tribunal Office