



# EMPLOYMENT TRIBUNALS

**Claimant** A

**Respondent** Secretary of State for Justice

**Heard at:** Cardiff

**On:** 18 July 2017

**Before:** Employment Judge S Davies

## **Representation**

Claimant: Ms K Gardiner, counsel

Respondent: Mr A Midgley, counsel

# RESERVED JUDGMENT

It is the judgment of the Employment Judge sitting alone that the claim is dismissed.

# REASONS

## **Issues**

1. The claimant brings a claim of unfair dismissal.
2. No issue was taken with the procedure adopted by the respondent. The challenges to fairness of dismissal were:
  - a. no evidence to support the allegation that the claimant's police caution brought, or was likely to bring, the respondent into disrepute;
  - b. the decision to dismiss was not within the range of reasonable responses;
  - c. inconsistency in treatment with colleagues.

**Hearing**

3. At the commencement of the hearing the claimant made an unopposed application under rule 50 that part of the hearing be held in private. This was on the basis that there were references in evidence to an assault within the meaning of section 11 Employment Tribunals Act 1996.
4. For the reasons given at the hearing, I granted anonymity for the claimant on a permanent basis and a restricted reporting order until the promulgation of judgment. It was also agreed that the reserved judgment and written reasons would not make reference to the locality of the prison where the claimant worked or the locality in which events took place, so as to avoid identification.
5. I heard evidence from the claimant and on behalf of the respondent from Mr G Barrett, HMP Governor and Mr K Brown Lead HMP Governor.
6. I was referred to an agreed bundle of documents and page references are to pages in the bundle.
7. Employment Judge Howden Evans attended the hearing in an observation role only.
8. There was insufficient time to deliver oral judgement on the day and this reserved decision was made in chambers on 21 July 2017.

**Background facts**

9. The claimant worked in a prison as an administrative assistant for a period of almost 10 years. Her role was not public facing and she was not responsible for direct contact with prisoners (page 109).
10. Her employment record was unblemished, until she was dismissed for gross misconduct on the basis that she accepted a police caution for assault and the risk of reputational damage for the respondent. The claimant appealed the outcome of her disciplinary; but her dismissal was upheld and her termination date confirmed as 31 October 2016.
11. The claimant was represented by her trade union throughout the disciplinary process. No issue was taken with regard to the disciplinary and dismissal process adopted by the respondent.
12. By way of mitigation the claimant provided a handwritten letter for consideration by Mr Barrett (page 68 – 74). This letter records the circumstances leading up to the claimant accepting the police caution. In it the claimant disclosed her struggles with mental health issues and alcohol dependency.
13. On 16 April 2016, the claimant was persuaded by friends, who wished to cheer her up, to go out for lunch. Having abstained from drinking throughout lunch and feeling better having spent time with friends, the claimant chose to accept an alcoholic drink bought for her. The claimant then stayed out with friends for the duration of the evening and continued to drink alcohol.
14. At the end of the night she joined a friend in a queue for a nightclub. The bouncer denied admittance to the club to the claimant and her friend. Although the claimant was unaware of it at the time, as she had turned away from the entrance

to the club, her friend slapped the bouncer. In the ensuing commotion, the claimant describes pushing the bouncer away from her friend and then swinging a punch at the bouncer with a closed fist, making connection with the end of his nose.

15. Police officers standing nearby arrested the claimant, who protested that she had acted in self-defence whilst on the way to the police station. After a night in the cells without access to her anti-depression medication, the claimant had an appointment with the duty solicitor. The solicitor reviewed the CCTV footage of the incident and the claimant was advised to accept a police caution. The claimant did so, having been assured by a police sergeant that there would be minimum likelihood of repercussions regarding her job.
16. As required (page 167), following acceptance of the police caution the claimant informed her manager, doing so immediately on a Sunday. This led to her suspension and a disciplinary investigation.
17. Prior to the dismissal meeting the claimant's trade union representative informed Mr Barrett that the claimant had been subjected to a prior assault. The representative explained that because of this assault the claimant was afraid when the bouncer verbally abused her, triggered by the previous incident. He explained this was the reason she had lashed out. In closing mitigation at the disciplinary hearing the trade union representative referred to this earlier provision of information.

### **Dismissal**

18. The claimant was charged with two allegations:
  - a. you received a police caution for an offence of assault on 17 April 2016
  - b. by your conduct on 17 April 2016 you brought discredit on the prison service which is likely to create an adverse effect on public confidence in the service
19. The claimant's dismissal letter of 22 July 2016 (page 88) recorded Mr Barrett's reasons for dismissal as:
  - a. the seriousness of the allegations and impact of your behaviour on the reputation of the organisation
  - b. I do not feel you have accepted responsibility for your actions
  - c. I am not convinced that this behaviour will not be repeated

### **Appeal**

20. On appeal Mr Brown gave his decision by way of letter 31 October 2016 (page 129 – 131) following further consideration of evidence presented by the claimant about the steps she was taking to address her personal issues. The reasons for Mr Brown upholding the decision to dismiss were recorded as:

'the penalty of dismissal is valid for the charge of gross misconduct you did not provide any new evidence at the appeal hearing to disprove the allegations. However, I acknowledge receipt of your letter stating you are seeking support for alcohol-related issues. Your police caution still stands and this is what you were disciplined for. The original finding is based on the simple caution given to you by the police and accepted by yourself for assault and I feel this evidence is valid and stands'

21. Mr Brown continued: "During the investigation, it was found that your chosen course of action having pushed the bouncer was to continue to swing and punch at the man. There is zero tolerance for violent behaviour and this action is in breach of the standards that we would expect of a civil servant..."

## **Policy**

22. The respondent's conduct and discipline policy is at page 137 onwards. Examples of gross misconduct include conviction of a criminal offence or receipt of a police caution for any offence of violence (page 164). The policy states:

"incidents that happened outside the course of your employment and working environment can be dealt with under the disciplinary procedure if it puts into question an individual's suitability for employment".

23. Examples of misconduct include bringing discredit on the service i.e. any action on or off duty which is likely to create an adverse effect on public confidence in the service (page 163).

24. The passage dealing with staff convicted of criminal offences states:

"all staff should be aware that if they are convicted of criminal offences they run the risk of dismissal or other disciplinary action. This applies to offences committed off duty, as well as those committed at work.

Although there are clear-cut cases where individuals, by their actions, clearly disqualify themselves from continued employment in the service, there are others where a fine judgement has to be made. The service will adopt a case-by-case approach. The key question is the effect that the conviction will have on the individual's employability and any future relationship of trust with NOMS.

When dismissal is being considered the following issues will be taken into account:

- a. the practical implications for the member of staff in their job;
  - b. the effect of the criminal conviction on their relationship with prisoners;
  - c. whether the conviction makes them liable to pressure or blackmail;
  - d. whether the conviction raises a fundamental doubt as to the member of staff honest (sic) or reliability under pressure;
  - e. where relevant, the member of staff's service record, mental or physical state of health, their domestic circumstances and issues raised by employee support."
25. Criminal offences and police cautions are grouped together for treatment under the policy (e.g. page 164) and it was Mr Barrett's evidence that no distinction would be made between the two in terms of application of the policy.
26. The claimant accepted in evidence that high standards were expected of staff working within the civil service.
27. The guidance at page 159 provides:
- "NOMS staff are expected to meet high standards of professional and personal conduct in order to deliver the NOMS vision. All staff are personally responsible

for their conduct. Misconduct will not be tolerated and failure to comply with the standards can lead to action which may result in dismissal from the service.”

## **Law**

### **Unfair Dismissal**

28. Section 98(2)(b) Employment Rights Act 1996 (ERA) provides that “conduct” is a potentially fair reason for dismissal. The burden of proof is on the Respondent to show the reason for dismissal.

Section 98(4) ERA provides that where the employer has shown conduct, 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.
29. **BHS v Burchell [1978] IRLR 379** sets out the three-stage test for fairness of a conduct dismissal:
- a. did the Respondent have genuine belief that the Claimant was guilty of misconduct at the time of dismissal? (burden of proof is on the Respondent)
  - b. was that belief based on reasonable grounds at the time of dismissal? (neutral burden of proof)
  - c. at the time the Respondent formed that belief on those grounds, had it carried out as much investigation as was reasonable in the circumstances? (neutral burden of proof)

### **Band of Reasonable Responses**

30. The Tribunal must consider whether or not the dismissal is a fair sanction to impose. The test is whether it was within the band of reasonable responses for the employer to treat the misconduct as a sufficient reason to dismiss **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**. The Tribunal must not substitute its own view on the action taken.

## **Conclusion**

31. Prior to setting out my conclusions, I stress that I have been mindful that I must not substitute my own view as to what the appropriate disciplinary sanction should have been. In submissions, the respondent acknowledged that the dismissal of the claimant could be viewed as harsh. I agree. I have considerable sympathy for the claimant and the impact that events of a single evening have had on her long-standing and previously unblemished career, particularly in

circumstances where she is taking appropriate steps to address her personal difficulties.

32. The claimant accepted in submissions that the **Burchell** test would only be relevant to the allegation that the claimant's conduct had brought the respondent's reputation into disrepute. The fact of the police caution was not in dispute.
33. The claimant suggested that the respondent did not have reasonable grounds to support the allegation of disrepute. She submitted that knowledge of the police caution and the claimant's employer was limited to the duty solicitor, the police dealing with the claimant on the evening in question and possibly the bouncer. There was no direct evidence of further dissemination of the information by appeal stage or even now.
34. The respondent reminded me that their policy defines misconduct as including matters that are likely to cause disrepute; it is not limited to those that actually have. The respondent submitted that the potential for reputational damage was not time bound and to require them to produce evidence of disrepute or wider dissemination of information would be to place too high a burden on them.
35. The claimant's evidence was that she had kept the information about the police caution confidential, however, she acknowledged that there was a "rumour mill" emanating from the prison. In light of the claimant acknowledging this situation and taking into account the wording of the policy, I consider that the respondent did have reasonable grounds for concern about the likelihood of reputational damage/ loss of public confidence. In reaching this conclusion I have also taken into account the wording of the policy outlined above and the claimant's acknowledgement of the requirement for high standards for civil servants.
36. Turning now to whether the decision was within the range of reasonable responses open to reasonable employer, I have already commented that the decision appears harsh. But the question is not whether I would have made that same decision; I must consider whether it falls within a reasonable range.
37. The claimant has long service and a good employment record and had expressed her remorse for her actions during the course of the disciplinary process (for example at page 55). The claimant has always accepted the factual basis leading to the police caution, albeit she provided explanation and mitigation for acting as she did. She also apologised and expressed remorse.
38. It is clear from the respondent's policy that not all criminal convictions or police cautions will inevitably lead to dismissal and that the factors at page 167 should be taken into account. Looking at those factors:
39. It seems uncontroversial that there would be no practical impediments or implication for the claimant carrying out her usual job, rather it is the effect on public confidence were the detail of her police caution to become known.
40. The claimant had no direct contact with prisoners so it seems that factor is not relevant. Similarly, it seems unlikely that the question of liability to pressure or blackmail is relevant.
41. The respondent focused on whether the conviction would raise fundamental doubt as to the claimant's honesty or reliability under pressure. The respondent submits that the claimant admitted lapses in judgement such as accepting alcohol

to drink when subject to peer pressure, in circumstances where she has an alcohol dependency problem indicates a lack of judgement.

42. Mr Barrett in his decision concluded that the claimant had not taken full responsibility for her actions and had sought to apportion some responsibility to others. Rather than reading the claimant's letter (page 68 onwards) as providing a full explanation of all the circumstances which led to the police caution, he interpreted it as the claimant providing excuses. Mr Barrett explained that he interpreted the letter as apportioning some responsibility on her friends for offering her drinks and encouraging her to stay out, on the police for not listening to her explanations that she was acting in self defence, that she was not feeling well when accepting the caution because she had not taken her medication, being poorly advised by the duty solicitor to accept the caution and being falsely reassured by police sergeant as to the ramifications for her job.
43. There is a dispute between the parties as to whether the claimant stating that she took partial responsibility at the disciplinary hearing, related solely to disparity between a police account and duty solicitor account of events on the evening (page 42 and 44) as the claimant suggested or whether, as the respondent suggested, the partial acceptance of responsibility went wider; to the way in which the trade union representative pleaded mitigation which was to the effect that had the claimant been properly advised by the duty solicitor she would never have accepted a police caution. The latter interpretation was open to Mr Barrett.
44. Mr Barrett also explained he felt that there were discrepancies in account. The claimant confirmed that the account the claimant gave to the duty solicitor at page 42 was accurate. That account does not refer to the bouncer verbally abusing the claimant. That account also refers to the claimant swinging a punch in *anger*. When questioned about this during the disciplinary meeting the claimant suggested that she had reacted in fear, as a result of the verbal abuse and with the history of serious assault in her past.
45. Having taken into account Mr Barrett's explanation and examined the relevant documents and transcript of the disciplinary meeting, I conclude that the interpretation Mr Barrett placed upon the claimant's letter of mitigation was one that could reasonably be drawn. Others may have interpreted the letter in a different light but that does not undermine Mr Barrett's own particular interpretation.
46. The claimant had no history of disciplinary action and the events of 16 April 2016 appear to have been a one-off event. Despite this Mr Barrett explained that he felt there was a risk of repetition for the reason related to reliability under pressure and poor decision-making outlined above. Again, this appears to be a permissible conclusion based on the evidence before him, although others may have taken a different view.
47. The claimant referred me to Mr Brown's reference to a 'zero tolerance' policy in respect of violence in the appeal outcome letter. It does not appear that this sentiment is echoed in the disciplinary policy and certainly page 167 suggests that a more nuanced approach is taken to criminal convictions and cautions. That said I do not consider that Mr Brown's use of this phrase undermines his decision overall. Mr Brown took time to consider the appeal outcome following a meeting on 21 September 2016; he considered a case analysis submission on behalf HR, as well as additional information about the claimant's appraisal markings and evidence of her counselling sessions and attendance at AA meetings (page 115). Mr Brown delayed his decision until consideration of this additional information.

48. Despite mitigating factors weighing in the claimant's favour such as length of service and positive steps to address her personal issues, Mr Barrett and Mr Brown considered that the allegations of gross misconduct were so serious to justify dismissal.
49. As for consistency in treatment, the claimant's trade union representative indicated that other unnamed colleagues have been treated more leniently for similar offences. The claimant confirmed in submissions that she did not suggest that any of the cases referred to in the bundle (page 222-226) were directly like-for-like comparators.
50. The claimant asserted that individuals working at the same prison as her who had committed acts of violence or accepted police cautions in the past had been treated more leniently than herself. The claimant confirmed that she knew the individual concerned at page 223, who received informal words after punching another member of staff on a night out, having claimed he acted in self defence, and the incident took place in 2010. The most recent incidents of violence occasioned by staff members were in 2013 and 2015 (page 224 – 226) and in both those individuals' cases they were dismissed, albeit for what appear to be more serious offences.
51. Despite suggesting that there had been more lenient treatment of other staff based at the same prison as her, the claimant accepted that the respondent's standards for discipline should be upheld on a national rather than a local basis.
52. In concluding that there was no inconsistency in treatment so as to render the dismissal unfair, I have taken into account that none of the other individuals referred to were in like-for-like circumstances to the claimant and those dealt with most recently had been dismissed. I note that cases are dealt with on their own individual circumstances and national standards were applied.
53. In conclusion, I consider that the decision to dismiss was within the range of reasonable responses and otherwise fair and the claim is dismissed.

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Employment Judge S Davies

Date: 28 July 2017

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JUDGMENT & REASONS SENT TO THE PARTIES ON

1 August 2017

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FOR THE SECRETARY TO THE TRIBUNALS