



EMPLOYMENT TRIBUNALS

Claimant

Ms F Topai

v

Respondent

Dimensions (UK) Limited

Heard: by video conference (CVP)

On: 13 July 2020

Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: Mr J West (solicitor)

For the Respondent: Mr T Gillie (counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal fails and is dismissed.
2. The claimant's complaint of wrongful dismissal in respect of notice fails and is dismissed.

REASONS

Claim, hearing and evidence

1. The respondent is a charity which provides support for people with learning disabilities, autism and complex needs. The claimant was employed as a support worker for the respondent from 3 September 2014 until her dismissal on 22 July 2019.
2. In a claim form presented on 12 October 2019 the claimant made complaints of unfair dismissal and wrongful dismissal (notice pay). The respondent presented its response on 14 November 2019. The respondent defends the claim and says the claimant was fairly dismissed for gross misconduct.
3. The hearing took place on 13 July 2020 by video conference (CVP).
4. I first heard evidence from the respondent's witnesses Mr Milligan and Mr Cockcroft. Mr Cockcroft's evidence was interposed while Mr Milligan changed rooms as there were problems with his internet connection. Mr Milligan was then able to continue with a better connection. I then heard evidence from the claimant. All the witnesses had exchanged witness statements. Both parties' representatives made submissions.

5. There was an agreed bundle of 248 pages.

The Issues

6. The issues I have to decide are:
 - 6.1 whether the claimant's dismissal was fair in accordance with the guidance set out in British Home Stores v Burchell; and
 - 6.2 whether the claimant was wrongfully dismissed in breach of the requirement to give notice.

Findings of fact

7. I make the following findings of fact based on the evidence I heard and read.
8. The Claimant was employed by the Respondent as a support worker from 3 September 2014 until her dismissal on 22 July 2019. She worked in a supported living home, supporting vulnerable adults who live there.
9. On 28 May 2019 a complaint was made to Mr Milligan about the claimant. Mr Milligan was the claimant's line manager. The complaint was made by a family member of one of the residents. They said that on 26 May 2019 when they had been visiting their relative, they had become aware that the claimant had left another resident, S, in the sensory room on his own with the door shut. They could hear him shouting or crying.
10. S has epilepsy. At the relevant time, he had not had a seizure for several years. He also has profound learning difficulties and cerebral palsy and uses a wheelchair. He is unable to open the sensory room door by himself. He is able to respond to a question by saying yes or no but is not able to ask a question himself.
11. Mr Milligan began an investigation into the complaint. He telephoned the claimant on 28 May 2019. She said that she had left S in the sensory room with the door shut. The claimant said that he had been agitated and had chosen to go to the sensory room to relax. He had said yes when asked if he wanted the door closed.
12. Mr Milligan spoke to the claimant again on 29 and 30 May 2019. The claimant asked why a complaint had been made and said several times that she did not think that she had done anything wrong. She sent Mr Milligan emails on 29 and 30 May 2019 in which she said that she had asked S if he wanted her to shut the door to the sensory room and he had said yes. She said that was his choice and she had listened to him. She confirmed that she knew S has epilepsy and that he could 'have a seizure at any time which can put his life in danger'.
13. On 30 and 31 May 2019 Mr Milligan spoke to the claimant's colleague who was also working at the house on 26 May 2019. She did not know that the claimant had left S in the sensory room until she became aware of this from the other resident's family member who was visiting. She said the claimant

had said told the family member that S's mother had said he should be left on his own until he had calmed down. She said that she thought S had been there for about an hour. She said that about 10 minutes after she became aware of S being in the sensory room she went to the sensory room to take S his lunch. She said that at that point he had calmed down and was no longer crying.

14. The claimant was suspended on 31 May 2019 while the allegations were investigated further. Her suspension letter said:

"The alleged gross misconduct is:

Negligence in your duties:

- *That on the 26th May 2019 you left a person we support in the sensory room with the door closed. The person we support does not have the capability to open the door.*

If founded this is a breach of Dimensions Safeguarding Policy."

15. The letter enclosed a copy of the respondent's disciplinary policy. At paragraph 14.1 the policy gave a list of 'examples of matters which are often regarded as gross misconduct' and said that if an employee committed one of these acts, the respondent could end the employment without notice. It said that the list was not exhaustive. The list included:

- *"Any act or mistake which puts people supported by the company at risk of harm or abuse"* and
- *"serious breach of confidentiality or trust".*

16. The claimant asked for more detail or context of the allegation of gross misconduct. The respondent's HR officer wrote to the claimant repeating the allegation of gross misconduct as set out in the suspension letter.

17. After conducting his investigation, Mr Milligan decided that there were potential safeguarding issues related to the claimant's conduct and that she did not appear to have understood the seriousness of the situation. He decided that the case should be referred to a disciplinary hearing. The hearing was chaired by Mr Cockcroft, one of the respondent's operations directors.

18. The letter inviting the claimant to the disciplinary hearing said:.

"The purpose of the hearing will be to discuss your alleged gross misconduct as set out in the attached fact finding document and specifically will be addressing:

- *That on the 26th May 2019 you left a person we support in the sensory room with the door closed. The person we support does not have the capability to open the door.*

If founded this breaches the Dimensions Safeguarding Policy."

19. The claimant was sent a copy of the investigation report and attachments. Later, the respondent sent the claimant further documents, including a copy of her contract of employment, the respondent's Code of Conduct, the Safeguarding Policy and S's support plan and risk assessment. S's support plan and risk assessment had some parts redacted for privacy reasons but these were not relevant to the claimant's case. In an email attaching further documents, the respondent's HR officer repeated the allegation as set out above, adding:

"If founded this may be viewed as psychological abuse/emotional neglect which is covered in the Dimensions Safeguarding Policy."

20. The safeguarding policy set out fundamental standards, standards of care 'below which we must never fall'. The first of these was that 'all care and treatment must be provided in a safe way'.
21. It also said that one of the six key principles that should underpin all adult safeguarding work is empowerment ('people being supported and encouraged to make their own decisions and informed consent').
22. S had a support plan and a risk assessment which were kept in his room. The list of hazards in S's risk assessment included:

"S may be at risk of SUDEP (Sudden unexpected death in epilepsy)"

23. The risk assessment said that S should not be left alone in the bath or shower. It said that in the bedroom:

"S has a listening device in his room which staff can use to monitor for seizures – also staff also visually check on S during the night/day. As S lives in 24/7 group supported living and as a result is constantly monitored day and night." [sic]

24. The risk assessment included a section headed 'Decision Making', for 'balancing the rights of individuals to privacy against the risks of injury or death'. It set out a procedure for a Multi-Disciplinary Meeting where someone does not have the capacity to decide what is in their best interests, so that a decision can be made to ensure they are supported in a safe way. The claimant was not aware of any such meeting being held in the claimant's case.
25. There was a signing sheet following the risk assessment document. A heading 'Document Name' had been filled in by hand and said 'SB epilepsy/risk management plan'. I find that this related to the risk assessment document. The signing sheet had been signed by a number of staff to confirm that they had read and understood the document. It was not signed by the claimant.
26. S's support plan said, under the heading 'Identified concerns and risks':

"S has not experienced seizures for several years, he is prescribed medication to manage his epilepsy. S is a wheelchair user and

requires full support 24 hours a day and because of this is constantly monitored by staff at all times.”

27. The support plan said that in the past S’s seizures have lasted from 1 to 5 minutes and that if S were to experience seizure activity staff should call 999 for an ambulance.
28. There was another signing sheet following the support plan (pages 119 to 130). The claimant signed this sheet on 20 January 2018. The heading ‘Document Name’ on this sheet was blank and had not been filled in. (Following the disciplinary hearing, Mr Cockcroft concluded that this signature sheet related to S’s support plan. I also find that this signature sheet related to S’s support plan, because it followed that document.)
29. Neither the Safeguarding Policy nor S’s support plan and risk assessment specifically stated that S should not be left alone in the sensory room with the door closed. Another support plan, for support with anxiety/behaviours had a section called ‘ideas for action plan’. One of the bullet points in this section said:

“Ask S if he would like to do/try something else. This could be listening to an audio book or the radio in his room or sensory room, this may refocus him or try and activity that engages him.”
30. The claimant’s disciplinary hearing took place on 28 June 2019. Mr Milligan read out the fact finding document and statements. The claimant agreed that his findings were accurate. S had been in the sensory room with the door shut. This had happened before, with S’s consent. There were no monitors or sensors in the sensory room to detect if S was having a seizure. The claimant had been in the kitchen and had been going up and down the corridor while S was in the sensory room. S had continued to be distressed while in the room. As she could hear him crying, the claimant was confident to leave him.
31. Mr Cockcroft looked at a plan of the house which showed that the sensory room was at the other end of the corridor from the kitchen, with two rooms in between them.
32. The claimant made a written submission for the hearing. In it she said that she had been told by Mr Milligan in an appraisal that it was OK to take S to a different room to calm down if he was distressed. She said that on another occasion she took S to his room to calm down and shut the door. She said that Mr Milligan had approached her later to ask whether she had taken S to his room and the claimant said she had, with S’s consent. Mr Milligan did not say that this was inappropriate or that the door should be left open. The claimant did not say in her submission that Mr Milligan had told her that it was OK to leave S in a room with a door closed, only that he had not told her that she couldn’t. (I find that the claimant was not told by Mr Milligan that she could leave S in a room on his own with the door closed.)
33. Mr Cockcroft adjourned the disciplinary hearing to consider some of the issues raised in the claimant’s submission. He decided that S’s mother

should be interviewed. Mr Milligan spoke to her on 5 July 2019. S's mother said that when S starts shouting she would, if S wanted, take him to another room to allow him to calm down. She said this would be for a few minutes, 5 or so minutes, not hours on end, and not far away.

34. The respondent sent the claimant copies of the further evidence. Her disciplinary hearing was reconvened on 22 July 2019.
35. At the reconvened hearing, the claimant said that S had been in sensory room with the door closed for about half an hour, with checks. She was checking that she could hear him. She said it was S's choice to be in the sensory room with the door closed and that she thought he understood the risks of being unsupported in a room.
36. The claimant said she was familiar with S's risk assessment and had looked at it around two months previously. She said S was not alone because she could hear him and that she walked up and down the corridor to check on him. She said she had left S in a room on his own before, probably more than twice.
37. The claimant was not asked by Mr Cockcroft whether she would do this again.
38. After a short adjournment Mr Cockcroft gave his decision. He said that S needs to have full support constantly and the claimant's actions meant that this did not happen. He said that from what the claimant had said there was a risk that this may happen again. The claimant was dismissed with immediate effect.
39. The claimant was sent a dismissal letter dated 22 July 2019. Mr Cockcroft had concluded that the claimant had read S's support plan and had signed to confirm this. The claimant had told Mr Cockcroft that she had read the risk assessment. He said that, although S had been asked whether he wanted the door closed, the risks to S from closing the door were too great and the claimant's action was in breach of S's support plan and risk assessments which state that constant support is required. The letter said that throughout the hearing the claimant had said she did not believe there was any misconduct on her part, and that Mr Cockcroft was not convinced that a similar situation would not recur.
40. The letter set out the mitigating circumstances put forward by the claimant in her submissions that Mr Cockcroft had considered.
41. In his evidence, Mr Cockcroft said he had concluded that leaving S in the sensory room with the door closed was a breach of the respondent's safeguarding policy and S's support plan and risk assessment. He decided that the claimant was aware of the need for S to be under constant supervision and that her conduct amounted to gross misconduct under the respondent's disciplinary policy.
42. He went on to consider what sanction was warranted. He did not think the claimant had been told by Mr Milligan that it was acceptable to leave S

alone in the sensory room with the door closed, but even if she had been, S's risk assessment and support plan did not allow for this.

43. Mr Cockcroft was concerned that the claimant did not feel she had done anything wrong and felt that there was a risk that she would leave S in a closed room on his own again. He decided that the claimant should be dismissed.
44. The claimant was told that she had a right of appeal but she did not appeal.
45. The claimant's colleague who was working at the house on 26 May 2019 was also the subject of a disciplinary hearing which was chaired by Mr Cockcroft. Mr Cockcroft decided that it was not her decision to leave S in the sensory room on his own with the door closed and that she had shown clear remorse and had learned from the experience. He decided that dismissal was not warranted in her case. She was given a first written warning.

The Law

Unfair dismissal

46. A reason that relates to the conduct of the employee is a potentially fair reason for dismissal pursuant to section 98(2)(b) of the Employment Rights Act 1996.
47. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996):

“whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal.”

48. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer, and must not substitute its own view of the appropriate penalty for that of the employer.
49. In a complaint of unfair dismissal where the reason for the dismissal is misconduct, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Guidance set out in British Home Stores v Burchell requires the tribunal to consider the following issues:
 - 49.1 whether, at the time of dismissal, the employer believed the employee to be guilty of misconduct;
 - 49.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
 - 49.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

Wrongful dismissal (notice pay)

50. A dismissal without notice for misconduct is a wrongful dismissal unless the respondent can show that:
 - 50.1 the claimant actually committed the misconduct; and
 - 50.2 the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.
51. The approach is not the same as in a complaint of unfair dismissal. It is not sufficient for the employer to demonstrate a reasonable belief that the employee was guilty of gross misconduct. (Shaw v B&W Group Limited UKEAT/0583/11).
52. The question of whether the misconduct was sufficiently serious to justify summary dismissal is a matter of fact for the tribunal to decide. In Briscoe v Lubrizol Ltd [2002] IRLR 607 CA, the Court of Appeal summarised the test as whether the conduct “so undermine[s] the trust and confidence between the employer and the employee that the employer should no longer be required to retain them.”
53. The conduct must be a deliberate and wilful contradiction of the contractual terms, or amount to gross negligence (Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 1 WLR 698 CA. In a case involving an allegation of gross negligence, the question is whether negligent ‘dereliction of duty’ is ‘so grave and weighty’ as to amount to justification for summary dismissal (Adesokan v Sainsbury’s Supermarkets Ltd [2017] IRLR 346).
54. The terms of the contract of employment and the employer’s policies, and whether the employer has made clear that certain acts will lead to summary dismissal, are also relevant factors (Dietmann v Brent London Borough Council [1988] ICR 842 CA).

Conclusions

Unfair dismissal

55. The employer must show that misconduct was the reason for dismissal, by reference to the three stage test set out in British Home Stores v Burchell.
56. The claimant accepts that the respondent had a genuine belief that the claimant was guilty of misconduct. She says that the respondent did not have reasonable grounds to believe that she was guilty of misconduct.
57. Mr Cockcroft was aware of the following at the time he made his decision to dismiss:
 - 57.1 There was very little factual dispute as to what happened on the day in question. At the disciplinary hearing, the claimant accepted the summary of facts presented by Mr Milligan that she had left S in the sensory room on his own, that the door was shut and S could not open

it himself. She said that S was distressed while in the room and she could hear him crying.

57.2 The claimant said at the disciplinary hearing that she had seen S's risk assessment; this referred to the fact that S *'lives in 24/7 group supported living and as a result is constantly monitored day and night'*.

57.3 In her email account of the incident given in the course of the investigation, the claimant accepted that she knew S has epilepsy and that 'he can have a seizure at any time which can put his life in danger'.

57.4 The claimant said in the course of the investigation and at the disciplinary hearing that she did not think she had done anything wrong.

58. I conclude that these were reasonable grounds for Mr Cockcroft's belief that the claimant was guilty of misconduct.

59. The claimant accepts that at the time the respondent formed its belief in the claimant's misconduct, it had carried out as much investigation as was reasonable in the circumstances, that is the investigation fell within the range of reasonable investigations.

60. I conclude that the respondent has established that the reason for the claimant's dismissal was a reason relating to her conduct. This is a potentially fair reason for dismissal.

61. I next have to consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient grounds to dismiss her (whether dismissal was in the range of reasonable responses). The burden of proof here is neutral.

62. I have considered the circumstances of the claimant's case and reached the following conclusions:

62.1 It was reasonable for the employer to decide that the claimant was or should have been aware that S required constant monitoring. S's risk assessment, which the claimant accepted she had seen and reviewed 2 months before the incident, referred to the fact that S is constantly monitored day and night. The support plan, which Mr Cockcroft concluded the claimant had signed as having read and understood, said that S requires full support 24 hours a day and because of this is constantly monitored by staff at all times. The documents also made reference to the fact that S should not be left alone in the bath or shower and to the fact that there was a listening device in S's room to monitor for seizures during the night.

62.2 The risk assessment and support plan did not expressly say that S must not be placed in the sensory room on his own with the door closed, but it was reasonable for the respondent to consider that this should have been clear from the documents as a whole and from the claimant's knowledge of S's medical conditions and complex needs.

The list of hazards in S's risk assessment included the risk of SUDEP (sudden unexpected death in epilepsy). When he was in the sensory room with the door shut, S was alone. There was no monitor or sensor in the room. It was reasonable for the employer to conclude that listening out for S from another room or from the corridor was not constant monitoring in line with S's support plan and risk assessment.

- 62.3 The claimant said that Mr Milligan had not said that she could not leave S in a room on his own with the door closed when it had happened on an earlier occasion. Mr Cockcroft considered this and decided that Mr Milligan had not told the claimant that it was OK for S to be in a room on his own with the door closed but that even if he had, that would have conflicted with S's risk assessment and support plan. That was a reasonable conclusion for Mr Cockcroft to reach.
- 62.4 The claimant said that she had prioritised the principle of empowerment and had acted in line with S's wishes. However, it was reasonable for the respondent to expect that the first of its fundamental standards as set out in the safeguarding policy, that 'all care and treatment must be provided in a safe way', would take priority, because of the possibility of very serious harm to those in the respondent's care if safety did not take priority. The respondent has a procedure for a formal meeting to be held for someone if their decisions were in conflict with being supported in a safe way. The claimant was not aware of a formal meeting like this being held in the claimant's case.
- 62.5 S's mother had said to the claimant that she takes S to another room to calm down if he wants, for five minutes or so. The respondent was entitled to conclude that this was different to the situation here, where S was left in a room on his own without being able to get out for what the claimant said was around half an hour and her colleague had said was about an hour.
- 62.6 S did not actually come to any harm. However, the claimant accepted that S was at risk of harm when not being monitored. The possible harm included the risk of sudden death and the claimant was aware of this risk. The respondent's disciplinary policy includes "any act or mistake which puts people supported by the company at risk of harm or abuse" as an example of gross misconduct and it was reasonable for the respondent to regard the claimant's conduct as falling within this.
- 62.7 Mr Cockcroft concluded that the claimant's conduct amounted to gross misconduct. The claimant's representative said that the claimant's actions were at worst an error of judgment which had been described by the respondent as negligence. He said that negligence could not be gross misconduct or such serious misconduct that it would justify the decision to dismiss. However, the disciplinary policy expressly highlighted that a mistake could amount to gross misconduct. In the context of the work the claimant did and the gravity of the risk to S, I conclude that the respondent's decision that the claimant's actions

amounted to gross misconduct was a conclusion that fell within the range of reasonable responses open to the employer.

62.8 Having reached the decision that the claimant's actions amounted to gross misconduct, Mr Cockcroft went on to consider whether the claimant's conduct warranted summary dismissal. He considered the mitigating circumstances put forward by the claimant including her length of service and employment history. He also took into account the risk that this would happen again. It was reasonable for him to conclude, without expressly asking the claimant whether she would do the same thing again, that there was a risk that it would happen again, as the claimant had made clear throughout the disciplinary process that she did not consider that she had done anything wrong. Mr Cockcroft's decision that the mitigating factors in the claimant's case were outweighed by the claimant's conduct and the risk of recurrence was within the range of reasonable responses.

62.9 When it considered the claimant's case, the respondent adopted a procedure which was within the range of reasonable procedures. The respondent made the claimant aware of what was being investigated and of the risk of dismissal. An investigation was carried out and the claimant was given opportunities to respond to the complaint. A disciplinary hearing was held and the claimant was provided with copies of the documents which the respondent considered when reaching its decision. An omission from the investigation (speaking to S's mother) was corrected during the disciplinary hearings. The claimant was offered an appeal.

62.10 The respondent did not treat the claimant inconsistently with her colleague. The claimant's colleague was also subject to a formal disciplinary procedure and was given a sanction. It was reasonable for the respondent to decide on a lesser sanction to the claimant's colleague because Mr Cockcroft concluded that her conduct was less serious.

63. I have concluded that, in these circumstances, dismissal was within the range of reasonable responses open to the respondent.

64. The claimant's complaint of unfair dismissal therefore fails and is dismissed.

Wrongful dismissal

65. The approach in relation to the claimant's wrongful dismissal complaint is not the same as in the complaint of unfair dismissal. I have to consider whether the claimant actually committed the misconduct; and whether the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.

66. As to what happened, this is not a case in which the claimant denied the treatment that was the subject of the complaint against her. She accepted that she had left S in the sensory room on his own with the door shut and S could not open it himself. There was no monitor or sensor in the room. S

was distressed while he was in the room; the claimant could hear him crying and he remained there for about half an hour.

67. The focus in this case is mainly on whether the claimant's conduct was sufficiently serious to justify summary dismissal. When considering this, I have taken into account the circumstances as set out above, including:

67.1 the employer's disciplinary policy which made clear that mistakes which put people supported by the company at risk of harm could lead to summary dismissal;

67.2 S's support plan and risk assessment, both of which I have found that the claimant had seen, and which said S was at risk of SUDEP and that he was constantly monitored;

67.3 My finding that the claimant was not told by her manager that it was acceptable to leave S in a room on his own with the door closed;

67.4 The claimant's acceptance that the claimant could have a seizure at any time which can put his life in danger;

67.5 S was on his own for a period of about half an hour, and for most of that period the claimant could hear that he was distressed;

67.6 The claimant's failure to accept that she had done anything wrong.

68. I have concluded that the claimant's conduct put S at risk of serious harm for a significant period of time and amounted to a neglect of her duty to care for S. The conduct was 'so grave and weighty' as to amount to justification for summary dismissal. It was a repudiatory breach of contract as it undermined the trust and confidence between the claimant and the respondent, such that the employer was entitled to dismiss the claimant without notice.

69. The claimant's complaint of wrongful dismissal in respect of notice therefore fails and is dismissed.

Employment Judge Hawksworth
Date: 6 August 2020

Judgment and Reasons sent to the parties
on: ...27.08.2020.....

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For the Tribunal Office