

BEFORE : LORD JUSTICE HENRY and MR. JUSTICE HOLMAN. CA on appeal from Bow County Court, (His Honour Judge Platt ) 28th May 1999

**JUDGMENT : LORD JUSTICE HENRY:**

The plaintiff, Mr. Uzoamaka, was summarily dismissed by his employers, Conflict & Change Limited. He claimed damages for wrongful dismissal from them. That case came on before His Honour Judge Platt in the Ilford County Court who dismissed the claim. The claimant now appeals to this court.

His employers, Conflict & Change Limited, are a charity. They operate in the multi-ethnic, multi-cultural Borough of Newham, dealing with conciliation and **mediation** between neighbours: disputes over noise, boundaries, pets and matters of that kind. Clearly, a difficult and sensitive task like this requires the trust of the community in order to perform the conciliation services that are required.

In October 1994 the claimant started working as a part time project officer for the defendants. Initially he had to undergo a probationary period. That period was successful and he was given a fixed term contract at some time in April or June 1995. He was made a full time conciliation project officer with a fixed term contract expiring on 31st March 1996.

On 4th July 1995 a written complaint was received as to him from the Newham Social Services Department who were the principal provider of work for the defendants. As a result of this claim he was first suspended and then, after a disciplinary hearing followed by an appeal hearing, he was summarily dismissed on 7th August 1995, and it is in relation to that dismissal that this claim is based.

I take my account of the facts from the judgment of the court below:

*"The events.*

*On 27th March 1995 a fellow worker of the Plaintiff was contacted by Social Services asking for help in resolving a family dispute which had arisen between a mother and her teenage daughter. A case file was opened. The records indicate a number of telephone calls between 29th March and 3rd April from the parties to the dispute to the Defendant organisation. The Plaintiff first became involved a day or so after 3rd April when he received a telephone call from social services requesting further assistance with resolving the ongoing conflict between mother and daughter. I accept the plaintiff's evidence that at the time his line manager was on holiday and that he was effectively the only permanent member of staff available. He was put under a lot of pressure by social services to try and help. At that time he was aware that his employers did not offer **mediation** services in family disputes. I accept that he told the social worker that he would be willing to help in a personal capacity only since Conflict and Change did not deal with this kind of problem. He did not then or at any later stage tell either his line manager or any member of the management committee what he was going to do nor did he seek advice from any member of the management committee as to the propriety of his taking on the case on a private basis. Thereafter he met initially with the mother to discuss the problem. He gave his home address and telephone number to the mother's elder daughter, a lady about 26-28 years old with whom the daughter was temporarily staying. A few days later the elder daughter, Christine and the daughter Daphne arrived at his home unannounced. He agreed to see them both. During the course of the visit it became necessary for him to speak to Daphne on her own. He offered to allow Christine to wait in another room in the house but she elected to go and visit a relative who lived nearby. He remained with Daphne on her own for about an hour talking through her problems. There was a subsequent visit a few days later which followed the same pattern of events. Again the plaintiff was alone in his own house with Daphne for about an hour. The plaintiff was not able to bring mother and daughter to any resolution of their dispute. He subsequently received through some mutual friends a message of thanks from the mother for his efforts. At a date which must have been after his final meeting with Daphne the plaintiff made some further entries in the case file recording the following information:*

*Status: Case closed*

*Outcome: Informal **Mediation**/Shuttle Diplomacy*

*Location: Other*

*Agreement Reached: None*

*Reasons for referring: Social Services to make care/custody order*

*Reasons for closure: No middle ground between parties (didn't want to mediate)."*

The judge found on those facts that, though the claimant was acting with the best of intentions, he was guilty of serious errors of judgment. The issue before the court was: were the defendants on those facts contractually entitled to dismiss the claimant summarily? The first major complaint was as to his getting involved at all. When Newham Social Services telephoned to invite him to mediate in a family dispute, he had no business

accepting. His employers did not offer **mediation** in family disputes because they had no one qualified to provide it. It was no business of theirs to engage in such **mediation** and it was no business of his. The reason for this is that it is a sensitive area and one in which he was not qualified. He did not tell the management of the defendants that he proposed to get involved. He did not ask for advice as to the propriety of getting involved, nor for permission to do it. He simply went ahead and did it. In so doing, he also broke his employers' confidence by using some information of theirs that he had on file in relation to the **mediation** in question. The manner in which he conducted that **mediation** was also unprofessional. First, he was working on his own and not with a colleague. Secondly, he saw the client, a young girl aged 14 who was in dispute with her mother, in his own home rather than in a neutral setting. Third, he twice saw her alone in his home. It is clear that that was unprofessional behaviour, though the judge rightly found that it was no part of his, or indeed the disciplinary committee's task, to judge whether the complaint made against him as to what took place when he and the girl were alone was true or not. It was assumed that there was no truth in it beyond the facts as they have been outlined.

This was a serious matter for the Project because the complaint came from the charity's chief, though not their sole provider of work, namely the Newham Borough Council Social Services. The nature of the complaint essentially was that the claimant had been recklessly unprofessional in dealing with it in this way.

The judge found that the statutory contractual statement incorporated by express reference the contents of the Project Handbook. The statutory contractual statement is a two page document which says in its first line: "Statement of the particulars of the main terms of employment" and then they are set out, and in the last paragraph: "Other Conditions of Employment are contained in the Project Handbook" to which the employee is referred. The Project Handbook is headed "to be read in conjunction with contract", and then there follow 16 chapter headings which I will read out simply to give the flavour: statement of continuity, pay and allowances, hours of work, expenses, holidays, compassionate leave, sick notification, sick leave, maternity leave, other leave, pensions, trade unions, public duties, redundancy, notice, grievance procedures, and then the paragraph that we are here interested in, "Disciplinary Procedure". That reads as follows:

*"The effectiveness and credibility of the project and employees is dependent, to a large extent, on our ability to achieve and preserve the high standards of co-operation and discipline which have contributed to the success the project enjoys. We believe that most employees fully understand and accept this, and that we must have rules of conduct and behaviour if our activities are to be smooth and orderly.*

*We prefer that discipline should be voluntary and self-imposed and in the majority of cases, this is how it works. There are times, however, when it becomes necessary to take action against an employee whose behaviour or performance is unacceptable.*

*The following procedures, which have been drawn up in accordance with the ACAS Code of Practice, provide a fair method of dealing with alleged failures to observe project rules and standards.*

*The procedure shall apply to all employees in the organisation, but where this is not possible the principle embodied in the procedure will still be adhered to.*

*All employees are expected to familiarise themselves with the conditions of employment and accepted standards of conduct.*

*How the procedure will operate.*

*The procedure is set out in two sections.*

*The first deals with the circumstances that will normally lead to instant dismissal.*

*The second section outlines the general rules and system for dealing with less serious incidents.*

*Section 1: Gross Misconduct*

*Offences under this heading are so serious that an employee who commits them may after proper investigation be summarily dismissed.*

*In such cases the project reserves the right to waive notice of termination and payment in lieu of notice.*

*The following examples give an indication of the project's view of gross misconduct, but it must be stressed that this list is not exhaustive. Some of these offences might well entail prosecution as well as dismissal, depending on the circumstances."*

There follow five numbered paragraphs: (1) theft of Project property or other theft committed in the course of employment; (2) violent behaviour or threats of violence subject to certain obvious defences; (3) insulting or abusive behaviour; (4) placing in jeopardy the Project's purpose or behaviour which could bring the Project into disrepute; (5) certain gross breaches of duty which have an immediate and substantial effect on the individual's capacity to do his/her job and may justify the use of the section 1 procedure. Then the document goes on to set out the powers to suspend pending investigation and hearing, the right of the employee to state his case in the original disciplinary procedure, and the appeal procedure that follows it.

The judge found as a fact, first, that the Project Handbook is incorporated in the contract of employment, and, second, that the claimant's conduct could have brought the Project into disrepute. He set up the principal issue that we have to decide in his judgment in this way:

*"Counsel for the Plaintiff has very helpfully referred me to various decided cases which explain the common law right of an employer to dismiss without notice and define what at common law may be classified as gross misconduct justifying dismissal without notice. If this case fell to be decided on common law principles I would say that in all the circumstances the defendants have not discharged the burden of satisfying me that the conduct of the plaintiff serious as it was amounted to 'wilful disregard of the essentials of the contract of service as to amount to a repudiation of the contract by the plaintiff.' See Laws v London Chronicle [1959] 1 WLR 698. However this case turns upon the proper construction of the contract which the parties have made. The parties have specifically agreed that placing in jeopardy the project's purpose or behaviour which could bring the project into disrepute constitutes gross misconduct entitling the defendant's summarily to dismiss the plaintiff. I accept that the test is an objective one and does not depend on the subjective judgment of the employer acting through its Management Committee. However I have to conclude that objectively the plaintiff's behaviour however well intentioned could have brought the project into disrepute. I am not satisfied that there is any sufficient evidence to justify the conclusion that it did place in jeopardy the project's purpose. However the two phrases are clearly disjunctive and consequently as a matter of construction of the contract I find that the defendants were entitled summarily to dismiss the plaintiff without notice and his claim must fail."*

The appellant attacked that on the basis that paragraph 17 was not a term of the contract. He submitted that the issuing of the Project handbook was simply the unilateral act of the employer and that did not mean that it had been specifically agreed. That is a difficult submission to sustain because the statutory contractual document, as we have already seen, says in terms: "Other conditions of employment are contained in the project handbook to which the employee is referred." The point is made that that refers to conditions of employment whereas the introductory words of that document state that it is a statement of the particulars of the main terms of employment, and a distinction is sought to be drawn between "terms of employment" and "other conditions of employment". I am bound to say that I find those words interchangeable and there is no point of distinction in the difference of wording.

Next, attention is drawn to the wording of paragraph 17, and it is submitted that it is clear that not all of the handbook can contain contractual terms. It is said that the numbered paragraphs, including paragraph 4, which we are here concerned with, are set out purely as illustrations of gross misconduct, and this is simply a unilateral statement by the employer rather than a contractual term.

Lastly, some fundamental basic rules of construction are relied on; for instance, that the contract shall be construed against the proposer where there is an ambiguity and that, in the absence of clearly expressed terms of a finding of gross misconduct, it is said that the judge should have applied the common law test and that under that test, as the judge made clear in his finding, he would not have found gross misconduct at common law.

The judge was plainly right, in my judgment, in saying that the contract of employment included paragraph 17, the disciplinary procedures. In relation to disciplinary procedures, it is clear that the form of this contract of employment has been cast with an eye on the ACAS Code of Practice. It is useful to look at the Code of Practice on disciplinary practice and procedures in employment. Under the general heading "Why have disciplinary rules and procedures", paragraph 2 states:

*"Disciplinary rules and procedures are necessary for promoting fairness and order in the treatment of individuals and in the conduct of industrial relations. They also assist an organisation to operate effectively. Rules set standards of conduct at work; procedure helps to ensure that the standards are adhered to and also provides a fair method of dealing with alleged failures to observe them."*

*It is important that employees know what standards of conduct are expected of them and the Employment Rights Act 1996 requires employers to provide written information for their employees about certain aspects of their disciplinary rules and procedures."*

There is a footnote to that paragraph which states:

*"The Employment Rights Act 1996, section 1 requires employers to provide employees with a written statement of particulars of their employment. Such statements must also specify any disciplinary rules applicable to them and ..."*

In relation to formulating policy, at paragraph 5 there is this:

*"Management is responsible for maintaining discipline within the organisation and for ensuring that there are adequate disciplinary rules and procedures. The initiative for establishing these will normally lie with management. However, if they are to be fully effective the rules and procedures need to be accepted as reasonable both by those who are to be covered by them and by those who operate them. Management should therefore aim to secure the involvement of employees and all levels of management when formulating new or revising existing rules and procedures. In the light of particular circumstances in different companies and industries, trade union officials may or may not wish to participate in the formulation of the rules but they should participate fully with management in agreeing the procedural arrangements which will apply to their members and in seeing that these arrangements are used consistently and fairly."*

The law is usefully summarised in Halsbury's Laws, 4th Edition, re-issue, volume 16, paragraph 299, in this short passage: *"It is now common for employees to be subject to written disciplinary procedures which often expressly state the employer's power of summary dismissal and indicate what may constitute gross misconduct warranting such dismissal. Such a clause normally covers certain immutable areas which would warrant summary dismissal in almost any employment, but may also be used by an employer to specify in addition conduct which will not be tolerated in the particular circumstances of that employment."*

There are two footnotes applicable to that passage. First, footnote 7: *"These may be either directly contained in the contract of employment or exist separately (eg in a company handbook) and be incorporated into the contract by reference. Where there is a disciplinary procedure, the written statement of terms and conditions of employment must contain a note specifying it: See the Employment Protection (Consolidation) Act 1978 s 1(4) (as amended) and para 60 ante."*

And then footnote 8, dealing with the express statement of the employer's power of summary dismissal:

*"Employees should be made aware of the likely consequences of breaking the rules and in particular they should be given a clear indication of the type of conduct which may warrant summary dismissal: Code of Practice on Disciplinary Practice and Procedures in Employment para 8."*

It is clear that the employers here followed the ACAS recommendations. Paragraph 17 gives examples of the Project's view of gross misconduct, i.e. conduct that justifies summary dismissal, and, when dealing with matters bringing the project into disrepute and the use of summary dismissal in those circumstances, the definition of "gross misconduct" used in the contract can and does embrace conduct short of that which would be necessary to establish an employee's repudiation were it a contract at common law with no specific terms. It is argued that paragraph 17 was never incorporated in the contract of employment. That argument is unsustainable in my view. The handbook was issued. The statutory contract of employment clearly incorporated it. The point taken, that the claimant never specifically agreed to it, is not, in my judgment, a good point. He knew that the disciplinary rules were part of the job. It may be that he had no option but to accept them. It is clear that they went with the job. The judge recognized that they went with the job and was well entitled to find that the indiscipline and unprofessional procedures used by the claimant in this case threatened the charity's most important commercial link and was capable of bringing the project into disrepute. In those circumstances, the employers, in my judgment, were well entitled to treat this case as one meriting summary dismissal. The issue as identified by the judge was the right issue and the judge rightly applied himself to it. I, for my part, would dismiss this appeal.

**MR. JUSTICE HOLMAN:** I agree.

Order: Appeal dismissed; order nisi against the legal aid fund with nil contribution.

MR. N. HOOD (instructed by Messrs Daybells, London, E15) appeared on behalf of the Appellant/Claimant.

MR. L. POWER (instructed by the Ratip Partnership) appeared on behalf of the Respondent/Defendant.