EMPLOYMENT TRIBUNALS

Claimant: Miss H Walker

Respondent: West Cumbria Care and Support

HELD AT: Kendal **ON:** 20-22 June 2016 (in chambers 18 July 2016)

BEFORE: Employment Judge T V Ryan

REPRESENTATION:

Claimant: Mr B Henry, Counsel
Respondent: Ms B Clayton, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The respondent did not dismiss the claimant in breach of contract by summarily dismissing her. The claim of breach of contract with regard to notice of termination fails and is dismissed.

2. The respondent dismissed the claimant fairly on 17 December 2014 for a reason related to conduct. The claimant's claim of unfair dismissal fails and is dismissed.

REASONS

1. **The Issues**

In a situation where the claimant was employed as a support worker and was summarily dismissed for gross misconduct in relation to her conduct towards a

vulnerable adult in her care, the parties agreed that the following were the issues to be resolved by the Tribunal, namely:

Unfair Dismissal

1.1 Did the respondent act reasonably in treating the alleged misconduct as a sufficient reason for dismissing the claimant, in particular, did the respondent comply with the principles established in the case **British Home Stores v Burchell [1980] ICR 303**:

1.1.1 Did the respondent undertake a reasonable investigation into the allegations against the claimant?

1.1.2 Was it reasonable for the respondent to hold the belief that the claimant was guilty of the alleged misconduct in the circumstances?

1.1.3 Did the decision to dismiss the claimant fall within the range of reasonable responses a reasonable employer could choose in the circumstances?

1.2 If the Tribunal finds that the claimant's dismissal was unfair, should the claimant's compensation be reduced on the basis of the following:

1.2.1 That the claimant contributed to her own dismissal by her conduct; and/or

1.2.2 That had a fair procedure been followed the claimant would have been dismissed in any event following the principles laid down in **Polkey**; and/or

1.2.3 That there was a fair reason for the claimant's dismissal, that being "some other substantial reason" of a kind such as to justify the claimant's dismissal, namely that the respondent had lost trust and confidence in the claimant's ability to perform her role?

Wrongful Dismissal

1.3 Has the respondent breached the claimant's contract of employment by failing to pay the claimant notice pay?

1.4 Is the dismissal without notice justified due to the claimant committing a repudiatory breach of contract?

1.5 Is the claimant entitled to notice pay?

Matters agreed as not being in issue

1.6 The consistency or inconsistency of the decision to dismiss the claimant for the conduct in question.

1.7 Whether or not the respondent had a fair reason for the dismissal, namely conduct. It was accepted that the reason for the dismissal was conduct.

1.8 Whether the respondent held a genuine belief that the claimant was guilty of alleged misconduct. The claimant takes no issue as to the genuineness of the belief and accepts that there was no bad faith or bias.

2. **The Facts**

2.1 The respondent is a Registered Charity providing care and support to adults and children with disabilities with a particular focus on learning disabilities. It provides residential care, such as at Low Fauld.

2.2 The claimant worked for the respondent at Low Fauld from 1 January 2007 until her summary dismissal on 17 December 2014 (arising out of an incident on 2 November 2014 involving "RT", a client diagnosed as having autism) on the grounds of gross misconduct. The misconduct found to have occurred related to what was found by the respondent to include the claimant issuing a threat to RT of the use physical restraint techniques upon him contrary to her training, its requirements, ethos and best established practice, and the best interests of RT.

2.3 The respondent operates a number of policies and procedures for the better care of its clients or service users (henceforth referred to as "clients"). Many of the respondent's applicable policies and procedures are based upon duties and responsibilities set out in the Mental Capacity Acts of 2005 and 2007; their focus is on the best interests of clients with the use of the least restrictive options possible in respect of care, that is to seek to avoid physical handling of clients by carers or the threat thereof and to de-escalate situations of conflict by passive methods. Emphasis is placed on reducing and hopefully eliminating the need for Restrictive Physical Intervention ("RPI") where physical intervention is a last resort to control the conduct of a client so as to prevent harm to the client, other clients, staff and property.

2.4 At all material times there was in place a safeguarding policy and procedure for the protection of vulnerable people from abuse (commencing at page 49 of the trial bundle to which all further page references relate unless otherwise stated). That policy confirms, amongst other things, that "abuse is a violation of an individual's human and civil rights by any other person or persons" (page 50) and abuse and referral guidelines are set out at pages 51-53, including the categorisation of abuse as physical, psychological, sexual, neglect/omission and discriminatory. The respondent's employees are made aware of the requirements of this policy and are trained to adhere to it.

2.5 Amongst the training tools used is one called "Team Teach", details of which appear at pages 199 and following. Emphasis is placed on what is termed "the spectrum of positive handling" and a commitment to the

utilisation of "a broad spectrum of risk reduction strategies" described as an holistic approach involving "policy, guidance, management of the environment, and deployment of staff". Its aim is to involve personal behaviour, "diversion, diffusion and de-escalation", in respect of which restraint plays a small part. In fact there is an attempted description and weighting of positive handling techniques comprising 95% of the proposed controlling activity (by way of the use of space, safe environments, comfortable environments, diversions, calm stances and postures, non-threatening facial expressions, low tone, volume and pace in communication and the careful use of words). In comparison only 5% of effort would be directed towards physical reassurance and prompts, effective guides and escorts, releases and holds with minimum drama and effort. These percentage figures are for guidance and are not targets; the target is to use the least restrictive intervention. Employees are trained on the use of help scripts to emphasise the 95% bias towards positive handling that does not involve physical restraint. Positive behaviour is to be used by way of support to reduce risks and any need for physical restraint, in supporting teaching, learning and caring and words to promote and protect positive relationships between clients and between staff and clients (and presumably therefore also between employees themselves).

2.6 The written policies, procedures and guidance and the training provided to employees was intended to increase staff confidence and competence in responding to behaviours of clients that challenged them whilst promoting and protecting positive relationships. It is recognised by the respondent that some clients display certain behaviour for reasons of their own, and possibly as a symptom or consequence of their physical or psychological condition and that all such behaviour that does not conform to the expectations of the staff is not necessarily wilfully disruptive or culpable; that behaviour may seem to be to a challenge to staff but the staff's role is not merely to police and to control behaviour that they and others may find challenging or disruptive, even threatening, to the harmony of the residential environment. The respondent's staff are employed and trained to care for the needs of the clients who are their charges. The threat and/or use of physical force would be considered as a last resort in any event and any such intervention would also have to be proportionate to the risk of harm; the threat and/or use of force would not in general terms be considered as the least restrictive interventionist option and as being in the best interests of clients in accordance with the requirements and ethos of the Mental Capacity Acts and the ethos and values of the respondent.

2.7 Clients at the respondent's premises, or at very least the client referred to throughout the hearing as "RT", have the benefit of what is called a Positive Behaviour Support Plan. This is a detailed document describing the needs of a client and how best the carers can provide for them, and in RT's case included avoidance, distraction and de-escalation tactics for the management in respect of his behaviour that may at times be perceived as challenging.

2.8 The premises at Low Fauld have a Safe Support Area ("SSA") which is a room with cushioned mats. In cases of extreme behaviour by clients they would be sent to or taken to the SSA either to calm down or, if that was not successful, to be held down in a tactic called "ground recovery". Ground recovery in the SSA was a last resort and it amounted to physical intervention to restrain and restrict behaviour that could be damaging or threatening to the client, other clients, staff and/or property. Clients knew that references to being sent or taken to the SSA meant that they were reaching the point where if they did not calm down or otherwise alter their conduct they risked being physically handled and held down in ground recovery until they stopped the behaviour perceived to be challenging. Clients could and would on occasions take themselves to the SSA for quiet reflection or to otherwise work out their frustrations and tensions in whatever way they could. If a client's extreme behaviour continued, however, then the client would know that being in the SSA with care workers or being taken to the SSA by care workers meant that continued such behaviour would result in ground recovery. The language used to describe all of that activity is naturally enough euphemistic and should not disguise that what was involved could be very physical and unpleasant. Carers also employed other techniques of physical control called "Caring Cs", where carers would not restrain clients in a hold but would "guide" them physically away from a scene, and "Single Elbow", where carers would physically hold onto a client by his/her elbows and steer the client in a direction employing whatever force was required to move the client to the place the carers decided upon as being appropriate (which is a euphemistic explanation for what I understood from the claimant's description to often involve a considerable struggle).

2.9 The Team Teach method of dealing with clients refers to "the conflict spiral" when conflict arises because of anxiety leading to belligerence resulting in a power struggle which somebody is going to lose. Team Teach required carers to recognise the potential for a conflict spiral, to evaluate experiences, feelings, behaviours and reactions, to assess the situation and to decide on appropriate action. Appropriate action ought to involve giving a client clear instruction, suggesting alternative and less risky or more acceptable conduct and generally distracting the client from anxious or belligerent behaviour. A carer is required to ask the client about the situation, to give the client clear instructions and to make a situation safe, preferably by de-escalation and only as a last resort through use of ground recovery in the SSA. At all times carers are required to act in the best interests of clients.

2.10 The above described duties, responsibilities, practices, procedures (including adherence to an individual client's support plan), and policies (as per training and available documentation) formed a fundamental and essential part of the contractual relationship between the respondent and its employees. Breaches of such could, and serious breaches would, undermine the essential trust and confidence between the parties in the

relationship and were known to potentially amount to gross misconduct justifying, in some cases, summary dismissal.

2.11 The claimant commenced her employment with the respondent in 2006 or 2007. She was employed as a support worker at Low Fauld. An incident arose involving the client referred to as RT on 2 November 2014, by which time the claimant was a very experienced and well trained care worker and in a position of responsibility, being the most experienced and qualified of the three care workers involved in the incident on 2 November 2014. She had been fully trained in respect of the respondent's policies, procedures, methods, ethos and culture as described above. She had received extensive training in March and April 2014 updating her previous training, and she was trained in advanced Team Teach methods in October 2014. She was very familiar with the resident clients' respective Positive Behaviour Support Plans and care plans, including RT's detailed plan (page 84 and following), which gives a very specific description of RT's conduct, some of which could be seen as challenging to good order, and instructions on how to employ "ask, tell and make (safe)" and other Team Teach methods.

2.12 RT was a long-term resident at Low Fauld and was well-known to the claimant. He is in his late 40s. He was generally described as being affable on occasions, being fond of dancing, and he would even ask if he could be allowed to go dancing. RT could communicate and would ask and answer questions. He knew the applicable rules of the house and he was able to differentiate between staff members, knowing their experience and seniority (the claimant saying repeatedly in her evidence that "he knew who was who"); he would on occasion be more accommodating to new staff and would be more obstructive to longer serving staff such as the claimant. RT would on occasions take himself to the SSA. He would understand an instruction. He clearly felt emotions although he may have had difficulty in understanding them and in understanding why he felt compelled to act in certain ways on certain occasions, but his main difficulty was that as a result of autism he could not always communicate appropriately how or why he felt what he did. He would respond to clear instructions with limited choices and fully understood when carers took a firm line with him. His behaviour could include aggression and destructive behaviour such as kicking or slamming doors and other property at the risk of injuring himself and/or damaging the property. Certain other residents' behaviour would upset him and he them. As indicated above, RT had the benefit of a positive behaviour support plan which fully describes the claimant and his needs and capabilities as well as suggesting the preferred and optimum way in which carers ought to deal with him and care for him. "He would understand simple words and distraction" (evidence of C. Gray). RT could respond to humour.

2.13 The trigger incident leading to the claimant's dismissal occurred on 2 November 2014. In the months leading up to that date RT's conduct was considered by the claimant to have become more challenging to staff and

problematic in respect of good order. Some of the carers, in particular the claimant, felt that RT's support plan should be amended as she did not think that the Team Teach techniques applied well to him in general terms, rather preferring that the claimant just be given a short, firm, unambiguous instruction with no choices and that this firm approach ought to be consistently applied to him irrespective of the current standing of his support plan. As at 2 November 2014, however, the claimant's suggestions had not been approved by the respondent nor incorporated into the support plan. The respondent's expectation of all carers was that in dealing with RT they would adhere to "Team Teach" techniques and act at all times in accordance with the then current support plan and the respondent's ethos accentuating positive personal care using the least restrictive methods and avoiding situations of conflict.

2.14 Against this background in May 2014 there was an allegation against the claimant that she had threatened RT with the SSA. The allegation was investigated but there was no evidence to support it. The claimant's evidence, however, remained during this hearing that RT's reaction towards her as opposed to his behaviour towards newer carers was that he was more obstructive, aggressive and argumentative and therefore challenging; no evidence was heard that directly suggested any connection between RT's stated reaction to the claimant (one less accommodating than to other, newer, carers) and any of their previous interactions.

2.15 On a subsequent audit of incidents the respondent ascertained that there were a number of reports when RT was subjected to "Caring Cs" or "single elbow" techniques, but more particularly the latter, that the respondent considered to be a concerning development in the care of the claimant. This audit was conducted after the disciplinary hearing but before the disciplinary appeal hearing into the events surrounding the claimant's dismissal and the issues of 2 November 2014. For whatever reason, it would appear that RT's conduct was deteriorating towards the claimant over time. The Tribunal finds that the claimant had arrived at a belief that the most effective way of controlling RT's behaviour which she found to be challenging was to explain to him in no uncertain terms that if his behaviour did not improve he would be required to attend the SSA which would involve then ground recovery if she thought it appropriate. The claimant's evidence to the Tribunal was that RT benefitted from a firm and consistent approach without confusing him with options, and such firm instruction was more efficacious than distraction or explanation. She considered that she knew best in terms of how to deal with RT. She disapproved of the support plan that was in place for RT and believed that she dealt better with him than other carers, knowing more than her management, through experience of RT. She also gave some compelling evidence that she could, on occasion, enjoy a reasonably friendly relationship with RT. She contended that he appreciated her firm and, in my words, "no nonsense" approach, albeit it was contrary to the support plan and "Team Teach" in that it short-circuited the approaches that ought

to have been adopted; I have no evidence to suggest that RT ever expressed or was even able to express such appreciation and from all that I have heard and seen I must conclude that the claimant is assuming this contention as it suits her case. I find that the claimant would employ her preferred method of dealing with RT's behaviour that she considered to be disruptive over and above the formal standardised and also particularised care prescribed for RT. Because she felt that it was more effective, the claimant emphasised the 5% physical reassurance and prompts, effective guides, escorts, releases and holds, or threat thereof, over the 95% advised handling techniques which formed an essential part of the Team Teach method and the respondent's ethos. This preference of the claimant was never reflected in RT's support plan and, albeit she had raised issues relating to it with management, her view was not subscribed to by management as at 2 November 2014.

2.16 On 2 November 2014 RT had been in a changeable mood. He was described as "banging and shouting" but then having lunch and chatting with staff, singing to music with staff and other service users before returning upstairs in a good mood. A relatively short time into the claimant's shift that started at 2:45 pm, at approximately 4.45pm, the claimant was in the living room with two colleagues Leigh Anna Mason and Andrew Weston when they heard RT being noisy. Mr Weston and Ms Mason left the living room and went to investigate the noise and found RT to be holding and repeatedly banging closed a door. Ms Mason started to use the help script as trained in accordance with Team Teach and RT's support plan but was interrupted by the claimant who appeared on the scene and took over control of the situation. She interrupted Ms Mason and said words to the effect that she was not prepared to put up with RT's "carry on" and that if he did not stop the noise then he would be going to the SSA and on the mats. This coincides with Mr Weston's recollection, whereas the claimant gave varying accounts at the final hearing as to what exactly it was that she said. Mr Weston's version to the Tribunal as described above is consistent with that which he reported to management. During the investigation Ms Mason merely said that if she was present during any such incident she did not hear the claimant say those words to RT as she was not listening, but that if she had heard threatening language then she would have reported it. The claimant accepts that she took over the situation from Mr Weston and Ms Mason and she says that she was concerned that the claimant would hurt his toes or foot through kicking the door and said words to the effect "stop kicking, you'll break your toes, for your own safety I'll take you to the soft room (SSA) and if you start hurting yourself there you could potentially end up on the mats". The Tribunal did not believe this evidence of the claimant but preferred the briefer version given by Mr Weston, that she was not prepared to put up with RT's behaviour and that if he did not stop it she would take him to the SSA and on the mats. The claimant's evidence varied according to the questions asked of her in respect of the words used, and her answers got ever longer, being given in an unconvincing way as if to portray a picture that she felt would best suit her case, whereas Mr Weston's evidence was

clear, consistent and credible. In fact the longer the claimant's explanation became and the more detailed, the less consistent it was with the denial given by Ms Mason that she could not recall the event which was a significant one (albeit it would have been consistent with her saying that had she heard threatening language she would have reported it). The claimant's lengthy version of events and her dialogue with RT that evolved during her evidence to the tribunal is inconsistent with what she said throughout as being her view as to the optimum way of treating RT, namely with strict, unequivocal instruction leaving little room for choice or deliberation by him; it was not consistent with what she said on investigation and at the hearings in the disciplinary proceedings. In all the circumstances I find that the claimant effectively issued a threat to RT that if he did not stop making the noise he would be taken to the SSA and subjected to ground recovery techniques; this is not in line with the least restrictive physical intervention required by the respondent in the best interests of its clients; her approach was contrary to her training; it was contrary to RT's support plan.

2.17 I in part concluded, as I did above, because the claimant's clear evidence was that she wished to nip matters in the bud and prefer to speak assertively to RT because being assertive "is more positive". She also repeatedly made statements to the effect that she and her colleagues found that this assertive approach was more effective and that it was not just her that employed it when she said such things as "it wasn't just me doing it…everyone was doing it not just me…I thought I needed to step in…he understood. I nipped it in the bud". She accepted in evidence at the final hearing, as she had done in the investigation and disciplinary hearing, that her words could be perceived as threatening, although she always denied that she meant to issue a threat. She admitted that she did not use the scripts provided or the guidance given, but that she took her decision as the most experienced carer on hand as she did not feel that Ms Mason or Mr Weston could cope, and she said that she had tried other techniques earlier in the shift but to little effect. Whilst Ms Mason wrote up the incident report, and the claimant was responsible for overseeing that and checking it, she did not think to incorporate into it many of the details that she gave in evidence at this final hearing. She did not note any injury to RT from his actions or that she had checked him for injuries which she said in evidence that she had done. She said that she checked for injuries, found no bruising and did not note it up on the incident form. The claimant admitted supervisory failings in that she did not ensure that Ms Mason made a sufficiently detailed and accurate record of the incident; it was the claimant's responsibility as senior carer on the shift to ensure that Ms Mason did so. Overall I considered that her evidence as to the events of 2 November included inconsistencies, but that what came across most forcibly was that she issued a threat to RT to stop making noise or he would suffer physical restraint.

2.18 In the event the Tribunal was told that RT took himself to the SSA and calmed down without the need for physical restraint.

2.19 Mr Weston was concerned at what he had witnessed. He felt that the claimant's conduct towards RT was abusive. He was disturbed at the claimant's tone and what she said to RT, which he considered to be threatening and contrary to the ethos and trained technique of concentrating 95% of effort on verbal de-escalation as opposed to physical restraint. Because of this apparent conflict between what Mr Weston considered being best practice in the interests of RT on the one hand and what the claimant said and did on the other, he reported the matter to management on 5 November 2014. He informed the Deputy Manager, Calvin Gray. He considered it to be a safeguarding issue. I accept Mr Weston's evidence as given clearly, cogently, credibly and consistently, without any ulterior motive.

2.20 In addition to Mr Weston as witness to the events I also heard evidence from Calvin Gray and the respondent's Operational Manager, Alan Scott to whom Mr Gray reported the matter. Mr Gray was not involved in the investigation or the decision to dismiss the claimant, but he carried out an audit or analysis of incidents over approximately a 12 month period involving the claimant, looking at incident forms upon which he subsequently reported (between the disciplinary and appeal hearings). This audit was in respect of safeguarding generally and was under the auspices of the local authority as opposed to forming part of the disciplinary investigation into the incident of 2nd November 2014. His conclusion, written up between the claimant's dismissal and her appeal hearing, was that the claimant indicated a dislike of RT and that some of her responses to his behaviour fell short of the trained and required methods and techniques in line with RT's support plan and Team Teach. He found her general interaction to be "poor". I accept Mr Gray's evidence as having been given conscientiously and honestly in all the circumstances of his witness statement cross examination and re-examination where he was consistent and credible.

2.21 I heard evidence from Alan Scott, Operational Manager with the respondent, who oversaw service provision at Low Fauld incorporating line management of the Registered Manager. Mr Scott suspended the claimant on 11 November 2014 following his receipt of the Mr Weston's complaint via Mr Gray. Mr Scott investigated the incident and the claimant's conduct as part of the disciplinary proceedings. He interviewed the claimant, Leigh Anna Mason and he considered witness statements provided by Ms Mason, Mr Weston, Ms Fawcett-Beldon (Manager at Low Fauld) and also an email alert from Mr Gray, as well as all other relevant documentation such as the incident debriefing form and RT's support plan. Having also retrieved and reviewed documentation from the investigation into a report against the claimant in May 2014, Mr Scott prepared an investigation report concluding that the claimant had a disciplinary case to answer. The investigation ascertained, and in part with reliance on the claimant's concession and admission, that she had said to RT that he may have to be put on the mats in SSA if he proceeded to display kicking and banging behaviour. He referred the matter to a disciplinary panel to consider

whether the claimant's conduct was in compliance with RT's support plan and "the organisational ethos of a person centred approach", whether the interventions by the claimant were proportionate to RT's behaviour, challenges and risks or whether what had in fact occurred was abuse, threat and controlling practice by the claimant. Once again I found Mr Scott to be a credible and conscientious witness whose evidence was cogent and consistent. He was aware that there was to be a more detailed investigation into incidents involving the claimant over a 12 month period in the background, and he could have deferred any recommendation or investigatory report until then but chose not to do so as he had sufficient information concerning the trigger incident without awaiting an audit of twelve months interactions involving RT. He introduced into his considerations the May 2014 allegation against the claimant that had been dropped previously and was unproven. When Ms Mason said she did not remember the details, he accepted that without showing her the incident report form and pressing her further or otherwise refreshing her memory.

2.22 The matter was considered by a disciplinary panel comprising Anne Ostle and Lesley Reed. Anne Ostle gave evidence to the Tribunal. Ms Ostle had been employed by the respondent initially as a Registered Manager then Service Manager before becoming Operational Manager and Head of Human Resources. At the time that she chaired the disciplinary panel she was Head of Human Resources. I find her also to have been a credible and conscientious witness; she was clear, cogent and consistent throughout her evidence. The panel decided that the claimant ought to be dismissed for gross misconduct, and I accept Ms Ostle's evidence that her decision was based on what she considered to be the claimant's use of an intimidatory approach and words to RT. She was aware of an apparent breach of the Team Teach ethos and techniques and concluded that if it was just a matter of the claimant not having de-escalated the situation properly then she may have considered there to have been a training need and may have considered a different sanction to that of dismissal. Ms Ostle believed, however, that the claimant deliberately issued a threat knowing that a vulnerable person such as RT would perceive it as such, and that this constituted abuse. Significantly Ms Ostle took account of the claimant's concession that her words to RT could have been perceived as constituting a threat. She dismissed the claimant because of the way the claimant spoke to RT in breach of the support plan and contrary to training and the respondent's known expectations of the standard of care. In her evidence Ms Ostle was prepared to concede that she could have discussed matters further with the investigating officer and looked into other issues and incidents relating to the claimant's practices. She was mindful, however, that the claimant was represented by her union throughout, and that in accordance with the union's wishes matters such as this disciplinary should be dealt with on the facts of the incident in question without unnecessarily bringing into such considerations any extraneous matters relating to behaviour on other occasions, or conduct and capability matters generally.

2.23 It was the practice of the on-site trade union representatives to ask management not to bring supervisory records into account in matters such as this as they would "muddy the waters". In accordance with the union's wishes Ms Ostle and her colleague on the panel scrutinised the specific incident on 2 November 2014 only. In that light she considered that the claimant's position and role was to support a vulnerable adult, but she had in fact been guilty of intimidation and threats which suggested to her that the claimant should not have been looking after a vulnerable person such as RT in the situation described above. She considered that if there had been a need for the claimant's approach at that stage, then it was incumbent on the claimant to properly record in the incident report form or otherwise all that had transpired and everything that she said justified her conduct, but that was not done either by Ms Mason who wrote up the report or by the claimant who was in a supervisory role at the time and had taken over the management of the incident. Ms Ostle concluded that applying Team Teach techniques may have involved introducing somebody else to the situation, but certainly ought to have involved attempts at distraction and explanation rather than the claimant weighing in with an immediate intimidatory threat to RT of physical restraint. She satisfied herself that Ms Mason and Mr Weston had attempted to de-escalate the situation, or at least started to do so when the claimant, who was more experienced and knowledgeable, ought to have been a further calming influence but was not, regardless of the eventual outcome. It made no difference to her that ultimately RT took himself to the SSA, as in her view and that of her colleague on the panel if that occurred at all it was in response to a threat from the claimant. I find that this evidence is of a genuinely held belief and one formed on the basis of a consideration of the claimant's known words and actions on 2 November and her concession that her words and actions could have been perceived by anyone, including RT, as being threatening. Such threat of physical intervention was not the last resort available to the claimant at the time; it did not constitute the least restrictive practice; it was tantamount to emotional abuse.

2.24 On 22 December 2014 Ms Ostle wrote to the claimant a letter which appears at pages 156-157, confirming that the claimant was dismissed for serious neglect of her duty through the use of threatening and intimidating communication, and she set out her findings which accurately reflect Ms Ostle's genuinely held belief on the basis of the investigation and concessions made.

2.25 The claimant appealed against that decision by a letter dated 24 December which appears at pages 158-161 of the trial bundle. The claimant considered that the decision was extremely harsh and an overreaction. The claimant contended that other methods having failed she used an appropriate practice which she knew would work best in the situation and which she says did work. She categorised her conduct as merely forewarning RT that if his behaviour continued the use of restraint may become necessary.

2.26 Prior to the appeal hearing on 4 February 2015 Mr Gray concluded his analysis of interventions involving the claimant over and beyond the incident of 2 November 2014. There were some incidents that caused him concern where single elbow technique was used, but overall it can be seen that there were issues in relation to other members of staff too, clients and record-keeping that raised questions for management to consider. The analysis did not disprove or undermine Ms Ostle's rationale for the claimant's dismissal for the incident on 2nd November 2014 and the claimant was not dismissed for extraneous matters.

2.27 The appeal hearing was held on 4 February 2015 (pages 171-184) and was chaired by Kathy Parker (the other panel member being Debbie Whitby). Once again the claimant was represented by her trade union and no procedural points were taken by the union representative as regards the initial hearing or the way in which the appeal hearing was conducted. The appeal panel came to the understanding that the claimant and her union representative agreed that the claimant's conduct on 2 November was inappropriate but that a lesser sanction ought to be applied than dismissal. Ms Parker considered that the claimant sought to have a complete re-hearing whereas in fact the panel was to confine itself to the grounds of appeal rather than restarting the whole process, and ascertained from the claimant and her union representative that this was acceptable; the panel proceeded on that agreed basis. In addition to the harshness of the sanction the claimant wished to raise, and Ms Parker and colleague considered, whether there had actually been a complaint by Mr Weston, whether a proper investigation had taken place and whether alternatives to dismissal had been properly considered. In her evidence Ms Parker conceded that the allegation of May 2014 was discussed at the appeal hearing and it was hard to ignore, so that to an extent it was taken into account, but that it made no difference to the panel's conclusions. Ms Parker accepted all along that the May 2014 allegation was unproven. She also accepted that Ms Mason had not been fully interviewed but her written and somewhat vague statement had been taken into account, and that Ms Ostle had not interviewed Mr Weston either but that to a large degree matters had been dealt with as a paper exercise. First and foremost, however, she concluded that RT, who was autistic and could display what she would consider to be behaviour challenging to an ordered regime, was nevertheless articulate and affable and an engaging person, and was in any event entitled to respect. She concluded that the claimant's attitude was that she knew best how to deal with RT and that she would do it her way regardless of RT's feelings, his support plan and the Team Teach techniques, that is in breach of the ethos, training and practices of the respondent. She looked at all appropriate documentation. Once again Ms Parker came across as a conscientious and credible witness who gave the matter considerable thought and attention before concluding, with her colleague, that the appeal should be rejected and that dismissal was the appropriate sanction. She formed the impression that the claimant felt that she could "jump" steps so that she could deal with incidents as she wanted to. In those circumstances redeployment or any other sanction did not

appear to her to be appropriate because “it is a trust thing”. She formed the view that the claimant could not be trusted to comply with a client’s support plan and in accordance with Team Teach techniques. She was also satisfied that the trade union representative present was agreeable to the way in which she and her colleague approached the appeal, and that neither the representative nor the claimant required any further investigation to be undertaken. The appeal panel reached the considered view that the claimant approached matters on 2 November as if she was in a “battle” of wills with the client, whereas there was no such battle, but that carers ought to be looking after the best interests of the clients, with 95% effort at least being placed on verbal interaction as an alternative to physical restraint such that it was not appropriate to refer to RT’s behaviour as “carrying on”; he was being himself. She did not consider that training would assist any further as the claimant seemed to have reached a point where notwithstanding her considerable training, knowledge and expertise she felt she knew better and carried on determinedly regardless.

2.28 By a letter dated 10 February 2015 (pages 185-186) the appeal panel chaired by Ms Parker dismissed the claimant's appeal.

3. **The Law**

3.1 The claimant claims that the respondent dismissed her in breach of contract as it did not give the claimant notice but dismissed her summarily. In this regard there is an implied term of trust and confidence in any contract of employment, and it is implicit that where an employee is in fundamental breach of contract such as by acts of gross misconduct an employer may dismiss for that breach and without notice.

3.2 Furthermore, the claimant was issued with terms and conditions of employment (pages 79(d)-79(g) with job description at 79(h) and (i) – disciplinary policy and procedure pages 34-44). At paragraphs 1.7 and 1.8 of the disciplinary procedure there is a non-exhaustive list of the matters considered to be gross misconduct which could lead to summary dismissal. The disciplinary procedure is specifically referred to in the written statement of terms and conditions. It is therefore the case that the claimant could either be dismissed on notice in accordance with the terms of the contract, or summarily dismissed without notice for any gross misconduct where gross misconduct includes, according to the non-exhaustive list, “physical violence or bullying or actual threatened violence or behaviour which provokes violence, conduct causing loss, damage or injury through serious negligence, serious neglect of duties or a serious deliberate breach of your contract or operating procedures”.

3.3 The Tribunal cannot imply contractual terms unless doing so is necessary to give effect to the contract, and that is not the case here. The written terms are clear as to what may result in summary dismissal, and gross misconduct may in any event also breach the implied term of trust and

confidence. The Tribunal must therefore decide whether the claimant was guilty of a fundamental breach of contract by way of breach of trust or by way of gross misconduct, or absent that whether the respondent was in breach of notice provisions.

3.4 The unfair dismissal claim is a statutory claim under the Employment Rights Act 1996 ("ERA"). Section 94 ERA gives an employee a right not to be unfairly dismissed. Section 98 ERA sets out at 98(2) a list of potentially fair reasons for dismissal, and at 98(2)(b) confirms that reasons related to conduct are potentially fair. It is for the respondent to prove that the dismissal was for a potentially fair reason. Subject to that the Tribunal must conclude whether it was fair in all the circumstances to consider that reason as sufficient reason to dismiss, and whether the employer acted reasonably or unreasonably in treating it as such in accordance with equity and the substantial merits of the case, taking into account all of the circumstances including the resources of the employer.

3.5 With regard to the unfair dismissal claim the lead case is **British Home Stores Limited v Burchell [1978] IRLR 379** which sets out the generally accepted test to be applied, namely for the Tribunal to establish whether the employer genuinely believed that the employee was guilty of alleged misconduct and did so on reasonable grounds following, and based on, a reasonable investigation. Furthermore, the test in **Iceland Frozen Foods Limited v Jones [1982] IRLR 439** provides that the function of the Tribunal is to determine whether an employer's actions fall within a band of reasonable responses of a reasonable employer, and this test goes beyond just consideration of the issue of sanctions imposed. If the actions of an employer fall within that band of reasonable responses a dismissal will be fair, but if outside that band then the dismissal will be unfair.

3.6 In her written submission Ms Clayton helpfully set out the principles of a number of leading cases relating to unfair dismissal, all of which are noted, and Mr Henry accepted that her paraphrase of and quotations from those cases were appropriate and correct. They were all taken into account by me in reaching my judgment.

3.7 I also reminded myself (helped by counsel's quotation of the principle in **Foley v Post Office** and other cases) that I must not substitute my view for that of the respondent in this case when applying the range of reasonable responses. It is not for me to decide what I would have done had I been the employer. I must consider what was the true reason for the dismissal and subject to that whether or not the respondent acted fairly and reasonably in treating that reason as sufficient reason to dismiss, in line with the band of reasonable responses test where one employer might reasonably take one view and another employer may quite reasonably take a different view.

4. **Application of Law to Facts**

4.1 There is no issue that the reason for the dismissal was conduct and I find, therefore, that that was the reason for the dismissal, and that the conduct in question was the issuing of a threat by the claimant to RT, a vulnerable adult in her care, on 2 November 2014. That threat was made in the context of the claimant expressing her unwillingness to put up with what she considered to be RT's "carry on" and was to the effect that if he did not desist from his then current behaviour she would take him to the SSA and if necessary inflict ground recovery upon him. She did this knowing that RT would be concerned if not in fact fearful of having to go to SSA and the risk of being subjected to ground recovery by carers. Whilst such a threat was listed as conduct constituting gross misconduct that was not why she was dismissed. She was dismissed for that conduct insofar as it constituted a serious neglect of duty, and a serious and deliberate breach of her contract and operating procedures; that is the methods by which she had been trained and according to which she was due to operate and conduct herself with regard to clients.

4.2 The conduct I have described was conduct entered into by the claimant in preference to following the prescribed methods of Team Teach and efforts to de-escalate situations where a client may exhibit conduct that was detrimental to him/her, other clients, property or staff. I conclude that the claimant considered frustrations exhibited by RT and connected to his autism as being challenging in that she could not tolerate the noise and behaviour and was determined to put a stop to it by bypassing or short-circuiting best practice and issuing a peremptory threat. I conclude that this was to ensure quiet good order to the claimant's satisfaction rather than to care for the claimant in RT's best interests.

4.3 The respondent undertook an investigation which established the behaviour described above, albeit the claimant denied that she was doing anything other than nipping a situation in the bud using a technique that she and others used which was more than likely to result in RT ceasing the behaviour she found to be challenging. It did so.

4.4 There is no issue that the respondent's management held a genuine belief that the claimant was guilty of the misconduct alleged, as there was no bad faith or bias. It was reasonable for the respondent's managers to hold the belief that the claimant was guilty of the alleged misconduct in the circumstances. A lot of extraneous matters were raised, discussed and considered during the course of this hearing. To his credit Mr Henry put forward a case far better than that initially argued by the claimant or her trade union representatives, or put either during the course of the investigation, disciplinary hearing, appeal or in the ET1 claim form. He raised deficiencies and shortcomings in respect of various aspects of the investigation and highlighted how matters could have been dealt with differently and arguably better. His forensic analysis of those extraneous matters was commendable and may have persuaded one to substitute one's judgment for that of the respondent if that was an available approach; it is not.

4.5 Notwithstanding Mr Henry's best endeavours, however, it was apparent that the issue before the disciplinary panel was quite a narrow one as there was little serious dispute as to the words used, the reason for them and the context; the main issue was to whether any such words ought to have been used in those circumstances. The claimant's discourse with RT was variously paraphrased but ultimately came down to the same thing; namely "stop what you're doing or you will go to the SSA"; "stop what you're doing or you will be subjected to physical restraint" (my paraphrasing). The investigating, dismissing and appeal officers in turn and insofar as it was relevant to their considerations had to consider whether such words and actions on the part of a carer towards a client was neglectful of duties set out in a client's support plans and were in compliance with or breach of contractual duties and operating procedures, being the taught, trained and enforced techniques relating to restrictive physical intervention being the least restrictive option and in the best interests of clients. These were matters of judgment for the respondent. The investigation such as it was, and albeit it could have been better in many respects, nevertheless presented the dismissing and appeal officers with sufficient information to form a reasoned and reasonable judgment.

4.6 In all the circumstances it was open to the dismissing and appeal officers to form the judgment that the claimant had issued a threat in preference to following other techniques to de-escalate a situation in which RT was displaying behaviour that could be harmful to himself and damaging to property whilst disturbing other clients and staff.

4.7 In all of those circumstances dismissal fell within the range of reasonable responses of a reasonable employer, albeit not all employers would necessarily dismiss in the same circumstances. The dismissing and appeal officers concluded that whilst the claimant had been trained to deal with such situation in what they considered to be a more appropriate and fitting way in the interests of RT, she wilfully chose a shortcut because she felt she knew better. They concluded she did this notwithstanding extensive training, qualification and experience. They had reasonable grounds to conclude that she could not be trusted in future to follow clients' support plans, training and the ethos of the respondent.

5. **Conclusions**

5.1 This is a difficult case. On the claimant's evidence the words that she used in those circumstances had the effect ultimately of calming RT's behaviour. It appears from her evidence, and there was no evidence to contradict it, that consequent upon her words that were deemed threatening RT took himself to the SSA and calmed down without the need for physical restraint. We know, therefore, that RT stopped banging or kicking doors and was not restrained. The claimant takes this as vindication of her approach, because she knows that the behaviour she found to be unacceptable actually stopped.

5.2 What we do not know is what effect her words had on RT emotionally and psychologically. He was not able to give evidence. He was not able to explain his emotions to the claimant or anyone else; all the witnesses conceded that because of his autistic condition he would be unable to do so and that he may in fact have had difficulty understanding his own emotions.

5.3 A very high standard is expected of carers of those who are vulnerable, be they children or adults. Those of us not engaged in such caring professions must be wary of assuming that it is easy to deal daily and for prolonged periods of time with behaviour that we too may find challenging; it is not. Caring professionals, and others such as me, must also be wary however of our use of terms which can become clichéd, such as "vulnerable adult", without at all times being mindful of the fact we are talking about a person with feelings, however poorly expressed or incapable of expression, with needs and requirements; we must be mindful not just of the label "vulnerable adult/child" but what it is that makes that person vulnerable and the ways in which they are vulnerable.

5.4 RT's primary need will have been for care and attention in a safe environment. Owing to his condition the assumption must be made that in keeping with most other people he would prefer an environment that was supportive, sensitive, and compassionate and not one governed by threats of force. That assumption was supported by RT's care plan which put in place advice and guidance as to how best to deal with him. It was therefore fair and reasonable of the respondent to expect that RT would be treated by his carers with all due respect and in accordance with that plan.

5.5 The claimant, as a carer, was expected not to deviate from the plan, notwithstanding her misgivings about its efficacy. This was not a matter of crowd control. The priority was not to prevent damage to property or a reduction in noise levels. The priority was the care and wellbeing of RT. That included considerations relating to the welfare of other clients, staff and maintaining the integrity of property, but the priority at all time in dealing directly with RT was RT's best interests and welfare.

5.6 The claimant sought to gainsay the respondent's considered view of RT's best interests and how they ought to be served in circumstances where RT could not express himself and his emotions effectively. The claimant thought that notwithstanding the care plan and all of the training she received she had a method of control which was ultimately more convenient to everybody and as a side product could prevent physical harm to the claimant.

5.7 In acting as she did the claimant breached her contract of employment, putting herself above and outside the respondent's practices, procedures and trained methods. She did so in no small part for her convenience, and while she may have had a care for the claimant's physical health in that he should not hurt himself, I am satisfied that her priority was controlling

behaviour that she found personally intolerable rather than as a carer putting RT's best interests first and engaging restrictive practices as a last resort. That was a breach of contract that was negligent and in breach of operating procedures such that it amounted to gross misconduct that destroyed the relationship of trust and confidence between the respondent and the claimant.

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Employment Judge T V Ryan

25th July 2016

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

[AF]