EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102300/2018

Held in Edinburgh on 25, 26 and 27th September 2018

Employment Judge: Amanda Jones

Ms P Benton	**Claimant** **Represented by** **Mr Fletcher, solicitor,** **Slater and Gordon**
Queens House Kelso Ltd	**Respondent** **Represented by** **Mr Howson,** **Peninsula Business Services Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly and wrongfully dismissed and the respondent is ordered to pay to the claimant a basic award of £6601.50 and a compensatory award of £20,303.92.

REASONS

Introduction

1. The claimant was a registered nurse employed by the respondent which provides residential care and support services for elderly at its premises in Kelso. Following her summary dismissal for gross misconduct on 18 September 2017, the claimant brought a claim of unfair dismissal. She also claimed that she was entitled to receive her notice pay. The respondent's position was that the claimant had been dismissed for misconduct. The

respondent denied that the claimant had been unfairly dismissed or that she was entitled to any notice pay.

2. In the alternative, the respondent argued that any unfairness in the claimant's dismissal should be considered procedural only and subject to the principles set out in the case of *Polkey v AE Dayton Service*s [1988] AC 344. The respondent also argued that if the claimant was found to have been unfairly dismissed, she had contributed to her dismissal and any compensation should be reduced accordingly.

3. It should also be noted that at the commencement of the proceedings, the respondent indicated that they were no longer seeking to make an alternative argument that if the claimant was not found to have been dismissed for misconduct, then her dismissal was for another potentially fair reason, being some other substantial reason.

4. The Tribunal heard evidence from the respondent's Executive Care Director, Dr Jane Douglas, the Chairman of its Board of Trustees, Mr Ray Jones, the claimant herself, her daughter, Ms Rebecca Benton and the claimant's trade union representative, Mr Brownlie.

Issues to be determined

5. The Tribunal was required to determine in the first instance whether the claimant had been wrongfully dismissed and was therefore entitled to her notice pay; and

6. In relation to the claim of unfair dismissal, whether the respondent had established a potentially fair reason for dismissal, being conduct, and;

7. In accordance with the long-established guidance set out in *Burchill v British Home Stores [1978] IRLR 379*, whether the claimant had been fairly dismissed in terms of section 98 of the Employment Rights Act 1996 ('ERA'), and whether in particular:

    a. Whether the employer actually believed that the employee was guilty of misconduct,

    b. Whether it had reasonable grounds on which to base that belief, and

c. Whether it had carried out as much investigation as was reasonable in the circumstances of the particular case

Findings in Fact

8. The Tribunal made the following relevant findings in fact:-

9. The claimant was a registered nurse who worked at the respondent's care home from 1 October 2007 until her dismissal on 18 September 2017. She had previously worked as a carer for a number of years at the respondent's premises before qualifying as a nurse at Napier University as a mature student. She was supported in this study by the then Matron.

10. The respondent runs a residential care home for the elderly and particularly those with dementia, in the Scottish Borders. It employs around 60 staff at any one time and has around 32 residents requiring differing levels of support. It is registered as a charity and as a care provider with the local authority.

11. The respondent would generally have one registered nurse on duty on any one shift, together with a number of carers and domestic staff. The registered nurse would direct and lead the team on duty on each shift.

12. The respondent employed one lead nurse who led the nursing team and all the staff ultimately reported to Dr Jane Douglas who was the Executive Care Director. At the time of the claimant's dismissal, Dr Douglas had been in post for around 16 months.

13. The respondent is governed by a Board of Trustees, with a Chair, Ray Jones.

14. On 12 July 2017, Dr Douglas had an informal meeting with one of the carers following the carer's return from holiday. During the course of that meeting, the carer alleged that she had witnessed the claimant treating two residents badly. The carer indicated that she had not previously reported these incidents but that they had been preying on her mind. No dates were given in relation to these alleged incidents.

15. The respondent has an internal procedure for reporting any issues of concern. For reasons which were not explained, this procedure was not produced to the Tribunal. The procedure was not followed in relation to the allegations made against the claimant.

16. The respondent's employee handbook lists 'failure to report an incident of abuse, or suspected abuse of a service user' as an example of gross misconduct. Dr Douglas did not consider taking action against the individuals who made allegations against the claimant.

17. Following the meeting between Dr Douglas and the carer, Dr Douglas contacted the Council Social Work department for guidance.

18. Dr Douglas was advised to suspend the claimant until the social work department could investigate the allegations. Dr Douglas was advised to tell the claimant that allegations had been made but not provide any detail in relation to the allegations and advise the claimant that the Social Work department would be in touch once they had appointed someone to investigate the matter.

19. Dr Douglas then telephoned the claimant at home on 13 July and advised her that she was being suspended. Dr Douglas did not consider inviting the claimant to a meeting to advise her of her suspension in person.

20. The claimant was very upset during this telephone call and indicated that she was 'gobsmacked'.

21. Dr Douglas did not speak to or meet the claimant after 13 July.

22. Dr Douglas wrote to the claimant on 18 July confirming that she had been suspended. Despite no details of the allegations having been provided to the claimant, the letter indicated 'if there is anyone whom you feel could provide a witness statement which would help in investigating the allegations against you, then please contact me and I will arrange for them to be interviewed.'

23. A written statement, which was undated was provided by the carer, subsequently identified as Vicky Purvis, to the Social work department during an interview with them. This statement was never provided to the claimant. The statement referred to the alleged incidents as having been 'a while ago'.

24. As a result of the interview with Ms Purves, another carer was interviewed by the Social Work department. The claimant was never advised the identity of those who made allegations against her. She discovered subsequently that Ms Purves was one of the carers, but still does not know the identity of the other carer.

25. At some point between 18 July and 8 August, the Social Department advised Dr Douglas that the respondent could now conduct its own investigation. No action was taken by the Social work department in relation to the allegations.

26. At some point before 8 August, a decision was taken by the respondent to engage an organisation called HRFace2Face to conduct an investigation into the allegations. That decision was taken on the basis that the allegations were very serious; that the respondent had been criticised (it was not clear by whom) in the past for conducting investigations internally, and that it was felt that the organisation was too small to conduct the investigations themselves. HRFace2Face was said to be an impartial organisation, although in fact it was a service provided by Peninsula which had been providing employment law advice to the respondent for a number of years.

27. Having had no contact from the respondent since the letter confirming her suspension on 18 July, the claimant contacted the respondent by email on 8 August asking for clarification on who her contact should be with the respondent and raising a concern about how long she had been kept uninformed. A request was also made for the disciplinary and suspension policies.

28. The respondent's business manager, George Jeffrey responded that day indicating that he would be the point of contact and providing extracts from the Employee Handbook. The claimant was also advised that a letter would be sent to her inviting her to an investigatory meeting on 15 August.

29. The disciplinary procedure indicates that 'other than for an 'off the record' informal reprimand, you will have the right to be accompanied by a fellow employee at all stages of the formal disciplinary procedure.' The procedure also indicates that the authority to dismiss either a member of management or other employees rests with the 'Disciplinary sub committee'

30. The claimant's contract of employment indicates that the disciplinary rules form part of her contract.

31. A letter dated 8 August, signed by Mr Jeffrey, was sent to the claimant requiring her to attend an 'investigatory meeting' at the offices of the respondent's accountants on 15th August. The letter made clear that if the claimant did not attend without good reason, this would be treated as a

separate act of misconduct and a decision on next steps would be taken in her absence. The claimant was advised that a HRface2Face consultant would make recommendations on further procedure following the meeting.

32. The letter indicated that the meeting was to consider 'Allegations of abuse to residents'. No further information was provided.

33. The claimant asked, by email, to be accompanied by her RCN representative at the meeting. She was advised by Mr Jeffrey 'as it is solely an investigatory meeting, there is no statutory right to be accompanied and it is not company practice to do this'. No reference was made to the claimant's contract of employment or the respondent's contractual procedure. This was a breach of the claimant's contract of employment.

34. A consultant, Mr McCabe conducted interviews with Ms Purves and the other carer who had provided information to the Social work department in advance of meeting the claimant.

35. While notes were taken of these meetings, these were not provided to the claimant at any time. The claimant first saw the notes in the weeks leading up to the Tribunal proceedings.

36. No detailed minutes were taken of any of the meetings conducted by Mr McCabe and there is no record of what questions he asked any of the witnesses. The notes are general in nature , inaccurate in some respects (in relation to the claimant) and attempt to paraphrase.

37. The interviews with the carers who made allegations against the claimant covered wide ranging issues beyond the specific allegations, including the carers making allegations about the claimant's mental health and calling the claimant 'crazy'.

38. Notes were taken of the meeting with the claimant, but these were not provided to the claimant at any time. The interview with the claimant lasted approximately 30 minutes. Again, no minutes were provided so there is no record of what questions were asked during the meeting.

39. The claimant attended the meeting alone and was upset and distressed throughout the meeting.

40. During the meeting, the allegations which had been made about the claimant were put to her verbally in a general manner. No dates or timescales were given and the claimant was not advised who had made the allegations.

41. As a result of the meetings, Mr McCabe drafted a report which was provided to Dr Douglas. The final section of the report, is entitled 'Findings' and makes 'findings' in relation to a number of issues other than the allegations of abuse. In particular Mr McCabe, for reasons which were not explained, made 'findings' about the claimant asking for lights to be switched off which caused her migraines, finding that "She could have avoided the lights and if they are as bad as she states, they have not caused her to suffer migraines' or to take absence from work and she has not provided any medical evidence to support her assertions." Mr McCabe did not have any medical qualifications and the claimant had no reason to believe that she would be asked about her migraines at the meeting with him.

42. Although there are no notes of any meetings between Mr McCabe and Dr Douglas, Mr McCabe makes reference to evidence obtained from Dr Douglas during his investigation in his report. In particular, the report states 'Dr Douglas states that the lights are not ones that flicker and shouldn't cause any adverse reaction which would lead to a migraine. She believes that Ms Benton does not like change …...'.

43. The report goes on to address alleged comments made by the claimant about scarves and a prior attempt at taking her own life; an allegation that the claimant kicked the feet of a resident 'in order for him to do what she wanted him to do'. However, again for reasons which were not explained to the Tribunal, Mr McCabe states 'This allegation (about kicking the resident's feet) was not put to Ms Benson but it would seem that she does act in a forceful manner with this gentleman and it could explain why he lashes out at her.'

44. Mr McCabe concludes his 'Findings' section, by stating somewhat contradictorily, 'I make no finding in relation to these latter points but suggest that they considered to be examples of Ms Benton's inappropriate behaviour.'

45. Mr McCabe then goes on to recommend that the claimant be invited to a Disciplinary Hearing to answer allegations of inappropriate treatment towards residents and inappropriate behaviour in work, such as

a. It is alleged that you have pushed a resident down into a chair because they would not comply with your verbal instruction to sit down at a time when you were eating supper.

b. It is alleged that you called an Employee to switch off a light outside the toilet so you didn't have to look at it. This is in breach of the use of staff resources.

c. It is alleged you shouted inappropriately at a resident standing in the hallway while you pushed him on his back to move him along the hallway.

d. It is alleged you display inappropriate behaviour when performing Reiki on residents, you complain about residents wearing scarves as it reminds you of a time when you tried to take your own life, it is alleged you have kicked residents feet (sic) in the past to get them to move.

46. This report was then provided to Dr Douglas. Dr Douglas agreed with the recommendations which had been made and wrote to the claimant by letter dated 25 August requiring her to attend a formal disciplinary hearing on 5 September. The allegations set out in that letter were identical in their terms to that set out in Mr McCabe's report. The claimant was advised that if the allegations were substantiated, they would amount to gross misconduct and her employment may be summarily terminated.

47. A copy of Mr McCabe's report was included with the invitation to the meeting. No further documentation was provided.

48. It was Dr Douglas' decision that the matter should proceed to a disciplinary hearing.

49. The claimant emailed Mr Jeffrey on 3 September asking for the names of the witnesses who had been interviewed; for them to be invited to the disciplinary hearing; for Mr McCabe to be required to attend the hearing and copies of the documentation referred to in the report, in particular the written witness statement and the other documentation which had been given to Mr McCabe in advance of his investigation.

50. The claimant did not receive a response to this email.

51. In the event, the hearing on 5 September was postponed to 7 September to allow the claimant to be accompanied by her RCN representative.

52. The claimant obtained a letter from her GP confirming that her migraines had been triggered by bright lights, which she provided to the disciplinary hearing.

53. A disciplinary hearing took place and was chaired by another consultant from HRFace2Face, Ms Reid. A transcript of this meeting was provided as the meeting was recorded with the consent of all parties.

54. Ms Reid was not aware of the email of 3 September from the claimant requesting various matters be addressed at the hearing.

55. HRFace2Face had decided that Mr McCabe should not attend the hearing and Dr Douglas agreed not to make him attend. There was no transparency about when or how this decision was reached.

56. The first part of the hearing was taken up with Ms Reid discussing the various requests which had been made by the claimant for information about the investigation. The hearing was then adjourned for Ms Reid to check this information. When the meeting reconvened, Ms Reid indicated that she couldn't get hold of Mr McCabe but that the witnesses had asked to remain anonymous. She did not say where she got this information from.

57. The substantive part of the hearing lasted 35 minutes. Ms Reid read through the letter of 25 August and then went through each allegation with the claimant.

58. During the hearing, the claimant indicated that her daughter, who at the time worked for the respondent, was present at one of the incidents which had been alleged. The claimant's representative raised a concern that neither the claimant, nor those making the allegations had been asked whether there were any other witnesses at the time. Concerns were also raised regarding 'judgmental' statements made by Mr McCabe in his report, and that the claimant had not been given minutes of any of the meetings.

59. The claimant was advised that Ms Reid would carry out further investigations and then make recommendations to the respondent who would decide whether to follow those recommendations.

60. Subsequent to the hearing, Ms Reid phoned the claimant's daughter while she and the claimant were in a supermarket and asked her about the incident

at which the claimant said her daughter was present. The claimant's daughter indicated that she had written down a statement once she was aware of the issue. Ms Reid asked for a copy of the statement which the claimant's daughter emailed to her. The call lasted 2-3 minutes and neither the claimant nor her daughter heard anything further from Ms Reid.

61. Following the disciplinary hearing, Ms Reid also spoke with Dr Douglas and Mr McCabe. No notes were taken of any such meetings or phone calls and the claimant was never given an opportunity to comment on anything which was said in these meetings or calls.

62. Ms Reid then produced a report. This report did include some comment from Mr McCabe in relation to various issues raised by the claimant during the disciplinary hearing. The claimant was not given the opportunity to comment on this. Neither was the claimant given an opportunity to consent the unilateral decision not to take her daughter's statement into account.

63. The report then went on to make 'Findings' in relation to the four allegations against the claimant. Two of the four allegations were upheld.

64. In relation to the allegation that the claimant 'shouted inappropriately at a resident standing in the hallway while you pushed him on his back to move him along the hallway,' Ms Reid concluded that the statement provided by the claimant's daughter was 'inadmissable'. Ms Reid also criticised the claimant for not providing this statement at the investigatory meeting with Mr McCabe, (even though the claimant was not aware of any detail of the allegations against her until that meeting). Ms Reid went on to state 'This is an example of PB's inconsistent version of events'.

65. Ms Reid also stated that 'Having clarified such a technique with Queens House Moving and Handling Instructor and also Social Work and Dementia Specialists, the is no such 'technique' for sitting somebody down as mentioned by PB.' Ms Reid did not speak to any of the people mentioned, and was provided this information by Dr Douglas.

66. The claimant had demonstrated a technique she said that she had used in relation to one of the allegations to Mr McCabe. She was never given an opportunity to demonstrate the technique to which she was referring to Dr Douglas, or any of those mentioned by Ms Reid.

67. Ms Reid found two of the allegation established and recommended that the claimant be summarily dismissed for gross misconduct.

68. The report was provided to Dr Douglas who decided to follow the recommendation. Dr Douglas wrote by letter dated 18 September to the claimant enclosing the report from Ms Reid, stating 'Please find attached their report, which represents my decision.'

69. The claimant was advised of her right to appeal to the Chairman, Ray Jones.

70. The claimant appealed against her dismissal, setting out 13 points of appeal.

71. The respondent wrote by letter dated 2 October indicating that a further consultant from HRFace2Face would consider the appeal on 4 October.

72. This hearing was chaired by Ms Waugh of HRFace2Face. The hearing was again recorded and a transcript of the meeting was available to the Tribunal. During the hearing all of the 13 points raised by the claimant were addressed. One of the issues discussed was point 6 'dismissal was inappropriate as Mrs Douglas was involved in the investigation procedure.'

73. A report was then produced by Ms Waugh. None of the points raised by the claimant were upheld. The report concluded 'Having given full and thorough consideration to the information presented I recommend that the Grievance Appeal (sic) be dismissed in its entirety.'

74. The respondent then sent a letter dated 19 October to the claimant signed by Dr Douglas stating 'Please find attached the report of the consultant which represents my decision.'

75. Mr Jones, who the claimant had been advised would deal with her appeal, did not read the report prior to the letter of 19 October being sent as he said he was on holiday. He did however discuss the position with Dr Douglas during his holiday and agreed with her that the appeal should be dismissed.

76. Mr Jones did not give any independent thought to the issue of the appeal.

77. As a result of the circumstances of her dismissal, the claimant has been unable to obtain alterative employment with any care homes or any caring role with the Council. The only employment she could obtain was working in a fish factory preparing fillets and putting fish guts in boxes at a rate of pay of £7.80 per hour.

Observations on the evidence

78. The parties were in dispute as to which version of the respondent's handbook was relevant for the purposes of considering the relevant disciplinary procedure. The claimant maintained that when she asked for a copy of the procedures, she was sent Version 0, but the respondent's position was that Version 5 was in operation. There were no documents presented which demonstrated which version had been provided to the claimant. In any event, it was the Tribunal's view that the dispute mattered little. The only difference of substance was where authority lay to dismiss an employee. In version 0, the authority law with the Disciplinary sub committee and in version 5, it lay with the 'Executive Care Director Sub Committee'. The Tribunal concluded that in either circumstances, what was envisaged by the contractual procedures was that where an employee was being dismissed, any dismissal should be handled by a sub committee created for that purpose. In the latter case, this ought to include the Executive Care Director, while in the former, no doubt it may, but would not necessarily include the person in this role, which was previously called 'Matron'. There was no dispute that the respondent failed to follow this procedure and there was no evidence from the respondent that they had in fact turned their mind to the procedures prior to dismissing the claimant. In fact, the evidence of Dr Douglas as set out above which formed the basis of her decision to engage external consultants, appeared to be entirely unaware of the respondent's own procedures. Further, it was never suggested by the respondent that they sought the claimant's agreement to the procedure which was followed which was in breach of the claimant's contract of employment.

79. A further issue of dispute, which was more fundamental, was the reason for the claimant's dismissal itself. Dr Douglas' evidence was that the claimant was dismissed because of her use of inappropriate language and that she pushed a resident into his chair when he was trying to get out of the chair. The claimant's evidence was that she thought she had been dismissed because of her use of inappropriate language and that she had pushed a resident into a chair after he had been standing up and walking. The claimant

admitted using inappropriate language although she maintained she did not say what had been alleged.

80. The allegation against the claimant about pushing a resident, in addition to having no reference to a date did not specify the circumstances leading up to this allegation, and so it is perhaps of no surprise that there was such confusion. The evidence of Dr Douglas was that she had understood that the claimant had pushed the resident into his seat when he was trying to get out his seat. She was, perhaps unsurprisingly firmly of the view that there was no appropriate technique to be used by staff in such circumstances. At no time, however, did Dr Douglas see the technique the claimant says that she used. This is because Dr Douglas did not ever meet the claimant or have any communications with her after the phone call telling her she was suspended. It was therefore clear to the Tribunal that the claimant was seeking to put forward her position based on a fundamental misunderstanding of the allegation against her.

81. One of the allegations against the claimant which was not ultimately progressed related to a very serious allegations (indeed it seemed to the Tribunal that it was more serious than the allegations which had led to the claimant's dismissal) that the claimant had been kicking a resident's feet to get him to sit down. The allegation was that there was a student nurse present at the time. Dr Douglas gave somewhat conflicting evidence about her efforts to identify the student nurse. At one point she suggested that it would be very difficult to identify the student nurse and at another point under cross examination, Dr Douglas indicated that she did phone the professional education facilitator to identify the nurse. Dr Douglas' evidence was that she was told if she could identify the dates, efforts would be made to help identify the student nurse. Dr Douglas then said that she asked the complainer who could not give any dates, so she did not take the matter further. The Tribunal did not find this evidence to be credible. There was no dispute that only 3 or 4 student nurses worked with the respondent in any one year. The notes taken by Mr McCabe of his meeting with this member staff state that she 'thought this took place a few months ago'. It therefore seemed implausible that, had Dr Douglas actually asked the complainer for specification of a date,

she would not have been told something similar, which would have allowed her to make efforts to identify the student nurse concerned.

82. A further matter of concern arose in relation to Dr Douglas' evidence in response to a question from the Tribunal. The report of Mr McCabe records the claimant as having stated in response to the allegation that she had pushed a resident into his chair 'She is not the only one who sits him in chair (sic) so she doesn't see why she is singled out for a practice that everyone does.' Dr Douglas was asked whether she had taken any steps to investigate the suggestion that the claimant was being disciplined for something all staff did. She indicated she had not and could give no explanation as to why that was the case.

83. In these circumstances, the Tribunal concluded that Dr Douglas' evidence was, in some respects unreliable. More generally however, the Tribunal was not satisfied that Dr Douglas was a credible witness.

84. The evidence of Mr Jones was straightforward. It was clear that he did not believe he had any responsibility to give any independent thought to the grounds on which the claimant had appealed her dismissal. Indeed, it did not appear to the Tribunal that Mr Jones believed he had any responsibility to ensure that the decision to dismiss the claimant was the correct decision. The Tribunal was particularly troubled that, despite the fact that Mr Jones was of the view that he was responsible for the good governance of the respondent, he did not think it necessary to give proper consideration to the appeal proceedings. The Tribunal concluded that Mr Jones was cavalier about his responsibilities in dealing with this matter. It was particularly concerned about his evidence that the organisation did not pay money to reject recommendations made by a professional body (HRFace2Face). When asked who made the decision to accept the recommendations, Mr Jones stated "Jane (Dr Douglas) would have mentioned it to me, and I would have been happy to let it run as the Face2Face report. Further, Mr Jones did not even think it necessary to read the report, before a decision was taken to dismiss the claimant's appeal."

85. The Tribunal found the claimant's evidence to be a credible. The claimant readily admitted she had used language which was inappropriate in relation

to a resident, albeit that she denied using the language alleged. The Tribunal also found the evidence of her daughter to be credible and reliable. It was suggested to the claimant's daughter by the respondent's representative that she had lied to the Tribunal and made up the statement which was produced to the Tribunal. This suggestion was made on the basis of mere speculation, given that no effort was made by the respondent to speak to Ms Rebecca Benton during the investigations other than to ask for a statement which was then deemed to be inadmissable.

86. The Tribunal also found Mr Brownlie to be a credible and reliable witness.

Relevant law

87. Section 95 of the Employment Rights Act 1996 ('ERA') deals with circumstances in which an employee is dismissed and section 98 deals with the issue of fairness of a dismissal. Conduct is a potentially fair reason for dismissal in terms of section 98 (2)(b).

88. Section 98(4) then goes on to provide that where a potentially fair reason for dismissal has been established, whether that dismissal was fair or not will depend upon 'whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee'. That issue will be determined 'in accordance with equity and the substantial merits of the case'.

Submissions

89. Mr Howson, on behalf of the respondent submitted that this was a normal unfair dismissal claim and therefore accepted that the 'Burchell test' (*British Home Stores v Burchell* [1978] IRLR 379) was applicable. The reason put forward for the claimant's dismissal was conduct. The respondent's submission was that the investigation which was carried out was reasonable, and that while statements were not sought from additional members of staff beyond the two complainers, the investigation was not required to go into the minutiae. It was submitted that the size and resources of the respondent required to be taken into account. The respondent did recognise that as a third party professional organisation had been engaged to conduct the investigation, this was also a factor in this regard.

90. The respondent also submitted that there were sufficient and reasonable grounds to entitle the respondent to have a reasonable belief in the misconduct of the claimant. The respondent put that misconduct as that residents had been deprived of their dignity and that the respondent was entitled to take into account what they said were admissions from the claimant.

91. The respondent also submitted that as long as dismissal **could** rather than **would** fall within a band of reasonable responses then it would be a fair dismissal and that if the respondent reasonably believed that the claimant had pushed a resident into a chair and deprived him (and another resident by using inappropriate language), then dismissal would fall within the band of reasonable responses. The respondent also invited the Tribunal to bear in mind that the claimant was the senior member of staff on duty and that she should show an example to other junior staff.

92. In addressing the procedure followed in this case, the respondent submitted that limited management structure made it fair to outsource the investigation into the allegations against the claimant. The respondent also criticised as contradictory, the claimant's apparent position that the respondent's Executive Manager was both too involved and not involved enough in the proceedings. It was also submitted that the investigation meeting with Face2FaceHR was an informal meeting and therefore there was no breach of the procedures in refusing to allow the claimant to be accompanied at that meeting.

93. The respondent also addressed the case of *Linfood Cash and Carry Ltd v Thomson and another* [1989] IRLR 235 in relation to the allegations against the claimant having been made on anonymous basis. The respondent submitted that the fact that the complainers spoke to the investigator face to face and that notes were taken and that the claimant had guessed the identity of one of the people (although it was not suggested that this was at the time of the investigation itself) were sufficient to ensure that there was a balance between the desirability of the protecting informants who were genuinely in fear and providing a fair hearing.

94. Mr Howson also submitted that it was fair to exclude the statement of the claimant's daughter from consideration on the basis that it was not credible that the claimant had not remembered at the investigatory hearing that her daughter had been present and that there was a reason for her daughter to lie in giving the statement, while there was no reason for the complainers to have lied.

95. The respondent then turned to the issue of remedy in the event that the Tribunal did not accept these submissions. The respondent submitted that even if the Tribunal found that the procedure had not been fair, there should be a 100% reduction in compensation on the basis of *Polkey v AE Dayton* [1987] ICR 142 in that had a fair procedure been followed there was a 100% chance of the claimant having been fairly dismissed.

96. The respondent also sought to argue that the claimant had contributed to her dismissal. It was submitted that if the Tribunal found that the claimant had committed the misconduct alleged in relation to Mr X on the basis of the claimant's admission of inappropriate language, then compensation should be reduced by 25%, but if the Tribunal found that the claimant had committed misconduct in relation to Mr Y also (by pushing him down in a chair) compensation should be reduced by 100%.

97. Finally, the respondent submitted that in the event the Tribunal found that there had been a failure to follow the ACAS Code of Practice on handling disciplinary matters, then compensation should only be increased by 5% and not the 25% requested by the claimant.

98. Mr Fletcher, on behalf of the claimant made submissions on the basis that it had been conceded by the respondent that the only potentially fair reason put forward for dismissal was conduct.

99. The submissions rehearsed the chronology of events and invited the Tribunal to make a finding in fact that the failure to allow the claimant to be accompanied at the investigatory meeting was a breach of her contract of employment. This was on the basis that, amongst other factors, by this point both Social Work and the Police had been informed about the allegations, and that failure to attend the meeting would be treated as a separate disciplinary matter. Mr Fletcher went on to highlight criticisms of the procedure which had been followed in relation to the investigation of the matter.

100. In particular, he submitted that the allegations of the two staff members showed bias and that this was not challenged in any way. Mr Fletcher made reference to *Linfield* and submitted that when an employer is relying on anonymous statements in an investigation, the there is a duty on the employer to check the reason why the statements were being anonymous. Mr Fletcher submitted that there was no

meaningful justification as to why the accusers should remain anonymous and that the only reason put forward was that they lived and worked in a small town. Mr Fletcher suggested that Kelso had a population of 6000 and therefore this was not a sufficient reason.

101. Mr Fletcher also criticised the failure of the Face2Face HR to narrate the questions which were posed to the claimant and witnesses during the investigation and the notes of the investigation meeting in general which he said were inadequate. The failure of Face2Face to answer the questions asked by the claimant was also criticised.

102. Mr Fletcher also criticised the failure of either Face2Face or the respondent to require Mr McCabe to attend the disciplinary hearing. Mr McCabe was also criticised for failing to make any attempt to identify any other witnesses who might be in a position to give relevant evidence and highlighted that Mr McCabe was a solicitor and that this was a relevant factor to take into account when considering the sufficiency of the investigation in the context of the size and administrative resources of the respondent.

103. Mr Fletcher acknowledged that a respondent could outsource an investigation but that if this was done, then the investigation would have to be conducted independently. Mr Fletcher pointed out that Dr Douglas was involved in each stage of the proceedings and submitted that it was clear that she had influenced and indeed helped craft the investigation report, which she then founded upon to progress matters to a disciplinary hearing. In particular, Mr Fletcher criticised Dr Douglas for effectively taking evidence from specialists on moving and handling techniques which was never put to the claimant and directing Face2Face to Codes of practice and good practice guides produced by Mental Welfare Commission and the Nursing and Midwifery Council, which again were never to put the claimant.

104. Mr Fletcher submitted that there was no genuine appeal at all and that Dr Douglas had been involved in instructing the investigation, influencing the investigation, deciding to proceed to a disciplinary hearing, being involved in the disciplinary proceedings, taking the decision to dismiss and then taking the decision to dismiss the appeal.

105. It was also submitted that there were inconsistencies in relation to the nature of the allegations against the claimant. Dr Douglas had said in evidence that it was all about restraint, but it was never put to the claimant during the proceedings that she had restrained a resident. He submitted that if the matter were about restraint, then this was a training issue rather than gross misconduct. It was also submitted that the question of whether or not the allegations against the claimant had deprived residents of dignity had never been investigated as there was no attempt made to look at the care plans or notes in relation to either resident. He also suggested that the claimant's admission about her inappropriate language could not amount to gross misconduct and that when the claimant's 10 years of unblemished service was taken into account, the decision to dismiss was not within the band of reasonable responses and was both procedurally and substantively unfair.

106. Turning to the issue of contribution, Mr Fletcher submitted that there should be no reduction in compensation if the Tribunal found in the claimant's favour. He also submitted that there were numerous breaches of the ACAS code and that this should result in an uplift of any compensation by 25%.

Discussion and decision

107. The Tribunal, on the whole, preferred the submissions made on behalf of the claimant.

108. The Tribunal was satisfied that the respondent had established a potentially fair reason for dismissal being conduct. The Tribunal then turned its mind to whether the respondent had acted fairly in terms of section 98(4) ERA in light of the test set out in Burchell.

109. In the first instance, the Tribunal considered whether the respondent genuinely believed that the claimant was guilty of the acts of misconduct of which she was accused.

110. The Tribunal was not satisfied that the respondent did genuinely believe that the claimant was guilty of the specific acts of misconduct which resulted in her dismissal. In particular, the Tribunal concluded that the respondent had failed to establish with any precision the exact nature of the misconduct of which the claimant was accused. The letter of 25th August 2017 put the two specific 'matters of concern' to be addressed which were established as:

> It is alleged that you have pushed a resident down into a chair because they would not comply with your verbal instruction to sit down at a time when you were eating supper, and
>
> It is alleged you shouted inappropriately at a resident standing in the hallway while you pushed him on his back to move him along the hallway.

111. The letter of dismissal makes no reference to the specific allegations which were found proved and simply refers to the report which was submitted by Face2FaceHR. The report itself does not set out with any specificity exactly what is it the claimant is said to have done or said in relation to either of these allegations. While each allegation is upheld in the report, the report does not make any attempt to set out what exactly, where or when the claimant is said to have done or said. The report indicates that Ms Reid clarified the technique the claimant said she used with the 'Social Work and Dementia specialists', but does not set out what technique she is referring to.

112. In any event, the Tribunal found that this information came from Dr Douglas, who could not have known what technique was being referred to without having been provided with specific details. The Tribunal was satisfied that at no time did Dr Douglas seek to clarify what exactly was being referred to in the demonstration made by the claimant during the investigatory hearing. The report then goes on to make reference to the claimant having 'offered insufficient mitigation for such a serious breach of The Nursing and Midwifery Council Code - "preserving safety and promoting professionalism and trust". However, the claimant was never referred to the code. While the Tribunal accepts that the claimant was aware of the code, it concluded that if the allegation against the claimant was that her actions were in breach of the code, this should have been put to her at the investigatory stage or at least during the disciplinary hearing.

113. Therefore, the Tribunal concluded that the respondent did not genuinely believe the claimant was guilty of the acts of misconduct as Dr Douglas could not have had anything but general allegations in mind when coming to dismiss the claimant. Rather, the Tribunal concluded that Dr Douglas reached

the decision to dismiss the claimant on general allegations of behaviour which was unspecified.

114. If the Tribunal is wrong about that matter, then the Tribunal concludes that the respondent did not have reasonable grounds on which to find that the claimant had committed the acts of misconduct. The Tribunal was of the view that the allegations were too general in nature, and lacked sufficient specificity to entitle the respondent to conclude that the claimant had committed acts of misconduct.

115. Further, the Tribunal concluded that the investigation which was carried out in relation to these matters was fundamentally flawed. The Tribunal was surprised at the quality of the investigation which was carried out by a professional organisation on behalf of the respondent. In particular, the Tribunal was surprised that proper minutes of the investigation meeting were not taken, that no note of the investigation meeting was provided to the claimant other than the report itself; that no record of the questions asked of the witnesses was made, including the claimant; that the complainers were not asked during the investigation why they wished to remain anonymous; that the complainers were not challenged in way for making entirely irrelevant allegations about the claimant's family and mental health; that no effort was made to identify any witnesses to the alleged incidents, in particular the student nurse, or other members of staff; that the claimant should be criticised for not raising matters about the allegations against her at the investigatory hearing when she did not know what the allegations were prior to the hearing and was not allowed to be accompanied at the hearing; that serious matters were raised during the investigation, which were not investigated at all (for instance, that the claimant was alleged to have kicked a resident and that many other staff did what the claimant was being investigated for doing); that the investigation report did not make any reference to information obtained from Dr Douglas or record any conversations with her about the investigation.

116. The Tribunal was particularly concerned that the investigatory officer appeared to make no attempt whatsoever to take into account that the claimant's career could be ended if the allegations against her were founded. The Tribunal would expect any employer, never mind a professional company

engaged to carry out an investigation to be aware that where serious allegations are made against a professional, such as a Nurse, that an investigation should be thorough to ensure fairness. The Tribunal formed the view that the investigation was instead cursory at best.

117. The Tribunal also considered whether the procedure as a whole which had been followed in relation to this matter had been fair. It concluded that it had not.

118. In particular, Dr Douglas was involved at every stage of the proceedings. Dr Douglas suspended the claimant, having heard an allegation against her; instructed the investigation; was involved in the investigation; took the decision that the matter should proceed to a disciplinary hearing; was involved in the disciplinary proceedings (albeit her involved was not recorded in any report or minute); took the decision to dismiss the claimant and was influential in the decision to dismiss the claimant's appeal. On that basis alone, the dismissal of the claimant was unfair.

119. In addition, the failure of the respondent to follow its own procedure in two significant respects rendered the dismissal unfair.

120. In the first instance, the respondent breached its own procedures in refusing to allow the claimant to be accompanied at the investigatory meeting. The Tribunal could not accept that this was an 'informal' part of the proceedings. At this stage, the Social Work department had already conducted some kind of investigation into the allegations and consideration had been given to referring the matter to the police. Furthermore the claimant was advised that if she failed to attend the meeting, that could be treated as a separate act of misconduct. This failure was particularly important as the respondent subsequently drew adverse inferences from what was an was not said by the claimant at this meeting, even though she had no idea of the nature of the allegations in advance and had nothing in writing to assist her in that regard during the meeting.

121. In addition, the procedure provided that a disciplinary sub-committee was authorised to dismiss an employee. It appeared to the Tribunal that even if the procedure had been amended to include the Executive Care Director (which was not at all clear), that in any event a sub committee was required

to be convened to decide on a dismissal. This did not seem surprising to the Tribunal given the nature of the respondent's operations and the potential impact of dismissal on an employee's ability to obtain alternative employment following dismissal.

122. In all of these circumstances, the Tribunal had no hesitation in concluding that the claimant's dismissal was both procedurally and substantively unfair.

Remedy

123. The claimant's gross weekly pay was £617.76 and she had 9 years' service and was aged 50 at the date of dismissal. On that basis, she is entitled to receive a basic award of £6601.50.

124. The claimant's net salary was £450 per week. Her annual gross salary was £32,123.52 and the respondent contributed £1500 per annum to the claimant's pension, therefore 52 weeks' pay was £33.623.52.

125. The claimant has obtained alternative employment, albeit of a menial nature with net income between dismissal and the 22 September of £13,386.16.

126. The claimant's net losses to 22 September 2018 were £9,713.84

127. The claimant has ongoing weekly net losses of £165.19 and pension loss of £28.85, giving a total ongoing weekly loss, £194.04.

128. In addition, the claimant has suffered a loss of her statutory rights, in respect of which the Tribunal makes an award of £500.

129. The Tribunal considered that the claimant would find it difficult, even standing the terms of this judgment, to secure alternative employment at a similar level of pay she had previously enjoyed. She is therefore likely to suffer this ongoing loss for an ongoing period.

130. Taking all of this into account, the Tribunal makes the following awards

    a. Basic Award £6601.50
    b. Compensatory award of £20,303.92 made up as follows:
        i. Loss to date of hearing - £9713.84
        ii. Ongoing losses of 52 weeks £10,090.08
        iii. Loss of statutory rights £500

131. The Tribunal considered the respondent's submissions that there should be a *Polkey* reduction to any compensation awarded to the claimant. The Tribunal did not accept these submissions. The Tribunal concluded that the nature and number of procedural flaws which had been identified were such that no *Polkey* reduction should be made to the award to the claimant.

132. The Tribunal then considered whether the respondent had failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and if so, whether any uplift in compensation should be applied as a result.

133. The Tribunal concluded that the Code had been breached in the following respects:

    a. Dr Douglas had not been authorised to dismiss the claimant in terms of her contract of employment;

    b. The respondent did not deal with the appeal of the claimant in an impartial manner, given that Mr Jones did not give any consideration to the grounds of appeal and Dr Douglas was involved in the decision to dismiss the appeal.

134. Taking into account these failures, the Tribunal applied an uplift of 10% to the compensatory award.

135. The Tribunal then went on to consider whether the claimant had contributed to her dismissal. The Tribunal concluded that the claimant had contributed to her dismissal in her admitted use of inappropriate language to the respondent's resident and in particular in saying to an elderly resident suffering from dementia, that he was potentially going to cause her staff to be sacked.

136. In this regard, the Tribunal concluded that, while it was not just and equitable to reduce the basic award, the compensatory award should be reduced in terms of section 123(6) of ERA by 10%.

137. While the Tribunal found that the claimant had also been wrongfully dismissed, and therefore the claimant of breach of contract succeeds, no additional damages are awarded in this regard.

138. The Tribunal therefore orders that the respondent pay to the claimant a basic award of £6601.50 and a compensatory award of £20,303.92.

Employment Judge: Amanda Jones
Date of Judgment: 08/11/2018
Entered into Register: 12/11/2018
And Sent to Parties