EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103458/2022

Heard at Dundee on 14 and 15 November 2022

Employment Judge J Young

Ms Ann Buchanan	**Claimant** **Represented by:** **Ms L Campbell,** **Solicitor**
Blackwood Homes and Care	**Respondent** **Represented by:** **Mr B Brown,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondent in terms of section 98 of the Employment Rights Act 1996.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal complaining that she had been unfairly dismissed by the respondent. The essence of the claim was that she had been employed as a Support Assistant by the respondent and dismissed on an allegation of mistreating

a customer. She denied any incident of mistreatment. The respondent maintained that there was sufficient evidence to conclude mistreatment and so dismissal on the grounds of gross misconduct was warranted.

2. The issues for the Tribunal were:-

(i) What was the reason for dismissal?

(ii) Was that a potentially fair reason for dismissal?

(iii) If the reason was misconduct did the respondent believe the claimant guilty of misconduct; had in mind reasonable grounds to sustain that belief, and carried out as much investigation into the matter as was reasonable?

(iv) If so, was dismissal for that reason within the band of reasonable responses?

(v) Was there procedural unfairness?

(vi) If the claimant succeeds, was there contributory conduct?

(vii) If the claimant succeeds on either substantive or procedural unfairness, what compensation should be awarded in respect of the unfair dismissal?

Documentation

3. The parties had helpfully liaised in providing a Joint Inventory of Productions paginated 1-370. In the course of the hearing one further production was produced (without objection) paginated 371 (J1-371).

The hearing

4. At the hearing I heard evidence from:-

(i) Kim Anderson, Team Leader at the respondent's home in Broom Court, Stirling. She had been employed by the respondent for some 27 years and held the position of Team Leader for approximately 10 years.

(ii) Linda Brown, Senior Care Service Manager with responsibility for the respondent's Edinburgh service. She had held the position of Senior Care Manager for a *"few months".* Prior to that she had held the position of Care Service Manager with the respondent for approximately five years.

(iii) Marshall McDowall, Head of Customer Services for the west of Scotland since January 2021 who carried responsibility for Broom Court since July 2021 and who had been engaged in the health and social care sector since approximately 1984.

(iv) Anna Marshall who had joined the respondent as an HR Officer in September 2012, then became Senior HR Adviser and who at date of hearing held the position of HR Manager.

(v) The claimant who had been employed by the respondent as a Support Worker for approximately 15 years and engaged on night shift for approximately eight years.

5. From the evidence led, admissions made and documents produced I was able to make findings in fact on the issues.

Findings in fact

6. The claimant had continuous service with the respondent in the period between 18 February 2008 and 28 January 2022.

7. She was initially engaged as a Support Worker at Broom Court normally working not less than 33.25 hours per week on a rota duty system of four days on/four days off. She had been engaged on night shift on the same rota for eight years prior to termination of employment. A number of people had worked with her on night shift over that period.

8. The claimant's Statement of Terms and Conditions of employment (J43/J50) advised that she was subject to the standards of conduct and performance within the respondent's "*Code of Conduct, Discipline and Grievance Procedure*"; that she was required to register with Scottish Social Services Council (SSSC) and that the SSSC Code of Practice applied to her employment. That code set out criteria, to guide the claimant's practice at work, and standards of conduct that the claimant was expected to maintain. If not, disciplinary action "*may be taken*".

Codes of practice and disciplinary procedures

9. The SSSC Code of Practice for Social Services Workers (J65/78) advised that amongst other conditions a worker would not "*abuse, neglect or harm people who use services, carers or my colleagues*" (J75).

10. The respondent Code of Conduct for Employees (J96/105) advised that in working with customers of the respondent a worker must maintain "*high standards of professionalism, fairness and courtesy in all your dealings with our customers*"; and treat them "*with respect at all times and always remain professional*" and not "*harass, bully or attempt to intimidate any person*". In the event of breach of the code disciplinary action may ensue.

11. The respondent Disciplinary Policy and Procedures (J80/93) gave examples of gross misconduct which might include "*Physical violence or serious levels of intimidation, harassment, victimisation or bullying of a customer or employee either directly or indirectly*" or "*Any breach of professional codes of conduct*" such as the SSSC Code of Practice.

12. Before disciplinary action was taken an investigation should be undertaken and the employee advised in writing of the nature of the allegations made against him/her and given the opportunity to state his/her case before any decision made on disciplinary action. The right to be accompanied to any formal meeting or disciplinary hearing outlined at paragraph 3.5 (J81) stated:-

> "*All employees who are the subject of this policy have the right to be accompanied at any formal meeting or disciplinary hearing held under the policy by a trade union representative or work colleague. Employees cannot be represented by someone who is already involved in the case, a family member or a friend (unless they are also a colleague or trade union official, or a legal representative.*"

13. The investigation process set out (J83) the appointment of an investigation officer who would prepare a report and establish whether there was a case to answer. If following an investigation it was decided to progress to a disciplinary hearing an employee would normally be given five working days' notice of that hearing; provided with details of the allegation(s); and given an indication of whether or not the allegation(s) amounted to

potential serious/gross misconduct. At any hearing an employee was entitled to bring witnesses.

14. Any employee disputing a disciplinary action was entitled to an appeal which would normally be heard within 28 working days from the date of the appeal being lodged; and the outcome normally intimated within five working days after the appeal hearing.

15. It was noted that the respondent was bound to inform SSSC of any disciplinary action taken.

Intimation of allegations

16. In late September 2021 Kim Anderson as Team Leader was approached by Marlene Bartle a Support Worker who raised concerns regarding the claimant. She advised that two night shift relief workers had indicated to her that the claimant had sworn at residents and in particular resident AB (as referred to here) when she buzzed for night shift assistance.

17. AB had been admitted to Broom Court in January 2017 for continuing care and support and required considerable personal care. Kim Anderson described AB as being very independent who after treatment from cancer had a continuing neurological condition which affected the feeling in her arms and hands. By September 2021 AB could be incontinent of urine overnight, sometimes frequently and this would require change of night clothes and bedding.

18. She was described as a "*quiet lady – nice lady*". Her care plan under "*mental capacity*" (J171) advised that she was "*able to make my own decisions but will ask staff or family if there is something I am unsure of*" and under "*making decisions*" it was noted that she "*may not understand fully what has been written or said and could make a decision that could impact on health or well being*" (J172). On mental capacity an overall risk score of 0 was noted but Kim Anderson did express some doubt as to whether the correct capacity score had been assessed for AB. There was no positive evidence on how that score had been assessed. It was noted that AB read the paper every day, watched TV and after perusing bank statements locked them in her safe. No power of attorney was in place for AB.

19. Kim Anderson reported the conversation with Ms Bartle to Flora Hay the Manager of the Home who spoke with Ms Bartle on 27 September 2021 and noted her concerns (J177).

20. Ms Hay then discussed with AB that a staff member had raised concerns in the way that the claimant had spoken to her when attending to AB's calls for support at night. She noted the response (J178) which indicated that the claimant was "*sometimes near to the bone in the way she speaks to me. I wouldn't call her unless it was an emergency*" and that she was "*a wee bit*" frightened of her and was sometimes "*nasty she tells me to shut the fuck up*" and this was a "*regular thing…*". AB signed that statement on 30 September 2021.

21. Separate statements were taken by Flora Hay from the two night shift workers named by Ms Bartle (J179/180). Those signed statements asserted that the claimant had told AB on occasion to "*shut the fuck up*" and that the claimant spoke "*sharply*" to AB when she "*wet the bed*" and became frustrated and angry and would on occasion curse in saying "*why you fucking wetting the bed*" "*why are you no fucking buzzing*".

22. A separate statement was taken from another Support Worker on night shift who was asked if she had witnessed the claimant being verbally abusive to AB and advised that she had not witnessed any abuse(J181).

23. A further statement was taken from a Support Worker regarding the behaviour of the claimant with AB (J187) who advised that the claimant's conduct was "*not good*" and that on occasions she had sworn at AB saying "*what the fuck do you want now*" "*that floor is fucking soaking*" "*why do you not use your fucking buzzer*".

24. A further statement taken from a Duty Officer on the alleged abuse of AB advised he had no recollection of a comment being made by the claimant which one of the support workers indicated he had witnessed. (J189)

Suspension of the claimant

25. By letter of 29 September 2021 the claimant received a notification of "*precautionary suspension from duty*" and advised that she was

suspended effective from 29 September 2021. The allegations to be investigated were listed as:-

"
- *Verbal Abuse towards a customer who uses our services*
- *Bullying/Intimidation towards a customer*
- *Inappropriate behaviour within the workplace*
- *Inappropriate relationship with a customer*"

26. The letter of suspension outlined the codes which would be contravened in the event that these allegations were well-founded and advised that the claimant would be interviewed at which time she may be accompanied by a trade union representative or a colleague. She was advised that she should not discuss any aspect of the investigation with "*anyone other than those named in this letter*" being essentially an HR assistant (J182/186).

27. Kim Anderson undertook the investigation along with Josh Stallard a team leader and interviewed the three Support Workers who had made allegations and AB.

28. The three Support Workers confirmed the previous statements given. They also answered supplementary questions and gave further information. It was advised the claimant had been abusive towards AB and on one occasion shouted from the outside garden "*shut the fuck up*" on hearing AB calling out for assistance (J190/191); that behaviour of the claimant happened on nights when AB was unsettled or buzzed or shouted out for assistance (J194/195) and a worker had not raised these concerns as she was "*worried about the backlash*"; that "*quite a few times (the claimant) was swearing*" at AB (196/197).

29. AB was also interviewed and her signed statement (J192/193) confirmed that she recalled the statement given to Flora Hay and when asked what "*kind of things*" the claimant said to her indicated that sometimes she shouted "*Shut your fucking Mooth*" or "*Shut the fuck up*" and that as a result she felt "*A wee bit scared she can be nasty*" and that it was only the claimant who spoke to her in that way.

30. The claimant was advised by letter of the intent to interview her on 11 October 2021 (J198/200) and advised that the allegations to be investigated at that meeting were those contained within the letter of

suspension. The claimant was reminded of her right to be accompanied by a colleague or Trade Union representative and that she was not to discuss any aspect of the investigation except with the investigating officers or the named HR point of contact or her representative or authorised companion.

31. The claimant had known AB since she had been admitted to the home and her position in interview was that she supported AB *"110 percent every shift I work"* and had never sworn at AB and had no idea why the staff members had spoken up against her other than that this was a "*witch-hunt*". She confirmed that she did find care for AB "*a bit heavy going sometimes, she shouts out even when you just leave the room and yes I've brought it up at supervision and also with Kim*" and that AB had constant needs.

32. An investigation report was prepared following those interviews and detailed the evidence obtained (J207/215). The Report indicated that 2 of the allegations specified in the initial suspension letter should not proceed but the conclusion was that the investigators were "*confident that there are indeed safeguarding concerns here for*" the resident and that there was a case to answer the allegations that:-

- the claimant had verbally abused the customer who used Blackwood Services
- that there had been bullying and intimidation towards a customer.

Disciplinary action

33. In light of the investigation report it was concluded that there should be a disciplinary hearing and by letter of 30 October 2021 (J217/221) the claimant was invited to attend such a hearing. That was to be taken by Linda Brown, Care Service Manager Edinburgh with a Human Resource Advisor present to take notes.

34. The letter of invite enclosed the investigation report and witness statements together with the appropriate policies. The letter advised that dismissal may be the outcome of the hearing and of the claimant's right to bring witnesses to the hearing. She was also advised that she was entitled to be accompanied by a trade union representative or a colleague. She

was again advised that she was not to discuss any aspect of the disciplinary hearing except with Linda Brown or Vicki Thomson, HR Officer or her representative/companion.

35. Albeit the investigation report had identified that only two allegations should be put forward for disciplinary hearing, the letter to the claimant advised that the allegations against her would be the four allegations narrated within the initial letter of suspension and invite to investigation hearing.

36. However the claimant was not given the requisite period of notice of the hearing to take place which was then postponed. Further postponements took place as the claimant wished to bring a representative from the Citizens Advice Bureau who was a lawyer which the respondent indicated was contrary to their policy. The final letter of invite of 24 November 2021 (J229/233) to the rearranged disciplinary hearing of 13 December 2022 advised that the two allegations to be discussed were:-

- Verbal abuse towards a customer who uses our services
- Bullying/intimidation towards a customer

37. Given the stricture on the claimant that she could not discuss any of the allegations with parties other than those named within the letter of invite to the disciplinary hearing the claimant sought character statements from other colleagues in preparation for the hearing.

Disciplinary hearing

38. At the disciplinary hearing the claimant was represented by an individual who it was stated was a trade union representative. However during introductions it was clear that the individual had not been actively engaged as a union representative for about four years. However an exception was made to allow the individual to remain as a representative.

39. The notes of the disciplinary hearing (J234/247) disclose that the claimant made statements regarding the allegations made by each of the support workers and Marlene Bartle. She maintained that those who had allegations against her had been influenced by Ms Bartle with whom she had had an altercation around November/December 2020 with a further

issue involving Ms Bartle around April/May 2021. She stated that one of the support workers had only been at the home for approximately two months and that she had worked with her for only three shifts. It was only when this worker had gone to work with Ms Bartle that she had turned against her. She had worked with another of the support workers on a number of occasions but again it was working with Ms Bartle which had influenced this worker. She advised that she had worked with another for two years with no complaint and was shocked at her statement. She denied any swearing at the resident AB. Again this worker had only recently worked alongside Ms Bartle. It was the claimant's opinion that all concerned "*have colluded with each other and MB being the instigator*". She advised that those three who had given statements had now left the home. None of the statements had any specific dates or times of the incidents taking place and there was no real evidence of any wrongdoing.

40. So far as the resident AB was concerned the claimant denied ever having sworn at her. She was of the view that AB lacked capacity to make the statements she had made as her memory was poor and she had been asked leading questions. She thought that AB "*would find it difficult to communicate such sentences*" in her statement. If the resident had been so worried she would have told her family but there was never any report of the claimant being abusive. She was of the view that AB was well looked after and there were never any complaints from her.

41. She advised that the resident could be changed up to four times a night with fresh bed linen on each occasion and that she could also be "*up and down to the toilet many times*" but it was sickening to be accused of bullying and intimidation.

42. She pointed out that the duty officer had not corroborated the statement in relation to the alleged comment made from the garden of the home.

43. She added that as recently as September 2021 she attended a staff performance review at which time no critical or adverse comments were made of her. Approximately one week before the hearing that claimant produced supporting statements from 12 colleagues with whom she had worked over her period of employment on day or night shift (J331/347). She referred to those statements from colleagues whose periods of

working with the claimant varyied from a few shifts to some years, being those most familiar with the claimant. None of those who provided the statements had witnessed any incidents of the claimant being abusive or bullying towards residents. Those statements were all in different and flattering terms of the claimant's abilities and character. She indicated those statements supported her position that the claims against her were false.

44. Subsequent to the appeal hearing Ms Brown received from Flora Hay comment on the colleagues who had supplied statements for the claimant (J348/349). These comments indicated the normal working pattern for those individuals and also whether Ms Hay believed that certain of her colleagues were friendly with the claimant.

45. Also subsequent to the disciplinary hearing information was sought from Flora Hay on 20 December 2021 as to whether AB had "*capacity*" and Flora Hay confirmed that she did "*have capacity, there has been no professional assessment of capacity requested or required as she can clearly tell you yes/no regarding her support and her financial affairs. No POA is in place nor does the family feel this is required at this present time.*" (J205). It was also confirmed subsequent to the disciplinary hearing that Kim Anderson had been present with Flora Hay when the first interview with AB took place regarding allegations and Kim Anderson considered the statement given at that time was accurate.

Outcome of disciplinary

46. By letter of 28 January 2022 (J248/255) Ms Brown advised that the claimant would be dismissed for gross misconduct with effect from 28 January 2022. The outcome letter rehearsed the evidence found within the investigation to support the allegations and also reviewed the 12 statements supplied by the claimant and noted when those individuals had worked alongside the claimant and for what periods (being essentially the information provided by Flora Hay). It was stated that while it was "*admirable that you received so many supporting statements from colleagues and friends, only two of these worked any night shifts…*" with the claimant within the last year and only one worked regularly with the

claimant. It was stated that none of those were "*witnesses to the specific incidents which are at the centre of this investigation*" and so those supporting statements did not "*nullify the complaints made against you and the evidence gathered in the investigation*". Particular reference was made to the statement from the resident AB whose mental capacity was not considered to be in doubt.

47. In evidence Ms Brown confirmed that the statements submitted by the claimant did generally confirm that the claimant was "*a good person and worked hard*" but as they were not witnesses to the specific incidents she was not able to take these statements into account and that "*many can get this form of backing but could behave in a way that was wrong*".

48. The outcome letter considered the claimant's position that the witness statements which made out the allegations were "*not credible*" and that those "*colleagues were liars*" who had been influenced by Ms Bartle who held a grudge against the claimant from previous incidents. It was indicated that Ms Brown found those explanations "*unacceptable because there is no evidence to support what you have suggested, it is only your opinion that collusion occurred*".

49. In evidence Ms Brown advised that she did not consider that Marlene Bartle could have influenced colleagues to "*lie to that extent*". She had to decide if "*all were telling lies*" and did not see *any* "*evidence that Ms Bartle told these people to lie*". She advised that she put good store by what had been said by the resident AB who was independent of Ms Bartle.

50. Given the flat denial made by the claimant there was no real lesser sanction available such as performance management or improvement programme as there was "*nothing to work with*". She considered that the conduct was in breach of the disciplinary policy and Blackwood's code of conduct along with the SSSC codes.

Appeal

51. The claimant appealed that decision by letter of 16 February 2022 stating that she had "*done nothing wrong and stand by my beliefs that I presented at the disciplinary hearing*". She considered that she had not "*been given*

a fair hearing" and the decision had been made with no actual evidence to back up any of the statements given. She also stated that she had asked for "*some further investigating to be carried out which as far as I can see has not been done*" and that the evidence she had provided had been disregarded.

52. The appeal was fixed for 16 February 2022 and was taken by Marshall McDowall. Notes of that hearing (J259/264) advise that the claimant was accompanied by her colleague Donna Gray.

53. The claimant repeated that she was not guilty of any of the allegations. She maintained that the dismissal hinged on the actions of Marlene Bartle who the claimant believed held a grudge against her. She also stated that she had "*requested that other staff members be questioned about the alleged incident*" and that too much weight had been given to the statement by the worker who had only worked with her for three shifts. It was stated by Mr McDowall that he was satisfied that those people spoken to in the investigation were appropriate.

54. The claimant maintained that while some character witnesses may not have currently worked closely with her they had worked closely with her for years previously. The claimant felt that those investigating the matter should have spoken to a wider circle of colleagues and in greater depth particularly those who had worked with her over the years. She was also concerned that the resident AB did not have capacity to make the statements that had been produced.

55. By letter of 13 April 2022 the claimant was advised that her appeal was unsuccessful. The letter summarised the points made by the claimant on appeal. In essence it was stated:-

- that the resident in question had the capacity and ability to communicate what happened.
- That there was a lack of evidence to support that the staff members involved were lying in the allegations that they made.
- That account had been taken of the witness statements supplied by the claimant but that required to be weighed against those received from other witnesses and the resident in question and it was

considered that the right conclusion had been reached upon dismissal.

56. While the outcome letter indicated that "*further investigation*" had taken place to confirm the capacity of the resident the evidence only related to Mr McDowall "*happening to bump into the resident and speak to her when visiting Broom Court"* and no specific investigation on capacity took place.

SSSC investigation and outcome

57. The respondent was under a duty to report the disciplinary action to SSSC and on 31 August 2022 SSSC responded to indicate that having considered the information received during their investigation into the allegations the claimant's fitness to practice was not currently impaired and they would take no action and close the case. Their letter (J326/330) advised that a solicitor had reviewed the evidence available and there was "*insufficient evidence to meet the civil standard of proof which is required in our proceedings*".

Events subsequent to dismissal

58. At the effective date of termination the claimant was paid at the rate of £1689 per month gross and £1400 per month net. Her gross weekly wage amounted to £389.77.

59. A letter from Forth Medical Group of 1 November 2022 confirmed that the claimant required to undergo psychotropic medication subsequent to being suspended from work and due to significant anxiety was prescribed Propranolol and ultimately Diazepam for symptoms of anxiety. She was also prescribed the anti-depressant Mirtazapine and continued with that medication as at date of hearing. She had benefitted from ongoing contact and support from the practice Mental Health Nurse.

60. She had commenced work part time as a school cleaner from July 2022 and earned around £600 per month from that occupation. The letter from Forth Medical Group (J371) advised that "*choosing to work part time was a completely reasonable decision given the severity of the mental health symptoms*" being experienced by the claimant and that "*getting back to work and working again*" were important steps in her recovery.

61. There was produced information on care jobs available in the Stirling area (J357). The claimant had not sought a job as a carer. Given her experience she advised that she was not wishing to return to a care home and in any event given the fact of dismissal for gross misconduct that would more than likely prohibit any return to work in that sector. She would want to get back to full time working but was unable to do so given her condition of anxiety/depression at the present time. It was possible that she could provide "*single person care"* if she was able to make a recovery. The pay in that respect would be commensurate with that received from the respondent at termination.

Submissions

62. I was grateful for the helpful submissions made and no disrespect is intended in making a summary.

For the respondent

63. It was submitted that the test within *British Homes Stores Ltd v Burchell [1980] ICR 303* had been met.

64. The respondent had a genuine belief in the misconduct of the claimant by reference to the statements made by the individual support workers and the evidence of the resident. That set out that abuse had taken place. The capacity of the resident was not an issue as it conformed to the information within the care plan and evidence of those who had interacted. The claimant would only see the resident at nights when there may be more problems but that did not affect AB's capacity to understand the language used.

65. The counter evidence was essentially that the statements made by the individuals were fabricated as a consequence of encouragement from Ms Bartle. There was no evidence that was the case. There was no reason to consider that there was collusion. It was too much of a leap to make that conclusion.

66. The investigation was sufficient to sustain belief in misconduct. The respondent had made sufficient enquiry. They had regard to the

statements produced by the claimant but that did not negate other evidence.

67. The decision to dismiss was within the band of reasonable responses. Reference was made to *Iceland Frozen Foods Limited v Jones*.1983 ICR 17. The gross misconduct was made out in terms of the policies and procedures to which the claimant was subject and the disciplining officers had applied their mind to the sanction and come to the same view.

68. If it was not found that there was gross misconduct then there was substantial contributory fault and compensation should be reduced.

69. It was also submitted that there had been a failure to mitigate. The claimant stated she did not wish to return to the care sector and work again in a home but the incident here was fact specific to that home. No barrier had been put in place by SSSC to practice for the claimant. It was submitted that the claimant could increase her hours in the present position or find another full time position.

For the claimant

70. For the claimant it was emphasised that the claimant had given her evidence in an open and honest manner. The ACAS Code provided that to act reasonably there should be a fair process in an investigation being the bare minimum to be expected by an employee.

71. There was a higher obligation on an employer in the investigation of any alleged misconduct if the issue was likely to be *"career ending"* for an employee. In this case there had been an imbalance in focusing on evidence of incrimination rather than of innocence.

72. The respondent had emphasised that the statements produced by the claimant did not speak to the incidents complained of but that was not surprising given that the position of the claimant was that abuse of the resident "*never happened*". It was not reasonable to disregard the statements.

73. The *Burchell* test had not been met in that there could not be a genuine belief in misconduct based on the evidence and the investigation made.

74. Reference was made to the cases of *Tykocki v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust UKEAT/0081/16/JOJ*; *Miller v William Hill Organisation Limited UKEAT/0336/12/SM*; and *Shrestha v Genesis Housing Association Limited [2015] EWCA civ 94*. Those cases emphasised that investigation required to be thorough in circumstances where a person's career was at stake. There was simply no investigation made with those who had supplied statements supporting the claimant's good character and conduct. No regard was had to the claim of innocence.

75. The statements that were produced alleging misconduct were similar and the claimant was right to suspect collusion but again that was simply not investigated. For example, an incident narrated by one of the Support Workers was not supported by another witness.

76. The claimant was advised that she should not disclose the allegations to anyone in any enquiry she made of witnesses and so was hampered in that respect. There was no test of the evidence with those who had worked with the claimant contrary to the belief of Ms Brown that these witnesses had not worked with the claimant. The same was true of Mr McDowall's superficial approach in the appeal. There was a duty on the respondent to consider seriously the defence put forward and that had not been done.

77. So far as any question of mitigation was concerned the claimant had done so by resuming work on a part time basis. The medical evidence supported that position and full compensation should be awarde

Discussion

Relevant law

78. In the submissions made there was no dispute on the law and the tests that should be applied. Section 98 of the Employment Rights Act 1996 (ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages namely (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2) of ERA; and (2) if the employer is successful at the first stage, the Tribunal must then determine whether the

dismissal was unfair or fair under section 98(4). As is well known the determination of that question:

> *"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and;*
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

79. Of the six potentially fair reasons for dismissal set out in section 98 of ERA one relates to the conduct of the employee which is the reason relied upon in this case.

80. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

81. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell [1978] IRLR 379* with regard to the approach to be taken in considering the terms of Section 98(4) of ERA:

> "*What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief, that the employers did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was*

reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have shared that view in those circumstances."

82. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small [2009] IRLR 536* where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. In that respect the Tribunal should be mindful that it should not put themselves in the position of the employer and consider what it would have done but determine the matter in the way in which a reasonable employer in those circumstances in that line of business would have behaved.

83. If satisfied on the employer's fair conduct of a dismissal in those respects, the Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Limited v Jones)*. In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

84. Additionally, a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the

employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer must have adopted. The Tribunal should not "*descend into the arena*" – *Rhonda Cyon Taff County Borough Council v Close [2008] ICR 1283*.

85. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal – *W Devis and Sons Limited v Atkins [1977] ICR 662.*

86. Both the ACAS Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. Again however when assessing whether a reasonable procedure had been adopted Tribunals should use the range of reasonable responses test – *J Sainsbury's plc v Hitt [2003] ICR 111*.

87. Single breaches of a company rules may find a fair dismissal. This was the case in *The Post Office t/a Royal Mail v Gallagher EAT/21/99* where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair. Also in *A H Pharmaceuticals v Carmichael EAT/0325/03* the employee was found to have been fairly dismissed for breaching company rules and leaving drugs in his delivery van overnight.

88. This all means that an employer need not have conclusive direct proof of an employee's misconduct but only a genuine and reasonable belief reasonably tested.

Conclusions

89. The reason for dismissal in this case is the potentially fair reason of misconduct and the essential point of dispute is whether or not the respondent in this case carried out as much investigation into the matter "*as was reasonable in all the circumstances of the case*" to found that belief. As was said in *Shrestha* an investigation should be looked at "*as a whole when assessing the question of reasonableness. As part of the*

process of investigation the employer must of course consider any defences advanced by the employee but whether and to what extent it is necessary to carry out specific enquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."

90. In this case the respondent required to advise SSSC of disciplinary action. Where the outcome of that disciplinary action is dismissal for alleged abuse of a resident there is clearly a risk of SSSC impairing fitness to practice. That can be career ending for a care worker and in such cases such allegations must be the subject of careful investigation. In *Ilea v Gravett [1988] IRLR 497* the standard of enquiry will depend on the state of the case against the employee which can "*at one extreme be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end so the amount of enquiry investigation including questioning of the employee which may be required is likely to increase….*". Also in *A v B [2003] IRLR 405* it was noted that the circumstances to be considered for section 98(4) purposes would include the gravity of the charge and the potential effect upon the employee. So a "*careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him*". That was stated to be particularly important where the employee has been suspended and denied the opportunity of being able to contact potentially relevant witnesses. A similar approach was adopted in *Salford Royal NHS Foundation Trust v Rolden [2010] IRLR 721* where it was emphasised that it was "*particularly important that employers take seriously their responsibilities to conduct a fair investigation where … the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite*". Thus the touchstone of reasonableness of the enquiry requires to be seen in that context.

91. In this case the initial approach was by Ms Bartle to Team Leader Kim Anderson regarding the claimant. Her position was that two night shift relief workers had mentioned the way in which the claimant spoke to

residents and in particular AB when she buzzed on night shift. In turn the team leader reported that matter to the care home manager Flora Hay. Ms Bartle it was known had altercations with the claimant some time previously and could be making mischief. However Ms Bartle made no direct allegations but reported on what she had been told. That prompted initial enquiries by the care manager and those enquiries disclosed evidence from the night shift workers of abuse of AB (J178/179)

92. Her enquiry of the resident also disclosed behaviour of the claimant which was untoward (J178). While the claimant indicated that she did not believe Kim Anderson had been with Flora Hay when that statement was taken I was satisfied that she was present. That was the evidence from Kim Anderson who was credible and was also confirmed in the exchange of email between Ms Anderson and HR adviser (J205/206). Ms Bartle had indicated two staff members had complained that the claimant swore at the resident and they were interviewed initially by the care manager who also interviewed three other workers. One had no evidence of any concerns (J181); another did not corroborate a comment he was said to have witnessed (J189); while a third did have further allegation (J187).

93. In the formal investigation which took place the three Support Workers who made allegations were interviewed by Kim Anderson and Josh Stallard and asked to confirm the previous statements made and answered some supplementary questions. These were fuller statements signed by the individuals concerned and while they made the same general allegation of abuse they were different in the detail. There was nothing on the face of those statements which would suggest to the reasonable employer that there had been collusion amongst the individuals concerned.

94. The incidents of concern apparently took place between July/September 2021 being the dates given to the SSSC in the report on the matter (J328/329). In that period the claimant worked her night shifts with the three Support Workers who had made the allegations and one other who did not make allegation (statements at J181; J190/191;J194/195;and JJ196/197). There was no team leader on night shift and generally the Support Workers nurses worked in pairs on night shift.

95. Interview also took place with the resident concerned. She signed her statement which made reference to her being sworn at by the claimant. There was no suggestion that the resident could be influenced by Marlene Bartle. The suggestion was that she lacked capacity to make the statements as she got confused and may not fully understand. However, Kim Anderson in her evidence was clear that the resident did have the requisite capacity to understand the questions being asked and to frame answers. She was aware that the resident regularly read her newspaper, selected TV programmes, perused her bank statement and there was no power of attorney in place. Enquiry of Flora Hay (J205) confirmed that she was of the same view. The care plan described that AB might sometimes not fully understand what said or written but she was interviewed twice in the course of enquiry and gave the same evidence (J178 and J192/193). The evidence would suggest that the reasonable employer could rely on AB having the mental capacity to make and understand the statements she signed.

96. The investigation report and the statements taken were put to the claimant. She produced 12 statements from former and existing colleagues, none of which contained any suggestion that she had been ill-tempered, nasty or abusive toward any of the residents. Ms Brown did make enquiry with Flora Hay on the shifts that the claimant may have shared with these individuals and whether they could be regarded as friends and received a response which indicated that in many cases individuals had not shared night shifts with the claimant for some time. The concern was that Ms Brown and Mr McDowall (Appeal Officer) had little regard to those statements because those giving the statements did not "*witness the events*". However they may have missed the point in that the claimant's position was that these events never happened and so those providing the statement were corroborating her position that she had never abused a resident and added weight to her position that there was collusion. Additionally the claimant had been in the home for approximately 15 years and had no disciplinary record for abuse or otherwise. Accordingly the concern was whether the reasonable employer would have wished to make more enquiry as to whether or not the likelihood that the three individuals who had made allegations against the claimant were indeed influenced by Ms Bartle given that many others

in the course of the claimant's employment with the respondent had witnessed no such behaviour.

97. The reasons given by Ms Brown and Mr McDowall as to why they did not consider there had been influence or collusion in making false claims were:-

(i) That the statements of those making allegations did not on their face give any indication that there had been collusion. There was different detail given of words spoken and particular instances.

(ii) The proposition of influence by one individual such that 3 workers fabricated detailed statements was an unlikely proposition.

(iii) That there was no suggestion of Ms Bartle being able to influence the resident and they were satisfied that the resident had capacity to make the statements she gave which corroborated a level of abuse.

(iv) The respondent was dealing with incidents of abuse over a period July/September 2021 when the individuals who had given statements would be working with the claimant and many of those who supplied character references had no such recent experience.

98. As indicated the test is whether the investigation is that of the reasonable employer in the context of the allegations made and it is not for the Tribunal to substitute its view of what would have been an appropriate investigation. The extent of the investigation and the form that it takes will vary according to the circumstances. Given the considerations that the respondent had in mind in weighing the conflicting positions between the statements containing allegations and those exculpating the claimant from any abuse of residents I consider that the investigation met the test of being within the band of responses of the reasonable employer and that the respondent did have sufficient information to come to a genuine belief in the guilt of the claimant. Of particular weight in that assessment for the reasonable employer would be the two statements made by the resident (J178 and J192-193). There was no suggestion she had been influenced by Ms Bartles and the information was that she understood the statements she signed.

99.

100. As indicated the test is not whether allegations were proved on the balance of probabilities (being the test for SSSC) but whether or not the appropriate test under the case of *Burchell* has been met.

101. On the procedure adopted of initial enquiry, investigation, disciplinary hearing and appeal there was opportunity for the claimant to put her position and she did so. The substance of the claimant's case was not a failure of procedure as such but on the quality and extent of the investigation made. In evidence it was put that she should have been allowed a lawyer from CAB to represent her at hearings but a fair reading of the disciplinary policy (J81) would allow TU representative or colleague and not a lawyer. Also while the initial invites to disciplinary hearing continued to contain 4 charges albeit the investigation report had discounted 2 of those charges the final letter of invite corrected the position.

102. That would mean that the remaining issue was whether or not the sanction of dismissal was appropriate. I do not consider there can be any real dispute on that issue. While the claimant had lengthy service with no previous disciplinary record the respondent clearly has a duty of care towards their residents and a finding of abuse is one which requires to be taken very seriously. The ongoing wellbeing of the home and its residents require to be protected. Kim Anderson was clear that residents needed to be free from abusive or bullying comments and be treated with respect. The alleged comments made a serious breach of that requirement of the policies in place. .Ms Brown was clear in stating that given there was a denial by the claimant of any untoward actings then no performance improvement could be put in place as the claimant considered there was nothing to be improved upon and no training required.

103. Again it is not for a Tribunal to substitute its own view of a sanction but to consider whether it comes within the band of reasonable responses. One employer may have considered that a final warning was the appropriate way to proceed and another dismissal. I could not consider that dismissal was outwith the band of reasonable responses. In all the circumstances

therefore I find that there has not been an unfair dismissal in this case under s98 of ERA

Employment Judge : J Young

Date of Judgment : 7 December 2022

Date sent to parties : 12 December 2022