EMPLOYMENT TRIBUNALS

Claimant: Mrs E Williams

Respondent: Barbara Rogers t/a Park Hills Nursing Home

HELD AT: Manchester **ON:** 23 February 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr B Culshaw, Solicitor
Respondent: Mr M Ainscough, Legal Executive

WRITTEN REASONS

Introduction

1. These are the written reasons for the judgment delivered orally with reasons at the conclusion of the hearing on 23 February 2017, and sent to the parties in writing on 24 February 2017. Written reasons were requested by email of 24 February 2017 from the respondent's representative.

2. By a claim form presented on 24 October 2016 the claimant complained of unfair dismissal from her post as a healthcare assistant at the respondent's Nursing Home in September 2016. She was dismissed following an allegation made by a service user whose home she had visited that day. In addition to the unfair dismissal complaint she sought notice pay, accrued annual leave, and argued that there had been a breach of her right to be accompanied. She also sought an award in respect of a failure to provide a written statement of the main terms of her employment.

3. The claim form also contained a complaint under section 93 Employment Rights Act 1996 that the written reasons for dismissal were not accurate, but this complaint was withdrawn and dismissed at the start of the hearing.

4. By her response form of 11 November 2016 the respondent resisted the complaints on their merits, although she accepted that some holiday pay was due to the claimant. It was argued that there had been a fair dismissal for gross misconduct, that the claimant had been given the right to be accompanied at the disciplinary hearing, and that a written statement of terms had been provided.

Issues

5. At the outset of the hearing I discussed with the representatives the issues to be determined. Mr Culshaw withdrew the complaint in relation to written reasons and confirmed that the claimant accepted that the reason for dismissal related to her conduct. The holiday pay claim turned on a dispute over whether the claimant had taken two or three days of annual leave before she was dismissed. It was agreed that the written contract issued to the claimant in October 2014 was in the same terms as that issued at the commencement of her employment. The respondent confirmed that there was no issue as to mitigation of loss: it was accepted that the claimant had become ill after her dismissal in a way which prevented her working.

6. It followed that the issues for the Tribunal to determine were as follows:

(1) Was the dismissal for misconduct fair or unfair under section 98(4) Employment Rights Act 1996?

(2) If unfair, what was the appropriate remedy?

(3) Did the respondent fail to comply with section 10(2A) of the Employment Relations Act 1999 in relation to the right to be accompanied at the disciplinary hearing?

(4) Could the respondent show that the claimant was guilty of gross misconduct in a way which deprived her of her entitlement to contractual notice of termination?

(5) What amount was due to the claimant as compensation for accrued but untaken annual leave under regulation 14 Working Time Regulations 1998?

(6) At the date of presentation of the claim form, had the respondent complied with her duty under section 1 of the Employment Rights Act 1996 to provide a written statement of the main terms of employment?

Evidence

7. The parties had agreed a bundle of documents running to 79 pages. Any reference in these reasons to a page number is a reference to that bundle of documents.

8. The respondent called Zoey Spellman, the Deputy Manager who decided to dismiss the claimant. A witness statement was also provided from the respondent personally, but she was unable to attend the hearing due to illness. I attached less weight to that statement than if the respondent had attended in person.

9. The claimant gave evidence herself but did not call any other witnesses.

Relevant Legal Principles

Unfair Dismissal

10. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. In a dismissal for a reason related to conduct the primary provision is section 98(4):

> **"(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(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".**

11. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision fof the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

12. If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

13. It is important that the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

14. The Acas Code of Practice on Disciplinary and Grievance Procedures can be relevant to procedural fairness.

15. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

16. The basic award is a mathematical formula determined by section 119. Under section 122(2) it can be reduced because of the employee's conduct:

> **"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

17. The compensatory award is primarily governed by section 123 as follows:

> **"(1) Subject to the provisions of this section and sections 124, 124A and 126 , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer….**
>
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……"**

18. Section 123(1) means that compensation can be reduced if the Tribunal considers that a fair procedure might have lead to the same result, even if that would have taken longer – see **Polkey v A E Dayton Services Limited [1988] ICR 142** and the subsequent guidance from the Employment Appeal Tribunal in **Software 2000 v Andrews & others [2007] ICR 825** (leaving aside that part of the guidance relating to the repealed statutory dispute resolution procedures).

19. The leading authority on section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. The Tribunal must be satisfied that the relevant action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

20. As to culpability, Brandon LJ said that:

> **"…it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

21. An unreasonable failure to follow the ACAS Code of Practice by an employee can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

Notice Pay

22. An employee is entitled to contractual notice of termination unless the employer can prove that she has committed a repudiatory breach of contract (gross misconduct) which entitles the employer to terminate the contract without notice.

Written Statement of Terms

23. Section 38 of the Employment Act 2002 provides as follows:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.**
>
> **(2) .....**
>
> **(3) If in the case of proceedings to which this section applies—**
>
> **(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and**
>
> **(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,**
>
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead."**

Right to be Accompanied

24. Section 10 of the Employment Relations Act 1999 gives an employee the right to be accompanied at a disciplinary hearing. Section 10(2A) requires the employer to permit the companion to address the hearing. A failure to comply with section 10 can result in an award of a sum not exceeding two weeks' pay (section 11(3)).

Holiday Pay

25. Regulation 14 of the Working Time Regulations 1998 requires an employer to pay an employee in respect of holidays accrued but untaken in the leave year upon termination.

Relevant Findings of Fact

26. This section of the reasons sets out the broad chronology of events in order to put my decision into context. The findings of fact necessary for the decisions in relation to notice pay and contributory fault will be addressed in the discussion and conclusions section.

Background

27. The respondent runs the Park Hills Nursing Home. According to the response form she employs approximately 24 employees. She is a Registered General Nurse and the manager of the Nursing Home. The only other manager is Mrs Spellman

who at the relevant time was the Deputy Manager. There is no access to specialist Human Resources advice. The Home provides care to its residents but also provides care to service users in their homes.

28. The claimant was employed by the respondent from 24 May 2009. She went through an induction process recorded at pages 43b-43e. She was employed at first to work in the Home itself and only later asked to deal with home visits for service users. A contract of employment signed on 17 October 2014 appeared at pages 51-52.

29. Although the contract made no mention of it, the respondent had a disciplinary procedure which appeared in the bundle at pages 40-41. It said that an employee facing dismissal would be entitled to a minimum procedure involving a written note to the employee setting out the allegation and its basis before a meeting to consider and discuss the allegation. The section for gross misconduct on page 41 gave examples including theft, and made provision for suspension of the employee on full pay whilst alleged gross misconduct was investigated. It made clear that if the respondent was not available Mrs Spellman was authorised to make a decision on dismissal. A right of appeal was provided.

30. There was also Dignity, Privacy and Respect Policy at pages 42-43. It made clear that where the service user kept the key in a key safe outside her house the employee had to return the key to the key safe before entering the premises, just in case anyone else needed access. The policy also made clear on page 43 that personal possessions of a service user should only be handled with express permission.

Previous Incidents

31. There were three previous occasions on which concerns about the claimant's behaviour had arisen but where no formal action was taken.

32. The first was an incident in July 2013 where a member of staff reported that she had come across the claimant handling her purse. When the allegation was put to her the claimant explained in a note at pages 47-48 that she had seen someone running out of the office wearing a hooded top and had noticed that her bag and her colleague's bag and purse had been tipped out on the filing cabinet. She said she had been putting the colleague's purse back into the bag when the colleague arrived.

33. The second incident occurred in December 2013. Money had been taken from a service user and in an attempt to catch the culprit two marked £20 notes had been placed in that service user's purse. A note with similar marking was later used by the claimant. The claimant was called to an investigative meeting on 6 December 2013 (page 49) but no further action was taken once she provided confirmation that she had withdrawn money from her bank in the days preceding this incident.

34. The third incident arose in May 2015. By a letter of 5 May at page 53 the claimant was invited to an investigatory meeting for a possible act of gross misconduct. The note of the meeting on 11 May 2015 appeared at page 54. It concerned some cigarettes which had been taken from a service user. The claimant

denied any involvement and following further investigation she was told that no further action would be taken as there was no proof she had taken the cigarettes.

35. Despite the suspicions of the respondent and Mrs Spellman in relation to each of these incidents, therefore, it followed that at the time of the incident which gave rise to this case the claimant had a clean disciplinary record.

September 2016

36. In early September 2016 two matters arose which the claimant believed caused Mrs Spellman to have concerns about her once again. The first was when she went home following a shoulder injury on 2 September 2016. There was a dispute about whether she had been to hospital or not. The second was when she reported to the police that some money had been stolen from her purse at work. She believed that Mrs Spellman resented her having called the police because it could embarrass the Home.

37. The claimant said in her witness statement that after the shoulder injury Mrs Spellman had said she would have a serious think about the claimant's position, and that after the police report she said the claimant was going to ruin the reputation of the Home. Mrs Spellman denied having made such comments in her witness statement. I will return to that matter in my conclusions.

28 September 2016

38. On 28 September 2016 the claimant worked a morning shift during which she attended the home of a service user "EM". EM was an elderly lady who required assistance with getting dressed and using the commode.

39. Shortly after 1.00pm that day EM's adult daughter rang Mrs Spellman. Mrs Spellman kept a note at page 58. The daughter said that EM had seen the claimant with her hand in EM's handbag. They did not want the claimant to visit EM again.

40. Mrs Spellman and a colleague went to see EM later that afternoon. Their note appeared at pages 59-60 and recorded EM making the following allegation:

> **"Was asleep in chair, [the claimant] was sat on bed going through my handbag. [The claimant] asked does the bag hold a lot? At the same time [the claimant] had hold of [EM's] purse, she put this back in the bag. EM's bag is kept under the bed."**

41. EM's son-in-law came in at that point and said they did not think anything had been taken. The note recorded that EM was upset.

42. The three additional allegations were that there had been occasions when the claimant had been looking in the kitchen cupboards at EM's house, that she had been looking in the box which the District Nurse kept for her dressings, and that she had been asked on several occasions to put the key back in the key safe before going into the house.

43. After that meeting Mrs Spellman rang the claimant. The note appeared at page 61. She was asked to come in as a serious allegation had been made and told

that she could bring a work colleague as a witness if she wanted. Details of the allegation were not given to the claimant.

Dismissal meeting

44. The claimant's meeting with Mrs Spellman was recorded in a brief note at page 62. That note was taken by a colleague, Ms Hanning. The claimant had as a witness Amanda Redmile. Ms Redmile was already in the meeting when the claimant arrived but the claimant agreed that she could be her witness. The note at page 62 recorded what the claimant said in relation to the four allegations. Regarding the bag, she said she had tripped over the bag and heard it jingle and had picked it up to see whether anything had fallen out of it. She and EM had had a laugh about the bag and then it had been put back under the bed. The claimant also said that she had needed a dressing from the nurse's box, that she had been in the kitchen to fill in a book that the family needed for information, and that she had not been asked not to take keys into the house.

45. At the conclusion of the meeting Mrs Spellman told the claimant she was dismissed for gross misconduct. That was confirmed in a letter issued the same day at pages 63-64. Mrs Spellman had discussed the allegations with the respondent before the claimant was called in for the meeting, and she got the respondent to approve the terms of the letter before it was sent.

46. The letter gave the claimant the right of appeal but she did not exercise it.

47. After dismissal the claimant was certified by her doctor unfit for work on account of depression in a series of fit notes (pages 67 – 70). In a letter in November 2016 at page 78 her GP said that the claimant may improve in three months' time. She was still not fit for work at the time of this hearing.

Holidays

48. The leave year began each year on 1 August. The claimant said she had booked three days of annual leave prior to her dismissal but had only been able to take two because there was no-one to cover for the third shift and she had to work it.

Submissions

49. At the conclusion of the evidence each party made an oral submission.

Claimant's Submission

50. Mr Culshaw submitted that it was plain from the contract that it did not cover some of the matters required by section 1 such as notice periods and the applicability of any disciplinary procedure. He sought an award of two weeks' pay. In relation to holiday pay, he invited me to accept the claimant's evidence that she had only taken two days in her last leave year. In relation to the right to be accompanied, he said that allowing the claimant to have a witness who could take notes but do nothing else was outside the terms of section 10 and therefore two weeks' pay should be awarded.

51. In relation to the unfair dismissal complaint he submitted that it was unfair for the following reasons. Firstly, the respondent had failed to follow its own procedure and the ACAS Code of Conduct by not providing the claimant with written notification of the allegations and copies of the documents in question. This had the effect of the claimant having to deal with the allegations without any warning and not being able to give a full explanation of her role. Secondly, the respondent had failed to go back to EM to put to her what the claimant had said in the meeting. It was possible that this was a mistake and that EM might have accepted it. Thirdly, Mr Culshaw submitted there was material unfairness in the fact that the respondent took the earlier matters into account in deciding to believe EM rather than the claimant when the claimant was not aware that those earlier matters were being considered at the disciplinary hearing. He reminded me of what was said by Bean LJ in paragraph 61 of the decision of the Court of Appeal in **Newbound v Thames Water Utilities Limited [2015] EWCA Civ 677** about the band of reasonable responses not being infinitely wide.

52. As to remedy he cautioned against too great a degree of speculation as to what would have happened had the respondent followed a fair procedure. In effect he was saying that the possibility that EM would have retracted the allegations was a significant one and there should be no significant **Polkey** reduction. Further, he said that this was in reality a sham dismissal since the respondent had already decided to dismiss the claimant, as evidenced by comments that Mrs Spellman had made during September, and therefore that reconstructing what would have happened had the respondent acted fairly was simply not possible. Had a fair procedure been followed the claimant would have been able to raise her concerns about EM not wearing her glasses, about her lapses in memory, and about the effect on her of any medication.

53. In relation to contributory fault, and the notice pay claim, he submitted that the respondent had failed to show the claimant was guilty of gross misconduct and that on the information before me I should conclude there had been no dishonesty and no contributory fault.

Respondent's Submission

54. On behalf of the respondent Mr Ainscough did not resist the minimum award of two weeks' pay in relation to the failure to provide a written statement of terms as required by section 1, and nor did he make any submissions as to the breach of the right to be accompanied. He accepted that the respondent had not evidenced in this hearing its contention that the claimant took three days of annual leave rather than two.

55. In relation to dismissal he submitted that it was within the band of reasonable responses to dismiss the claimant, as it was a question of the word of EM against the word of the claimant, and that there had been procedural fairness. Given the very limited size and resources of the employer (relying on the decision of the Employment Appeal Tribunal in **Mackellar v Bolton [1979] IRLR 59**) he suggested it was reasonable not to provide written notification to the claimant of the allegations against her or provide her with copies. That justification arose out of the serious nature of the allegations and the pressure from the family of EM to deal with matters urgently. The failure to follow a procedure compliant with the ACAS Code had

created no unfairness because the gist of the allegations was put to the claimant and she had her chance to have her say before the decision to dismiss her was taken. The earlier incidents were relevant only as part of the reasoning process by which it was decided that the account of EM was more credible than that of the claimant.

56. As to remedy issues, Mr Ainscough submitted that a different procedure would have made no difference at all to the end result. He suggested the claimant had acted unreasonably in not pursuing an appeal against dismissal.

57. He also argued that there should be a substantial reduction of 100% for contributory fault because the claimant admitted in cross examination that picking up the bag without express permission was a breach of the dignity policy, which was itself gross misconduct. That also explained that even on the claimant's case no notice pay was due.

Discussion and Conclusions – Miscellaneous Claims

Right to be Accompanied

58. The first matter I considered in my deliberations was the claim of a breach of the right to be accompanied under section 10 of the Employment Relations Act 1999.

59. According to her standard disciplinary invitation (page 53), and to what the claimant was told on the telephone (page 61) and to what happened at the meeting (page 62), the respondent only permitted the claimant to be accompanied by a witness who could take notes but not participate in the hearing. That was less than the right to address the hearing which section 10(2A) requires[1]. This complaint succeeded.

Written Statement of Terms

60. The contract from 2014 which appeared at pages 51-52 did not contain all the matters required by section 1. Amongst the matters which were omitted were any references to notice periods or disciplinary procedures.

Holiday Pay

61. On the unchallenged evidence before me the claimant took only two days of annual leave in the final leave year. The claimant explained in her evidence why the respondent might think that three days had been taken but it was only two. The amount due will be addressed in the remedy section.

Discussion and Conclusions – Unfair Dismissal

62. The claimant accepted that the reason for dismissal was a potentially fair reason relating to her conduct. The issue for me to determine was whether it was fair or unfair applying the general test in section 98(4) of the Employment Rights Act 1996. That required me to take into account the limited size and resources of this employer but also equity and the substantial merits of the case. I reminded myself of the case law summarised above.

[1] It was also less than her own disciplinary policy required at page 40.

Genuine Belief

63. I was satisfied there was a genuine belief the claimant was guilty of misconduct. Mrs Spellman made that clear in her evidence and she also confirmed that she dismissed the claimant because of the allegation regarding the service user's bag and purse, not because of the allegations about the nurse's box, the cupboards or the key. I concentrated my considerations on that allegation.

Reasonable Grounds

64. The next question was whether the conclusion the claimant was guilty of misconduct was based on reasonable grounds. I was satisfied that the account of the service user as recorded at pages 59 and 60 gave Mrs Spellman reasonable grounds to conclude that the claimant had the service user's bag and purse as alleged. Mrs Spellman explained how in her experience the service user was lucid and able to give information direct and through her family which was relevant and time orientated. It followed that it was within the band of reasonable responses to give credence to the allegation being made as recorded at page 59.

65. In doing so Mrs Spellman took account of the history of allegations involving the claimant. Although there were no disciplinary proceedings against the claimant following the various investigations, in my judgment it was within the band of reasonable responses for Mrs Spellman to use her previous knowledge of the claimant as an employee in assessing the credibility of the claimant's denial of the allegations. There was a similarity between what the service user was alleging and the three allegations made in the past. The claimant had been suspected of having someone's purse, of using a £20 note which had been marked and left in a service user's purse, and of taking cigarettes from a service user. That pattern of allegations could reasonably be taken into account by an employer when assessing the credibility of a denial of a fourth incident of that kind.

Reasonable Investigation

66. The only flaw that Mr Culshaw identified in the investigation (as opposed to the procedure – addressed below) was not going back to the service user to put the claimant's case to her. In my judgment it was within the band of reasonable responses not to take that step. Firstly, in Mrs Spellman's experience the service user was a person able to give a lucid account of events. Secondly, the family were concerned at what had gone on and the service user was upset and the family wanted matters resolved quickly. Thirdly, the account given by the service user as was not reconcilable with the claimant's account. The service user was clear that the claimant had the purse in her hand and was putting it back into the bag; whereas the claimant was adamant she had not got anything out of the bag.

67. Overall the investigation was conducted in a way which fell within the band of reasonable responses.

Reasonably Fair Procedure

68. That left consideration of whether a reasonably fair procedure had been followed. In my judgment the respondent failed to follow a fair procedure. There were two main flaws.

69. The first flaw was that the respondent should have put the allegations and the supporting evidence to the claimant in writing prior to any disciplinary meeting to allow the claimant time to prepare. The failure to do that was a breach not only of paragraph 9 of the ACAS Code of Practice but also a breach of the respondent's own disciplinary procedure at page 40.

70. The argument that the allegations were too serious to justify that step did not hold water. The ACAS Code at paragraph 23 makes it clear that a fair procedure must be followed even where gross misconduct is alleged, and the respondent's own procedure at page 41 in the gross misconduct section made it clear that there should be a full investigation. Similarly, the argument that the family wanted action taken immediately did not withstand scrutiny. An employer acting reasonably would have informed the family that the claimant would not be attending that service user's home again, and would have suspended the claimant on pay in accordance with the disciplinary policy at page 41. That would have enabled a fair procedure to have been followed.

71. The second flaw in the procedure was the failure to give the claimant a proper chance to be accompanied by a trade union representative. The claimant said in evidence she was a member of Unison and had she had proper notification of her right to be accompanied, together with information about the allegations, she would have been able to have sought union assistance in formulating her response to the allegations. I was satisfied that the failure to provide this information did have a material effect on the claimant's ability to defend herself. There were points mentioned in her evidence to this hearing which she had been unable to mention at the disciplinary investigation hearing, including in particular the suggestion that the service user wore glasses and would not have been able to see properly what was happening without those glasses, and the suggestion that from time to time EM's memory or recollection was affected by medical conditions and/or medication.

72. The combination of those two procedural flaws rendered this an unfair dismissal and therefore the unfair dismissal complaint succeeded.

73. I did not consider that the procedure was flawed because Mrs Spellman did not tell the claimant that she was mindful of the pattern of past allegations. This was a small organisation where the employee and the decision maker had worked closely together. It would hardly be surprising if the manager's impression of the employee from previous dealings played a part in her thinking. In any event there was nothing the claimant could have said since the allegations had plainly been made. Mrs Spellman was not reopening those allegations and finding the claimant guilty. She was taking into account the similarity between those past allegations and this new one as one of many factors in assessing credibility.

Sanction

74. Had the matter been dealt with following a fair procedure I would have found that the decision to dismiss was within the band of reasonable responses. Theft appears in the list of examples of gross misconduct at page 41 and for the respondent the maintenance of trust between the service user and the support worker is of crucial importance.

75. Consequently if Mrs Spellman had formed the view that the allegations were made out and a fair procedure had been followed, it would have been within the band of reasonable responses to characterise the claimant's actions as gross misconduct and to have decided that dismissal should result.

76. In reaching that conclusion I considered the competing evidence about the comments alleged to have been made by Mrs Spellman in September 2016 (paragraph 37 above). The differing accounts were not tested in cross-examination. Even if those comments had been made, in my judgment they showed only a degree of frustration on the part of Mrs Spellman. They did not support a case that this was an overreaction to the EM allegations because of a desire to find a way to get rid of the claimant. The allegations made by EM and her family were serious enough to result in a fair dismissal on their own merits.

ACAS Code Reduction

77. I was able to determine some remedy issues before the hearing addressed the amount of compensation due. First was the argument by Mr Ainscough that there should be a reduction in compensation because of an unreasonable failure by the claimant to follow the ACAS Code of Practice by not pursuing an appeal.

78. I rejected that argument. In my judgment the claimant acted reasonably in not appealing. In reality there was no independent person available to hear her appeal. The respondent personally had already been involved by discussing matters with Mrs Spellman between her visit to the service user and the disciplinary hearing and by approving the dismissal letter. The claimant did not know that but given the close relationship between the respondent and Mrs Spellman her view that there was little point in an appeal was a reasonable one.

Polkey

79. Second was the question of what would have happened had the respondent followed a fair procedure. As the **Software 2000** authority illustrates, some degree of speculation is permissible based on evidence. I was satisfied that if a fair procedure had been followed the claimant would have been informed in writing of the allegations and her right to be accompanied by a colleague or union representative. She would have received the notes which appear at pages 58-60 in advance of the disciplinary hearing, and she would have had a better chance to prepare her case and work out what she wanted to say.

80. However I rejected the argument (see paragraph 67 above) that a fair process would have required the respondent to go back to the service user. I discounted that point.

81. I was satisfied that even if a fair procedure had been followed the claimant would have been dismissed by Mrs Spellman in exactly the same way. The points raised by the claimant about the service user not wearing her glasses and being prone to poor recollection on occasion were points which Mrs Spellman would fairly and reasonably have rejected based on her own experience of the service user. The claimant would have been fairly dismissed anyway.

82. However, in my judgment it would have taken a further two weeks to get to that point. Instead of calling the claimant to a disciplinary hearing on the evening of 28 September Mrs Spellman would have had to have collated the interview notes and written to the claimant advising her of her right to be accompanied, and the claimant would then have had to have involved her union representative before arranging a date not more than five working days away for the hearing. Overall I was satisfied that it would have taken a further two weeks but would have ended with an immediate dismissal for gross misconduct. The compensatory award in respect of loss of earnings will be restricted to a two week period.

Contributory Fault

83. I considered a reduction to the basic and compensatory awards under the respective statutory provisions. I had to make my own mind up as to what happened based on the evidence I heard rather than assessing whether the employer's view fell within the band of reasonable responses.

84. The respondent called no evidence from the service user. I understand that she sadly passed away prior to the hearing, but nor was there any evidence from her family. The evidence before me as to what happened came only from the claimant. I was satisfied on the evidence before me that the claimant was not engaging in theft or attempted theft; I accepted that she picked up the bag because she thought that something might have fallen out fo it when she tripped over it. There was no dishonest intent.

85. The claimant acknowledged that she should have had express permission to pick up the service user's bag. In my judgment that is conduct which is culpable or blameworthy. Although I accepted the claimant's evidence that she had not seen the dignity policy, she was also candid enough to say that she was aware that that was the position in any event. The failure to get express consent on this occasion made her vulnerable to the allegation which followed. It was unreasonable conduct which contributed to dismissal.

86. However, I was satisfied that it would be just and equitable to impose a limited reduction as there is a significant difference between what might be thought to be a potentially innocent breach of procedure and the allegation for which the claimant was actually dismissed. I was satisfied that it was just and equitable to reduce the basic and compensatory awards by 20% to reflect the claimant's contribution to the dismissal.

Discussion and Conclusions – Notice Pay

87. The question was whether on the evidence in this hearing I was satisfied that the claimant was guilty of gross misconduct.

88. I explained above why I concluded the claimant was not guilty of theft or attempted theft. Her misconduct was limited to picking up the service user's bag without express permission.

89. In my judgment that was not gross misconduct. It was not mentioned in the list of examples at page 41, although of course that list is not an exhaustive list, but nor was there any suggestion at page 41 that a breach of the Code of Conduct was

potentially gross misconduct. Further, the Dignity Policy itself at pages 42 and 43 did not suggest that a breach of it was potentially gross misconduct.

90. I was satisfied that the respondent failed to prove in this hearing that the claimant was guilty of gross misconduct which entitled the respondent to dismiss her without notice. She was at fault but not to that extent.

91. The notice pay complaint succeeded.

Discussion and Conclusions – Amount of Awards

92. Following delivery of oral judgment with reasons as recorded above we discussed remedy. There was no requirement for me to hear any further evidence. Matters were largely agreed based on the findings set out above.

93. Helpfully the respondent agreed that the gross weekly pay was £547.74, based on the figure provided on the P45 on page 65, and the net weekly pay was £481.74.

Holiday Pay

94. It was agreed between the parties that 4.5 days had accrued in the leave year. I found as indicated above that the claimant had taken two days. That left 2.5 days, or half a working week, due to the claimant.

95. Mr Ainscough submitted that the payment should be assessed on the basis of the hourly rate of £7.20 multiplied by the contractual hours of 44.3 per week. That would lead to a figure of £159.43.

96. Mr Culshaw submitted that the full earnings of the claimant should be taken into account as set out on the P45.

97. I decided that the claimant's position was correct. These were the first few days in the leave year and therefore in my judgment part of the regulation 13 leave under the Working Time Regulations 1998. The European and domestic case law leading to the decision of the Court of Appeal in **British Gas Trading Ltd v Lock and ors [2016] IRLR 946** establishes that normal remuneration should be taken into account, which can include overtime beyond contractually specified hours as long as it is worked frequently enough and is intrinsically linked to work under the contract. The evidence of the claimant was that she was regularly working up to 70 hours a week. That was consistent with her earnings figures and not challenged by the respondent.

98. I therefore awarded the claimant £273.87 representing 2.5 days of accrued but untaken annual leave. This was a gross figure from which tax and national insurance can be deducted as appropriate.

Right to be accompanied

99. The award of two weeks' pay for a breach of this right was agreed at £958.00.

Section 1 statement

100. The award of two weeks' pay for a failure to provide a statement of terms complying with section 1 of the Employment Rights Act 1996 was agreed at £958.00.

Notice Pay

101. It was agreed that the claimant was entitled to seven weeks' notice representing the statutory minimum period. Her net pay over that period was £3,372.18. The respondent did not challenge the evidence that the claimant was too ill to work in that period.

102. The claimant also received income based Employment Support Allowance of £73.10 per week, meaning a deduction of £511.70. The net award of damages for breach of contract was therefore £2,860.48.

103. I did not reduce this to take account of the compensatory award for unfair dismissal (see below) because if the respondent had followed a fair procedure taking a further two weeks the claimant would still have been entitled to seven weeks' notice of termination.

Unfair Dismissal Basic Award

104. The claimant was entitled to 1.5 weeks of gross pay for each of her seven years of employment. The figure for gross pay was capped at £479. The basic award was therefore £5,029.50. This was subject to a 20% reduction for contributory fault in the sum of £1,257.38, leaving a basic award of £3,772.12.

Unfair Dismissal Compensatory Award

105. In relation to the compensatory award, I awarded two weeks' net pay in the sum of £963.48 to represent the time it would have taken had the respondent followed a fair procedure.

106. Mr Culshaw sought an award of loss of statutory rights of £400. Mr Ainscough said this was too high. I decided to make an award of £200, reflecting the fact that the claimant lost her statutory rights only two weeks earlier than she would have done had the respondent acted fairly.

107. This meant a total compensatory award of £1,163.48, from which a 20% reduction for contributory fault in the sum of £290.87 was then made. This left a compensatory award of £872.61.

108. The recoupment regulations applied as the claimant received income related Employment and Support Allowance. I explained the effect of the recoupment regulations to the parties.

Fees

109. The claimant paid an issue fee of £250 and is currently awaiting the outcome of her application for help with the hearing fee.

110. Sensibly Mr Ainscough did not resist the application that fees be reimbursed and I made an order for reimbursement of the issue fee.

111. I also made an order providing for the hearing fee to be reimbursed if the claimant provides proof of payment to the respondent.

Employment Judge Franey

3 March 2017

REASONS SENT TO THE PARTIES ON

03 March 2017

FOR THE SECRETARY OF THE TRIBUNALS