



EMPLOYMENT TRIBUNALS

Claimant

Mr A Lancaster

Respondent(s)

Catalyst Housing Ltd

AND

Heard at: London Central

On: 21 & 22 September 2017

Before: Employment Judge Mr A. Spencer

Representation

For the Claimant: Ms C Urqhart, of Counsel

For the Respondent: Mr A Johnson, of Counsel

Reasons provided following request pursuant to Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

REASONS

Introduction

1. The Respondent is a housing association that provides affordable housing to residents in the London and South East area. By the time of the Claimant's dismissal, he worked for the Respondent as a Residence Service Operative (Ground Maintenance) undertaking gardening work.

2. In a Claim Form presented to the Tribunal on 25 April 2017, the Claimant brought claims for unfair dismissal, breach of contract and unlawful deduction from wages. However, the claims for breach of contract and unlawful deductions were dismissed upon withdrawal by the Claimant at a Preliminary Hearing (Case Management) on 20 June 2017. The issues in dispute were also clarified of that hearing although they have narrowed further during the course of the hearing before me.

Witnesses

3. For the Respondent, I heard evidence from two witnesses:
 - 3.1 Paula Brown who was employed by the Respondent as Senior HR Business Partner and who made the decision to dismiss the Claimant; and
 - 3.2 Neil Verman who was formerly employed by the Respondent as Head of People. Mr Verman heard the Claimant's appeal against dismissal.
4. For the Claimant I heard evidence from the Claimant himself.
5. All three witnesses gave evidence before me by verifying the truth and accuracy of their written witness statements. I had the benefit of seeing the evidence of all three witnesses tested under cross-examination.

Documents/Submissions

6. I considered various documents including the Claim Form, the Response, written statements for each witness and an agreed Tribunal bundle. The bundle was extremely substantial for a two-day hearing. It contained much material that was not directly relevant. I did identify to the parties' Counsel the documents that I had read during the course of the hearing and invited them to draw my attention to any I had not read.
7. The Respondent's Counsel provided written closing submissions and both parties' Counsel gave helpful oral submissions.
8. The Claimant cited the Court of Appeal's decision in **Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677** citing paragraph 61 of that decision in particular.
9. The Respondent cited the various cases set out in the Respondent's Counsel's written closing submissions all of which are commonly cited in unfair dismissal cases.

The parties' respective cases and the issues.

10. There was only a single claim to be determined in this case. That is a complaint of unfair dismissal. There was no issue as to whether the Claimant had the requisite length of service to have the right to bring a claim nor was there any issue as to whether the Claimant had lost that right. There was no

dispute that the Claimant was summarily dismissed with effect from 14 February 2017.

11. The first key issue for me to determine was the reason, or if more than one, the principal reason for dismissal. The Respondent asserted that the reason related to the Claimant's conduct. It was for the Respondent to prove that. Although the Claimant disputed that the reason for dismissal related to his conduct he did not advance an alternative reason and in closing submissions the Claimant's Counsel sensibly accepted that the reason was conduct related.

12. The second key issue was the fairness of the dismissal. By the time I heard closing submissions the Claimant had conceded that the Respondent held a genuine belief in his conduct and the issues had narrowed and were:

12.1 whether it was reasonable for the Respondent to conclude from the evidence that the Claimant had committed the misconduct for which he was dismissed; and

12.2 whether the sanction of dismissal was within the band of reasonable responses or whether it was excessively harsh; and

12.3 there was an issue regarding procedure. In particular, whether the Respondent's failure to follow its own appeal procedure by not convening an appeal panel rendered the dismissal unfair.

13. In relation to remedy, the Claimant sought compensation only and so if the claim succeeded, I had to determine compensation and address the issues raised by the Respondent whether there should be a deduction for contributory conduct on the part of the Claimant and whether there should be a "Polkey deduction".

14. With the agreement of the parties I heard evidence in relation to the issues of liability, contribution and Polkey and agreed to give a decision in relation to those issues before dealing with any remaining remedy issues.

Applicable law.

15. There is no dispute between the parties regarding the applicable law. The Claimant's Counsel accepted that the law is correctly set out in the Respondent's Counsel's closing submissions.

16. I must be satisfied that the Claimant has the right not to be unfairly dismissed. That right arises under Section 94(1) of the Employment Rights Act 1996 (ERA).

17. I must be satisfied that the claim was brought within the requisite three-month time limit set out in Section 111(2) of the ERA as extended by Section 207B ERA. There is no dispute in this regard.

18. The test of fairness for an unfair dismissal claim is set out in Section 98 ERA. The relevant parts of that Section are:

98 General.

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—
 -
 - (b) relates to the conduct of the employee,
 -
- (4) Where the employer has fulfilled the requirements of subsection (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.

19. The starting point when considering the fairness of a conduct related dismissal is the test laid down by the Employment Appeal Tribunal in **British Home Stores Ltd v Burchell**. That case and subsequent cases established that the key questions the Tribunal should ask itself are:

19.1 Whether there were reasonable grounds on which the employer could believe that the employee had committed misconduct in question; and

19.2 Whether the employer completed a reasonable investigation prior to the dismissal; and

19.3 Whether the decision to dismiss for the misconduct in question fell within the band of reasonable responses.

20. It is not for the employment Tribunal in such cases to substitute its own view as to what it would have done in the circumstances. The proper test is to consider whether the Respondent's decision and procedure fell

within the band of reasonable responses. The test of fairness recognises that when faced with a particular situation, different employers may reach different decisions. The question is to identify what is the band or range of reasonable responses in this case and to consider whether the Respondent's decision fell either within or without that band. If the Respondent's decision fell within the band, the dismissal will be fair. It is only if the Respondent's decision falls outside the band that the dismissal will be unfair.

21. The Respondent's Counsel also cited the case of **Wincanton Group Plc v Stone** which is of particular relevance in this case given that the Claimant was on a live disciplinary warning when he was dismissed. I accept that in such cases the Tribunal must not look behind such a warning unless it is satisfied that a warning was issued for, in the words of the President Mr Justice Langstaff, "*an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it.*" It is only in those circumstances that the earlier warning can be ignored.

Findings of Fact

22. The Respondent is a publicly funded "not for profit" housing association. It provides affordable housing to residents in the London and South East area. A substantial proportion of their homes are provided to vulnerable adults including the elderly, and those with learning difficulties or disabilities. The Respondent is a large organisation with something in the region of 700 employees and significant resources available to it including significant HR resources.

23. The Claimant started work for Brent Council in 1994. He subsequently transferred employment to Fortunegate Community Housing and subsequently transferred employment to the Respondent. The parties accepted that the Claimant's period of continuous service with the Respondent dated back to 1994 as the transfer of his employment had been subject to the Transfer of Undertakings (Protection of Employment) Regulations.

24. Previously, the Claimant had been employed in the more senior role of Estate Supervisor. That was a management role. However, when the Respondent restructured in about 2012 or 2013, the Claimant was unsuccessful in his application for an equivalent role and was offered his current role as an alternative to redundancy. He accepted and after a period of 12 months in which the Claimant's salary was protected, his salary dropped significantly to reflect the less senior new role. That new role was in the Respondent's gardening team and involved the Claimant visiting the

Respondent's properties and undertaking gardening work normally with a team of other workers.

25. The Claimant was an employee who was more than willing to challenge managerial decisions and practices that he disagreed with. He did so either on his own behalf or on behalf of others. There are numerous examples of this including:

25.1 raising a grievance in 2003 regarding pay which resulted in him receiving a pay increase; and

25.2 Raising a grievance in 2006 about himself and his team being side-lined; and

25.3 Conflict with a manager in 2006 which led to the manager complaining that the Claimant had threatened him. This had led to disciplinary action being taken against the Claimant although no disciplinary sanction was imposed; and

25.4 The Claimant raised a complaint about inadequate tools which he said led to him suffering from tennis elbow; and

25.5 He challenged the managerial decision to change the meeting point where he and his work colleagues met up to be assigned work when this was changed to a new and less convenient location; and

25.6 The Claimant raised a grievance in 2013 against the Respondent's decision to restructure and their decision not to appoint him to one of the new equivalent jobs he had applied for. His grievance and subsequent appeal were unsuccessful; and

25.7 The Claimant raised a grievance in March 2016 regarding various health and safety issues, this included complaints about lack of toilet facilities for the gardening team when they were working out on site. This complaint is particularly pertinent to the issues in this case. That grievance was partly upheld.

26. The Claimant did not assert with any vigour in this case that he was considered by the Respondent's management to be a problem employee or a "trouble maker" because of these matters. Nor did he seek to argue that these were factors in the Respondent's decision to dismiss him. In any event, I accept Mrs Brown's evidence that she was aware of very few of these historical issues and that they were not a factor in her decision-making. I also accept Mrs Brown's evidence that she was not aware of any

"agenda" amongst the Respondent's management to get rid of the Claimant and that this did not feed into her decision making in this case.

27. The Respondent has a number of relevant policies and procedures. Those that are of particular relevance to this case are as follows. The Respondent has a code of conduct, the relevant sections state:

"You must fulfil your duties and obligations responsibly acting in the best interest of Catalyst, its customers and other service users, you must treat others with respect and uphold catalyst values at all times".

and

"Catalyst aims to treat all its residents and other service users fairly and provide excellent customer service. Employees must ensure that their conduct reflects this commitment while maintaining the highest standards of the integrity and behaviour at all times".

28. Those values fed into the Claimant's statement of main terms and conditions of employment that stated that his duties would be in accordance with his role profile which included *"the need to provide an effective, responsive and pro-active customer focused ground maintenance service that is of a consistently high standard"*. Other specific role competencies included being *"personable, proactive, professional and able to demonstrate a full commitment to exceptional customer care and service in all activities"*.

29. The Claimant's contract also states *"you are expected to perform the duties of your post to do so with due diligence and not to do anything which is in conflict with the interest of Catalyst, its tenants or employees"*.

30. The Respondent also has a dignity at work policy which included a provision stating *"our aim is for Catalyst to be a great place to work in every way and this includes making sure everyone is treated with dignity and respect. Catalyst will not tolerate any form of bullying, harassment or victimisation. Colleagues and others working at catalyst must always consider how their actions and behaviours may affect others"*.

31. The Respondent's disciplinary policy and procedure also included a list of examples of misconduct that potentially amounted to gross misconduct. They include:

31.1 a fundamental breach of the employee contract; and

31.2 a fundamental breach of the Respondent's Code of Conduct; and

31.3 a fundamental breach of the Respondent's values; and

31.4 harassment, victimisation or discrimination against one of the Respondent's employees, one of the Respondent's customers or a member of the public connected to the Respondent whilst representing the organisation; and

31.5 any serious misconduct or deliberate and/or negligent act which is to the detriment of the business or the Respondent's reputation.

32. The Respondent made their procedures and policies available to all employees on its intranet to which the Claimant had access. Managers were also expected to make their staff aware of policies and changes that might occur through briefings and regular toolbox talks. The Claimant had also worked in a managerial role himself. I am satisfied that he would have been familiar with or at least aware of the various policies and requirements.

33. The Claimant asserted that he was a valued and effective member of staff. However, the only evidence cited was the Claimant's appraisal record from 2011. I accept that at that time the Claimant was awarded scores that suggested that his contribution to the Respondent was either good or exceptional. The record also contains many very positive comments about the Claimant. I accept that at that time the Claimant was considered to be making an excellent contribution for the organisation. No wider documentary evidence was produced about the Claimant's performance although the Respondent did not contest the Claimant's assertion other than in relation to disciplinary action from 2016 onwards and so I accept that the Claimant was an employee who made a valuable contribution toward the Respondent's organisation.

34. However, in 2016, the Respondent took disciplinary action against the Claimant. This resulted in the Claimant receiving a final written warning on 18 July 2016 for a number of acts of misconduct including insubordination which included shouting and threatening behaviour toward a manager and refusing to undertake instructions from that manager. The misconduct included walking off the job without permission, unauthorised absence from work, a refusal to carry out duties at work and regularly sleeping during working hours. The Claimant unsuccessfully appealed against the warning. The warning was to remain on the Claimant's record for a period of 12 months to July 2017.

The Incident on 3 November 2016

35. The incident that led to the Claimant's dismissal took place within that period on 3 November 2016. At the time, the Claimant was undertaking gardening work at one of the Respondent's sites with two work colleagues, who I will refer to as "V" and "Z". Z has learning difficulties. It was acknowledged by the parties that he was a vulnerable individual. All three workers were wearing the Respondent's uniforms at the time and were readily identifiable as being the Respondent's workers. The site was a housing development. Z urinated in a bush at the site. A resident at the site (who is referred to as Resident A) had seen this and had come out of her home. This led to an altercation with the Claimant.

36. The matter first came to the Respondent's attention when Resident A telephoned the Respondent's customer services to make a complaint on 3 November 2016 shortly after the incident occurred. Although some details of the call were recorded in writing, the person who took the call appears not to have recorded anything other than a brief record of the complaint, despite going through the complaint with Resident A in some detail. Furthermore, no immediate action was taken to deal with the matter. The record however states that Resident A complained of the Claimant being very aggressive towards her and using rude words including the "F word".

37. After no action was taken by the Respondent Resident A telephoned them again on 8 November to find out what action was being taken. I have seen a transcript of that call. The accuracy of that transcript is accepted. Darrell Gavin of the Respondent took the call. The transcript contains a detailed account of the incident from Resident A. Resident A complained of the Claimant using aggressive and foul language towards her. She referred to having reported the matter to the police and having obtained a crime number. She said she had been looking out of her window when she saw one of the Respondent's contractors urinating against a neighbour's fence. It is common ground that this was Z and not the Claimant. Resident A said that she went outside to confront the three contractors who included the Claimant. She described him as a black man, over six-foot-tall and of large build, a description that everyone accepts could only have related to the Claimant and not to V or Z. When Resident A asked what they were doing, the Claimant is said to have responded *'pissing, get back into your house you shouldn't be looking out of your window at men'*. Resident A said that when she responded, the Claimant had been very aggressive, looming over her, telling her that she shouldn't be peeping out of her window at people and that she should get back into her house. She also complained that the Claimant said that he knew where she lived, which was something that she found very intimidating. Resident A then went back to her house to get her phone, emerged again and took a number of pictures of the Claimant without his consent. Z was said to be very upset and apologetic throughout the

incident. It is clear that Resident A felt sorry for Z and her complaint related entirely to the Claimant's behaviour towards her.

The Complaint and the Investigation

38. Darrell Gavin emailed details of the complaint to Phillip Taylor and Jim Lundie on 8 November. Both men are members of the Claimant's line management. The two men went to visit Resident A that day. During the visit they also saw another resident, a male who I will describe as Resident B who also witnessed some of the incident. Mr Taylor's account of the meeting is recorded in minutes of a meeting that he had with Eugene Browne on 17 November as part of the disciplinary investigation. Mr Taylor took a statement from Resident A, which is broadly consistent with Resident A's initial account on 8 November.

39. Eugene Browne of the Respondent was appointed to investigate the incident. He placed the Claimant on suspension on full pay on 9 November 2016. The suspension and the reasons for the suspension were confirmed to the Claimant by letter the same day. Mr Browne obtained the documents I have referred to as part of his investigation and also decided to conduct interviews with Resident A, Resident B, the Claimant, V, Z, Mr Taylor and Mr Lundie.

40. The results of that investigation included the following evidence all of which was before Mrs Brown when she made the decision to dismiss:

40.1 Resident A was reluctant, when interviewed by Mr Browne, to give yet another account of the incident but did confirm that the Claimant had continually shouted at her and told her to 'pissing get back into her house'. He got very close to her, shouted that he knew where she lived and took photos of her house. She again confirmed that she had felt intimidated.

40.2 Mr Browne also reviewed the transcript of the original call between Resident A and Darrell Gavin on 8 November.

40.3 Mr Browne attempted to interview Resident B. However, Resident B did not return his calls and therefore no interview took place. However, Resident B had given a statement to Mr Taylor on 8 November. Resident B had confirmed then that he had been in his house when he heard the incident and came out to investigate. He said the Claimant had been very animated, loud and aggressive, describing the Claimant as in his face and saying to him '*who the F**k do you think you are?*'

40.4 Mr Taylor had taken the statement from V on 8 November which gave a much more sanitized version of events. At its highest, that statement suggested that the Claimant had spoken to Resident A in a raised voice and that in V's view the Claimant was going over the top. V had also given an even shorter statement on 9 November again taken by Mr Taylor that made no mention of the Claimant's behaviour. When he was interviewed again by Mr Brown on 18 November, V again gave little detail about the Claimant's behaviour other than saying the Claimant was talking non-stop and that V had asked the Claimant to stop on about three or four occasions. V described the incident as an argument.

40.5 Mr Browne then held an investigation meeting with the Claimant on 16 November. The Claimant had produced his own written statement about the incident. He presented this at the investigation meeting. According to his statement, when Z was urinating, Resident A had come storming out of her property and demanded to know what Z was doing. Z had become very upset and the Claimant felt that he had to intervene to protect Z. The Claimant said that Resident A was aggressive and abusive towards him and had sworn at him. He said in his statement that he absolutely did not respond in kind. The clear tenor of the Claimant's statement is that he had done nothing wrong and that this was Resident A who had been at fault.

40.6 At the investigation meeting on 16 November the Claimant began by presenting his written statement. He went on to confirm it had been Resident A who was swearing and aggressive. He denied saying anything about her peeping out of her window, denied referring to pissing and getting back in her house and denied suggesting that he knew where she lived. He denied shouting at Resident A, conceding though that he had been talking loudly to her. He denied saying to Resident B "who the F**k do you think you are" or similar and denied swearing at him. The Claimant however accepted that the incident lasted about 10 minutes and was, in his words, "quite heated" for that time. He said however that he had kept it straight and calm. He also accepted that he had taken some photographs after the incident including photographs of Resident A's house.

40.7 Mr Browne also interviewed Mr Taylor and Mr Lundie separately on 17 November as they had met both residents and taken accounts from them. Written records of both interviews were kept.

40.8 Mr Browne also interviewed Z on 22 November again keeping a written record of the interview. Z said that Resident A had not been shouting when she had approached them but had been speaking firmly. He said the Claimant was talking loudly to her but he could not understand what the Claimant was saying and he went on to say the Claimant was loud and had been shouting when speaking both Resident A and B and also confirmed that both he and V had tried to calm the Claimant down.

40.9 Mr Browne also obtained the photographs that were taken by both the Claimant and Resident A.

40.10 Mr Browne obtained and reviewed copies of the Claimant's contract of employment and the relevant policies and procedures.

41. Overall, the investigation was comprehensive and thorough with written records of all the relevant evidence and meetings being taken.

42. Mr Browne concluded that the Claimant had behaved in a threatening and offensive manner toward the Respondent's residents and that there was a case to answer. He prepared a comprehensive investigation report dated 29 November and annexed all the written evidence to the report.

Disciplinary

43. The Claimant was invited to a disciplinary meeting on 6 December 2016 by letter dated 29 November. That letter confirmed the allegations against him, it enclosed the investigation report and supporting documents, confirmed that the hearing would be chaired by Paula Brown, confirmed the Claimant's right to be accompanied and confirmed that the potential disciplinary sanction might be dismissal.

44. Paula Brown was appointed to chair the disciplinary hearing as she had no prior involvement with the matter and had no history with the Claimant. This was a conscious decision on the part of the Respondent to remove the decision making from the Claimant's management line as the Respondent was aware that the Claimant felt that the Director of Environmental Services and his line management were against him and that he had raised grievances in relation to them in the past.

45. The Claimant attended the disciplinary hearing with his union representative on 6 December 2016. When the Claimant's ill health was raised at the outset of the meeting, Mrs Brown agreed to adjourn to

investigate whether the Claimant was fit to attend. This resulted in the Claimant being referred to the Respondent's occupational health service. They subsequently confirmed that whilst the Claimant was suffering from stress and high blood pressure he was fit to attend a disciplinary meeting and it was considered in the interests of his health to resolve the matter sooner rather than later.

46. The disciplinary hearing was reconvened and took place on 7 February 2017. Again, the Claimant attended with his union representative. I have seen minutes of the meeting; the accuracy of which is not disputed. It is clear that the Claimant was given a comprehensive opportunity to respond to the allegations against him. When giving his account of the incident, the Claimant said that Resident A had been shouting at the top of her voice and swearing at him. However, when he was pushed on the swearing issue later in the interview he appeared to back-off this allegation and said he could not remember whether she swore. He said he had intervened because Z was vulnerable and had tried to calm the situation down and tried to explain things to Resident A. Again, the Claimant denied shouting at Resident B and denied saying "*who the F**k do you think you are*". The Claimant also denied that V's account of him going over the top was accurate. He also denied again saying the words to Resident A about pissing and for her to "get back into your house" and denied saying that she should not have been watching men out of her window. The Claimant described the evidence against him as a pack of lies and said that everyone had clearly "congregated" together against him. Overall, the Claimant's position was that he had not behaved unacceptably and would not do anything differently if the situation occurred again.

47. It is clear from the notes of the disciplinary meeting that Mrs Brown was faced with a conflict of evidence. She had to decide based on the evidence available to her what had happened on 3 November.

48. Mrs Brown adjourned the disciplinary hearing and discussed the matter with Carla King who had also attended the hearing. However, I am satisfied that it was Mrs Brown who was the ultimate decision maker.

49. Mrs Brown's conclusions were that the Claimant had committed three acts of misconduct:

49.1 Firstly, she concluded that the Claimant had been using threatening and/or offensive behaviour toward the Respondent's residents. Essentially, Mrs Brown disbelieved the Claimant's account of the incident and concluded that the Claimant had behaved in the way alleged. Her conclusion was based on various factors including the fact that the Claimant's accounts of

the incident was markedly different to all those others who were present and that the evidence of others had confirmed that the Claimant had been loud and aggressive. She took into account that apologies had been made to residents on his behalf and that he had been asked by his colleagues to leave the scene on a number of occasions. She also took into account the discrepancies in the Claimant's account particularly as to whether Resident A had been swearing and took into account the fact that there was no good reason for the other witnesses to lie about the matter; and

49.2 Mrs Brown also concluded that the Claimant had been acting in a manner likely to bring the Respondent's reputation into disrepute and that he had also breached the Respondent's Code of Conduct and the Respondent's values and behaviours. These two conclusions inevitably flowed from the conclusion on the first issue.

50. Given that that the Claimant was working for the Respondent at the time and was publicly representing the Respondent at the time and also given the content of the Code of Conduct and the Respondent's values and behaviours. Mrs Brown concluded that the Claimant's behaviour amounted to gross misconduct under the Respondent's disciplinary procedure and that it warranted summary dismissal. She took into account the Claimant's long service but concluded that the live final written warning overshadowed this.

51. Mrs Brown's conclusions are comprehensively set out in her letter to the Claimant dated 13 February 2017 that confirmed the Claimant's summary dismissal for gross misconduct.

Appeal

52. The Claimant exercised his right to appeal by letter dated 16 February 2017. His grounds for appeal included that the decision was overly harsh, that the situation would not have arisen had the Respondent provided adequate toilet facilities, that he had been trying to protect a vulnerable work colleague and that on reflection he would have dealt with matters differently if a similar incident had reoccurred and would have handled the matter in a more calm and subjective way.

53. Neil Verman was appointed to hear the Claimant's appeal. I accept that this was in breach of the Respondent's disciplinary procedure which provides for disciplinary appeals against such sanctions to be considered by a panel rather than an individual. That procedure, gives no indication of the

number of persons to be on the panel and provides for the chair of the panel to be the ultimate decision maker.

54. The Claimant was invited to an appeal hearing which took place on 3 March 2017. He attended with his union representative. Minutes were taken at the meeting. The accuracy of those minutes is not in dispute. The Claimant was given every opportunity to put his case. The Claimant appeared to concede during the appeal hearing that he had not behaved entirely blamelessly on 3 November. He maintained that he had been trying to keep the situation as calm as he could. His union representative conceded on his behalf that he had shouted and had handled the incident wrongly at the time. The Claimant accepted that with proper training, the incident may have gone better.

55. Mr Verman considered the matter and concluded on the evidence that the Claimant had reacted aggressively to Resident A, that he had shouted, he had gone over the top and had handled the incident wrongly, as the Claimant's union representative had conceded. He concluded that the Claimant's behaviour amounted to gross misconduct. He reconsidered the severity of the sanction noting that the Claimant had not accepted that he had been wrong until after his dismissal. Mr Verman concluded that the Claimant was not genuinely contrite and that his acceptance of wrongdoing was tactical rather than genuine. He was also not satisfied that imposing a lesser disciplinary sanction would rule out the risk of repetition of the behaviour and took into account the live final written warning. He concluded that the decision to dismiss would not be overturned and wrote to the Claimant on 6 April 2017 to confirm his decision and the reasons for his decision.

Conclusions

56. My conclusions based on those findings of fact are as follows:

57. Firstly, I considered the reason for dismissal. The reason for dismissal was plainly the Claimant's conduct. I accept the evidence of Mrs Brown in this regard. The Claimant no longer challenges it in any event. To be precise, the conduct which the Claimant was dismissed was threefold although it does all concern his behaviour on 3 November. Firstly, the Claimant had been using threatening and/or offensive behaviour toward the Respondent's residents on 3 November. Secondly, that in doing so, he had been acting in a manner likely to bring the Respondent's reputation into disrepute and thirdly in doing so had breached the Respondent's Code of Conduct and the Respondent's values and behaviours.

58. It follows from this finding that the dismissal was for a potentially fair reason within Section 98(2)(b) ERA and the Respondent has discharged the burden in this regard.

59. Turning to the test of fairness under Section 98 and turning to the three questions I identified earlier. I considered firstly whether there were reasonable grounds upon which Mrs Brown could conclude that the Claimant committed the misconduct concerned. The Claimant's Counsel challenged Mrs Brown's conclusions on six grounds:

59.1 Firstly that she failed to give weight or sufficient weight to the fact that Resident A may have been gilding the lily to support her complaint and/or exaggerating her complaints as she was unhappy because the Respondent had failed to deal with them between 3 and 8 November; and

59.2 Secondly, that she did not give weight or sufficient weight to the fact that the motives for the Claimant's actions were to protect a vulnerable employee, a motive which was in line with the Respondent's core values; and

59.3 Thirdly, that Mrs Brown did not give weight or sufficient weight to the fact that the outcome and process followed by the Respondent may have been very different had it been the Claimant who had complained about Resident A's behaviour; and

59.4 Fourthly, that she placed too much weight on the fact that the Claimant's evidence was in some instances inconsistent, bearing in mind that the evidence of other witnesses also bore inconsistencies and that the Claimant was doing his best to record details of a fast paced and short event. The assertion was that in such circumstances, the Claimant should have been given the benefit of the doubt; and

59.5 Point five was that Mrs Brown had placed too much weight on the fact that the police had been notified by Resident A; and

59.6 Point six was that the conclusion that Mrs Brown had reached that the photograph taken by Resident A supported the allegations of aggressive behaviour were challenged.

60. Taking these points into account I fully accept that there is scope for a different decision maker to take a different view on all of these points. However, that is not the issue. The issue is whether Mrs Brown's conclusions were reasonable conclusions that she could have reached on the evidence available to her. I find that her conclusions were open to a

reasonable employer on the evidence available. The weight she placed on the above factors was in my view within the band of reasonable responses open to a reasonable employer. Mrs Brown was faced with a number of differing accounts of the incident. That is hardly surprising and is only to be expected when witnesses are seeking to recall a fast paced and short incident where tempers were high. It is not surprising that in that context the accounts were not all entirely consistent with each other. However, I accept that they did, with the exception of the Claimant's account, paint a broadly consistent picture that the Claimant had sought to argue with Resident A. He had shouted at her or at least raised his voice and had certainly inflamed a difficult situation rather than defusing it. It was also plain that Resident A had felt intimidated by the Claimant's behaviour and clearly felt strongly enough about the issue to immediately complain to both the Respondent and the police. It is, in my view, plainly within the band of reasonable responses open to Mrs Brown on the evidence before her to conclude that the Claimant was guilty of the conduct concerned.

61. I also considered the question of whether the Respondent had completed a reasonable investigation prior to the dismissal and had followed a fair and reasonable procedure throughout. With the exception of the one issue regarding the composition of the appeal panel, the process followed by the Respondent in this matter both at the investigation stage, disciplinary stage and appeal stage was exemplary.
62. With regard to the investigation stage, one simply cannot see any further reasonable steps that the Respondent could have taken to investigate the matter other than perhaps interviewing Resident B. However, attempts were made to do so and Resident B could not be compelled to co-operate.
63. I am satisfied also that the procedure at the disciplinary stage was thoroughly fair. The Claimant was given every opportunity to present his case before a decision was made.
64. The appeal stage was conducted with similar fairness. It is arguable whether it is the correct stage of the **Burchell** test to consider this procedural issue as it relates to the appeal process rather than the investigation stage. However, I consider that it really matters not. Taking a step back and looking at the entire procedure, I am not persuaded that the failure to convene an appeal panel and the failure to follow the Respondent's own procedure in this respect takes the Respondent's procedure outside the band of reasonable responses. Whilst I accept that, if differently constituted, an appeal panel may have taken a different view there was nothing inherently unfair about the appeal process conducted in this case and it is the inherent fairness that is significant. It

is also significant that the Respondent's failure is a single failing in what was otherwise an exemplary process.

65. I also considered whether the sanction of dismissal was within the band of reasonable responses. It is clear that the Respondent carefully considered all the available circumstances. Had the Claimant not had the final written warning live on his record, I accept that the Respondent's decision would have been a harsher end of the range of reasonable responses and at the harsher end of the sanctions open to a reasonable employer. However, even in that scenario, I would still have taken the view that notwithstanding the Claimant's clean record the sanction was not outside the band of reasonable responses given the severity of the Claimant's conduct and, significantly, the lack of insight and remorse displayed by the Claimant. However, that is an artificial scenario because this was not a case where the Claimant had an unblemished disciplinary history. He had a final written warning that had been imposed only four months before the conduct on 3 November. That warning related to serious misconduct that in some instances bore a similarity to the conduct on 3 November. Deciding to dismiss an employee who was guilty of the Claimant's conduct in circumstances where he had already received a final written warning was plainly within the band of reasonable responses and so for all of those reasons the claim is unsuccessful and will be dismissed.

Employment Judge Mr A Spencer
15 November 2017