



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms M Kotarek

v Four Seasons Health Care Limited

Heard at: Bury St Edmunds

On: 12 March 2018

Before: Employment Judge S King

Appearances

For the Claimant: In person.

For the Respondent: Mr Ashwood, Solicitor.

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.
2. The claimant's claim for wrongful dismissal fails and is dismissed.

RESERVED REASONS

1. The claimant was unrepresented. The respondent was represented by Mr Ashwood (solicitor). I heard evidence from the claimant and I heard evidence from Ms Joanna Kemp and Mrs Cheryl Baird on behalf of the respondent. The claimant and respondent exchanged witness statements in advance and prepared an agreed bundle of documents which ran from pages 1 to 235.
2. The claims were identified at the outset as that of unfair dismissal and wrongful dismissal. The claimant confirmed that she did not have any other claims in respect of outstanding holiday pay or a wage claim (despite the boxes being ticked on the ET1 form). She confirmed at the outset she is not owed any such sums. The case therefore proceeded on the basis of wrongful dismissal and unfair dismissal only.

3. A preliminary hearing took place on 4 December 2017 before Employment Judge Warren where the issues were agreed. The claimant was at that time represented by a solicitor. The claimant's position at this hearing was that she had not seen the agreed list of issues before today and disagreed with the content. In particular, she disagreed with her job title and where she worked. The claimant also disputed that she accepted the reason for dismissal was a potentially fair reason of conduct. I explained to the claimant that this was how the case had since been prepared in readiness for the hearing. The claimant felt that her dismissal was motivated by the nursing homes manager following a complaint made against her sometime previously. I advised the claimant that the case should proceed in accordance with the agreed issues. Those issues were as follows:-
 - 3.1 The claimant accepts that the reason for dismissal was the potentially fair reason of conduct. She does not suggest that her dismissal was motivated by the grievances she had raised with regard to her manager Mrs Gogo.
 - 3.2 The misconduct relied on by the respondent is that the claimant:
 - 3.2.1 Was verbally abusive to a resident;
 - 3.2.2 Was verbally abusive to a colleague; and
(The respondent no longer relied upon this reason.)
 - 3.2.3 Had left work early without permission.
 - 3.3 The legal question will be whether the respondent had reasonable grounds for its belief in the claimant's misconduct, based upon a reasonable investigation and if so, whether the decision to dismiss lay within the band of reasonable responses.
 - 3.4 The claimant's challenges to the fairness are as follows:-
 - 3.4.1 English is not her first language;
 - 3.4.2 She had not been warned that the resident who complained had a urinary tract infection;
 - 3.4.3 The resident was confused; the medication she was on may have caused confusion, her identification of the claimant should not have been relied on;
 - 3.4.4 The resident was prone to outbursts and to making complaints;
 - 3.4.5 There were other members of staff interacting with the resident at the same time;

3.4.6 A member of staff who reported the claimant was motivated by the fact that the claimant had reported that person for a misdemeanor, and

3.4.7 She was entitled to leave work early because she was being bullied.

3.5 Was the decision to dismiss a fair sanction ie in the range of responses of a reasonable employer?

3.6 If the dismissal was fair did the claimant contribute by way of culpable conduct which requires the respondent to prove the claimant committed the misconduct alleged?

3.7 Does the respondent show that if it had followed a fair procedure the claimant would have been dismissed fairly in any event, if so to what extent or when?

Wrongful dismissal

4. This being a claim which the employment tribunal can determine:

4.1 Did the claimant commit an act of gross misconduct?

4.2 If not, is there a breach of contract by the employer in failing to pay that notice?

4.3 Has the claimant suffered a loss as a result?

The Law

Unfair dismissal

5. Dismissal under s.95 of the Employment Rights Act 1996 not being in dispute, the claimant has the right not to be unfairly dismissed by the respondent under s94 of the Employment Rights Act 1996.

6. S.98 of the Employment Rights Act 1996 states that:

“(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—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (3)
- (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."
7. In conduct cases one must have regard to the case of British Homes Stores Limited v Burchell [1980] ICR 303 which sets out a three-step test where the respondent must hold a reasonable belief formed on reasonable grounds following a reasonable investigation. Regard should also be had to the ACAS Code of Practice on Discipline and Grievance (COP1).

Wrongful dismissal

8. The claimant has the right to minimum notice under s.26 of the Employment Rights Act 1996, save that s.86 (6) states that:

“This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.”

Findings of fact

9. The claimant worked as a care assistant with the respondent. She commenced her employment on 18 February 2008. She worked part time – two nights a week.
10. The respondent owns and operates residential care homes for the elderly and infirmed. The respondent operates in a heavily regulated industry. The respondent must abide by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (here and after called the

Regulations) and those Regulations are enforced by the Care Quality Commission (CQC).

11. Around February 2014 the claimant was promoted to a deputy manager role and moved from the Kingfisher building to another building, Spiller the dementia unit (where the claimant worked full time night shifts). The claimant's evidence is that she was bullied by another care assistant, LL. The claimant also observed incidents of abuse of the residents and reported the facts to Mrs Gogo. The claimant provided a statement to Mrs Gogo. Shortly after that meeting the claimant was told that her probationary period as a senior carer had ended and she was placed back into the role of care assistant. The claimant appealed against that decision but had no response.
12. Around this time the claimant transferred back to the Kingfisher building which is where the events that form the subject of these proceedings are said to have occurred. She made a complaint to head office and received a confirmation letter that her complaint had been forwarded to the relevant senior management team responsible for Kingfisher House for prompt investigation and that she would be contacted. This was a complaint (grievance) against her manager, Mrs Gogo.
13. The claimant did not hear further in respect of her grievance. The colleague against whom she raised a complaint at Spiller unit was later subsequently dismissed for abusing two residents. It was around this time the claimant reduced her shifts to part time – two nights a week.
14. The claimant raised a second grievance by email to the regional manager, Jo Hadfield in 2015. On this occasion she had a meeting with the regional manager. The outcome of that grievance was dated 18 September 2015 which the claimant felt was inadequate but she did not appeal. The grievance outcome confirmed that Mrs Gogo had told the claimant that "I will fire you". In the period that followed this outcome, the claimant received a number of investigatory invitations. These were purportedly disciplinary matters from 2014 through 2015, 2016 and into 2017. None of these disciplinary investigations amounted to any disciplinary action beyond the investigatory stage to the claimant. The sheer volume of these matters should have raised alarm bells with the respondent.
15. In March 2017, a further investigation commenced which is the subject matter of these proceedings. The claimant was sent a text message by the deputy manager, Nelsie Palisoc asking for confirmation that she was attending a meeting the following day. The claimant did attend the meeting but had not received the letter the respondent had sent. This was received after the meeting as the respondent had failed to pay the correct postage.
16. The letter concerning the investigation meeting contained a number of allegations. The first was that resident Mrs O reported that the claimant was rude during the night on the 2 March 2017 and that the claimant told

her she was “evil woman who was waking up other residents by using the call bell and if she continued to ring the buzzer the claimant would take it away from her and shut her door so that no one would hear her”.

17. The second allegation referred to an incident in January 2016 concerning the claimant’s behaviour in an investigatory meeting. The third allegation related to an incident on 23 January 2017 where the claimant was said to have not wanted to work with agency staff, and that her attitude was inappropriate. The fourth allegation referred to a matter which took place on 21 December 2017 concerning a complaint by another resident ‘Mr T’. The fifth allegation related to the claimant’s behaviour towards her manager Mrs Gogo and the comments made. Notes were made of the investigatory meeting on 14 March 2017. Present were Antoinette Edwards, human resources for the respondent, Mrs Gogo the home manager, the claimant and a notetaker. These minutes were reproduced for the bundle.
18. The claimant accepts that she got angry and was distressed in this meeting as she thought that the allegations she had read from the copy letter at the outset of the meeting were lies. The claimant said that she had never said that Mrs O was evil as that would be abuse. The claimant accepted that she said that Mrs O was a demanding person and explained the difficulties she had had on that shift. The claimant accepted she told Mrs O that she had been to the toilet 30 minutes ago and did a small amount of urine but that she asked another colleague, Mihai to take her to the toilet instead. In the end the claimant ended up doing this as Mihai did not feel that he knew her well enough to take her to the toilet. The issue around the infection control was discussed with the claimant.
19. The claimant was able to identify who would have probably reported her. The claimant was concerned that the same person, Shirley Curtis was the person against whom the claimant had raised a complaint to the night nurse and day nurse just a few days earlier.
20. The claimant was not suspended. Her next shift was on 19 March 2017. According to the rota she was due to work upstairs in Kingfisher House. The claimant was in the office for approximately 20 minutes after her shift started completing a handover when Mrs Gogo came into the office and advised that the claimant was not allowed to work on the floor. The day nurse and another colleague went to see the home manager, Mrs Gogo to identify why the claimant could not work on that floor. The claimant was told by the individuals that she could not work upstairs because there was an investigation regarding Mrs O underway. The claimant went to see Mrs Gogo who walked out of the office without saying a word to her.
21. It later transpired that the respondent had sent a letter dated 16 March 2017 to the claimant about her not working on Kingfisher upstairs floor until the matter was resolved. The claimant did not receive this letter until 23 March 2017 after her shift on 19 March 2017. The

claimant was informed by two other members of staff that the manager had advised them not to talk to the claimant, and not to tell her anything.

22. The claimant felt that she was unable to remain at work in light of this. She said she felt that she could not carry out her job professionally if her colleagues could not talk to her. She wrote a statement dated 19 March 2017 stating that she felt she was bullied by the home manager on a daily basis and that she was not able to stay at work that evening. She explained the scenario and that she would report the matter to regional manager because she could not work in a place where she was bullied and ignored by the manager. She set out that she tried to talk to the manager this evening but she left the office, and also called the nurse upstairs asking her not to talk to her and tell her anything. The claimant signed this and got a counter signature from the nurse in charge, Margaret Gangere.
23. Margaret Gangere was the person from who the claimant required permission to leave shift on 19 March 2017.
24. The claimant left shift because of the conduct of the home's manager Mrs Gogo and that she felt she could not stay. Since this document was signed by the person who could give authority for that to happen and the document made it clear that the claimant was leaving her shift as she was unable to work, I find it any event that the claimant would have had permission to leave on that occasion.
25. On 22 March 2017 the claimant received a phone call from the regional manager, Martin Murphy asking the claimant to come to Kingfisher House to talk to him. The claimant attended at 11am. The meeting concerned her shift on 19 March 2017 and that she had put residents at risk by leaving her shift.
26. On 23 March 2017 the regional manager called the claimant again and advised her that she was suspended. A letter dated 23 March 2017 was subsequently sent to the claimant to confirm that suspension. The letter of suspension confirmed that the claimant had been suspended pending an investigation into two serious allegations. The first was verbal harassment and abuse towards your management team, colleagues and residents specifically on 14 March 2017 and 22 March 2017. The second concerned her leaving her shift on Sunday 19 March 2017 without authorisation leaving the home short staffed which is constituted as neglecting residents care needs and abandoning her duties.
27. By letter dated 6 April 2017 the claimant received an invite to an investigatory meeting on 20 April 2017. It is this meeting which progressed to further disciplinary action for the claimant. Three matters of concern were raised with the claimant; the first was the verbal and psychological abuse to a resident on 2 March 2017, namely Mrs O; the second was the breach of infection control on 3 January 2017, and the third, inappropriate behaviour on 20 December 2016 and 3 January 2017.

The claimant was also sent a bundle of documents for that investigatory meeting. There was a statement of Mabel Gogo, Shirley Curtis and a record of complaint made by Anna Gren. The claimant was also provided with access to the resident Mrs O's care plans. From these the claimant was able to make a number of comments concerning the resident and her state of mind. The same resident also made a further complaint about night carers on 15 March 2017 but this did not involve the claimant.

28. On the 20 April 2017 the claimant attended the investigatory meeting with Declan Miskelly and notes of that meeting were taken. The claimant was spoken to about the agency staff and the issue with another resident's complaint 'Mr T'. The claimant raised with the respondent that she felt that she could not stay in the workplace when she was ignored, bullied and harassed. She left her shift and wrote a statement and left it with the nurse. The claimant raised issues of bullying and manipulation by her manager. It appears these were ignored by the investigating manager. The claimant was asked about the incident with the resident Mrs O which the claimant denied.
29. By letter dated 28 April 2017 the claimant was invited to attend a disciplinary hearing on 3 May 2017 in respect of two allegations of gross misconduct. Allegation one, verbal and psychological abuse to a resident on 2 March 2017. Allegation two, absconding from duty on 18 March 2017 on a night shift.
30. The claimant was sent a number of documents as attachments to that invite letter. She was sent a copy of the investigation meeting minutes, the record of the complaint completed by Anna Gren, the report made to the Care Quality Commission and the statements of Shirley Curtis, Rayniza Siao and Mabel Gogo. She was sent a copy of the rota and the safeguarding report. She was provided with a copy of the company disciplinary policy, procedures and standards of conduct. The claimant was given the opportunity to be accompanied to that meeting and warned that if found proven the claimant could be dismissed for gross misconduct.
31. In preparation for the disciplinary hearing the claimant prepared a statement concerning the allegations of verbal and psychological abuse to the resident on 2 March 2017. This statement was reproduced for the purposes of this hearing in the bundle of documents. The claimant set out that around 9.30pm she assisted to put Mrs O to bed. When she was in bed she was uncomfortable because the pillows were not to her liking. The claimant tried to adjust those pillows but Mrs O was still complaining. The claimant accepts that she said to Mrs O:

“Sorry but I don't know how to improve your pillows to make you comfortable in bed. You are a demanding person and there are more residents here who need my assistance. You are already in bed and some of the residents are still in chairs waiting for carers who will put them to bed.”

The claimant then managed to adjust her pillows and switch off the light and believes that she left the door open.

32. The claimant confirmed that about 4.15am Mrs O used the buzzer as she needed assistance with her toilet needs. In evidence before this tribunal it was established that the resident was in a bed with bed rails, and a high-risk resident in terms of falls. Whilst this resident was able to go to the toilet during day time hours largely unassisted, at night, given the bed rails, she required assistance for her toilet needs. Mrs O was over ninety years old and suffered from anxiety and depression. The claimant took her to the toilet and then out her back to bed. After around twenty minutes the resident started to shout "help, help, help". The claimant went to her room and asked what she wanted, to which the resident replied that she needed to go to the toilet.
33. The claimant advised her in a polite but firm manner that she was in the toilet not long ago and didn't pass much urine. The claimant said "can you please stop shouting everyone is sleeping and you will disturb them". The claimant then returned to her chair in another part of the building. After 5 minutes a nurse assistant came to her and said "can you take Mrs O to the toilet because I didn't know how". They went together to Mrs O's room and the nurse assistant observed the claimant. Mrs O said to the nurse assistant that the claimant had taken her buzzer away. The claimant told Mrs O her buzzer was in her bed and that she didn't do anything with the buzzer and told the nurse assistant that she always complains. After taking Mrs O to the toilet she was put to bed and comfortably slept. The claimant set out in her statement that the resident regularly complains and set out the nature of these complaints.
34. The claimant attended the disciplinary hearing on 9 May 2017. Unhelpfully there are two sets of notes in the bundle. They differ as to content. The claimant received one set of notes. The claimant outlined in the meeting her statement and also that she was harassed and bullied by her manager. The respondent did not deal with this allegation. In the meeting the claimant threw all her paperwork onto the floor and herself. She had what the witnesses described as a child like tantrum. The claimant accepts this and states that she was upset by the allegations to which she was facing. A second set of minutes has been produced where the claimant is reported to have said that she spoke to Mrs O in a "demeaning way". The respondent's witness who attended this meeting accepts that the claimant did not in fact make this statement. For this reason I prefer the set of notes as sent to the Claimant as these are more accurate.
35. The tribunal was referred to a number of documents concerning process and procedure, with a document for all care staff outlining their personal responsibilities. One of these such responsibilities was to treat all residents/patients, their relatives, friends and visitors as valued customers. The respondent has a zero tolerance of abuse to its residents as do all care home providers. The respondent's disciplinary procedure sets out the standard of conduct expected. This provides that unauthorised

absence and abusive behaviour is misconduct. Matters amounting to gross misconduct include the verbal or physical abuse of a resident, relative, member of the public or fellow employee, and neglecting residents' care needs or duties. I was also helpfully provided with extracts of the regulations to assist with the standards that the respondent must adhere to. The Care Quality Commission defines abuse as:

“Any behaviour towards a person using services that is an offence under the Sexual Offences Act 2003, ill-treatment of a person whether of a physical or psychological nature, theft, misuse or misappropriation of property belonging to a person using services or neglect of a person using services.”

36. Regulation 10 of the Regulations states that service users must be treated with dignity and respect. Service users are in effect the residents of the respondent. Regulation 13 of the Regulations states that:

“Service users must be protected from abuse and improper treatment in accordance with this Regulation.”

and

“Care or treatment for service users must not be provided in a way that is degrading for the service user or significantly disregards the need of the service user for care or treatment.”

37. The guidance from the Care Quality Commission on Regulation 13(4)(c) is that the care of a resident is degrading in the following ways:

“Not providing help and aid so that people can be supported to attend to their continence needs; making sure people are not left in soiled sheets for long periods; left on the toilet for long periods without the means to call for help; left naked, partially or inappropriately covered; made to carry out demeaning tasks or social activities; and ridiculed in any way by staff.”

38. Regulation 18 of the Regulations requires the respondent to have sufficient numbers of staff at all times. It is a term of the respondent's employee handbook that if an employee leaves their shift when caring for residents:

“You should ensure your departure is authorised in advance by the person in charge.”

39. I heard evidence from the disciplining officer Miss Joanna Kemp who stated that based on the claimant's statement she decided that the claimant had subjected the resident to verbal and psychological abuse as alleged. She was satisfied from the complaint and the statements from the staff that the resident had been distressed by what the claimant had said to her. Whilst the claimant denied what the resident had alleged she had said exactly, she did admit to saying and doing things that amounted to abuse. The claimant accepted that she told the resident she was very demanding. The claimant accepted when the resident asked to be taken

to the toilet in the night she told the resident that she had been to the toilet not long ago and didn't pass much urine, and then didn't take her to the toilet. The claimant had not provided the resident with help or support with her continence needs and in doing so the respondent felt that the claimant had subjected the resident to abuse.

40. The respondent felt that the claimant was guilty of absconding from duty because she admitted leaving her shift early. They concluded that there was no evidence and the claimant did not suggest that she had permission to leave. It was stated that all she had to do was get permission to leave however upset she was. The respondent did not outline why it disregarded her statement and the fact that she was being bullied on shift. The respondent failed to investigate these issues further.
41. The disciplining officer felt that the claimant was guilty of gross misconduct solely by abusing the resident. She was also guilty of misconduct for walking off the shift without permission. The respondent's disciplining officer felt that the claimant ought to have known better and had no confidence that she would not do something similar again if she just received a warning. It also raised particular concerns about the way she conducted herself in the disciplinary hearing. The decision was made to dismiss the claimant for gross misconduct.
42. By letter dated 17 May 2017 the respondent wrote to the claimant confirming that she was guilty of gross misconduct. It upheld both allegations against her and summarily dismissed her with effect from 17 May 2017. The claimant was not paid any notice pay. The claimant was given the right of appeal.
43. The claimant exercised her right of appeal by letter dated 21 May 2017. She also raised a grievance against Mrs Gogo, by letter dated 21 May 2017. The claimant raised a number of grounds of appeal including that the resident suffered from a urinary tract infection she felt at the relevant time, but she was not informed of this. Her position at the appeal stage was that had she known she would have taken her to the toilet.
44. By letter dated 22 June 2017 the claimant was invited to attend an appeal hearing. The appeal hearing took place on 27 June 2017. Again, the claimant was given the right to be accompanied.
45. An appeal hearing took place on 27 June 2017. Unfortunately, the respondent misplaced the handwritten notes of the meeting so it is not possible for these to be typed. As such there is no record of the appeal meeting. The claimant does however raise no issues with the appeal meeting itself. By letter dated 12 September 2017 the respondent upheld the decision to dismiss the claimant for gross misconduct. There was a delay in communicating the decision to the claimant due to annual leave.

46. In the intervening period unbeknown to the appeal officer, the claimant met with Amanda Chester on 5 July 2017 to discuss her grievance. The outcome of this grievance was provided to the claimant by letter dated 21 August 2017. In so far as this relates to the issues before this tribunal the respondent apologised for the incident concerning the claimant leaving night shift and that the respondent expected a professional approach and conduct to work from its staff and that this would be discussed with the regional manager to manage effectively. The grievance was partially upheld and action was outlined as a result. The appeal officer was unaware of the grievance and its outcome at the time she made her decision.
47. The claimant commenced ACAS early conciliation on 4 July 2017, and the certificate was issued on 2 August 2017. The claimant issued a claim on 1 August 2017. This was originally submitted to the Manchester Employment Tribunal as the claimant had given the respondent's registered address. This was transferred to Watford Employment Tribunal upon request of the parties.

Conclusions

48. At the outset I remind myself that it is not for the tribunal to substitute its decision for the respondent's, it must merely be satisfied that the dismissal fell within the range of reasonable responses. As I explained to the claimant at the outset of the hearing my role is not to determine her guilt or innocence in respect of the unfair dismissal claim but to look at the respondent's actions and determine whether it fell within the range of reasonable responses. It was a requirement for me to make findings as to her conduct with regard to the wrongful dismissal claim and I make those conclusions set out below.
49. I do have some concerns about the way that this matter came to light. I note that it was agreed between the parties' representatives that the claimant accepted her dismissal was for conduct and not for a reason associated with the grievances raised against her manager. It is against this framework within which I must make my decision. For the reasons I have set out below, the claimant made a number of admissions in her statement prepared for the disciplinary hearing which formed the basis of the decision to dismiss her. I do have concerns that the respondent has failed to investigate the allegations of bullying and harassment that have been raised by the claimant at various points. It also failed to appreciate that the pattern of a series of investigations following the grievance raised against the manager may have led to this situation. Nevertheless, this does not take away the allegations as put to the claimant for which she in part accepts. Even if her case had been put as she intended by those representing her that the grievances raised against the manager were the catalyst for the matter, this does not take away in particular from the incidents on the night shift on 1/2 March 2017 and the fact she made admissions in the statement prepared for disciplinary hearing in this regard.

50. Now turning to the agreed issues:

Unfair dismissal

50.1 The reason for dismissal is agreed as conduct. This is a potentially fair reason within s.98 of the Employment Rights Act 1996.

Did the respondent hold a genuine belief in the claimant's misconduct?

50.2 The respondent carried out an investigation. The claimant was provided with copies of all the investigatory notes in advance of both investigatory meetings and the disciplinary meeting. In this regard the respondent went further than is required under the ACAS Code of Practice and best practice to ensure that the claimant was aware of the allegations. It failed to investigate the allegations of bullying and it ought to have done. In this case however given the admission of the claimant this was not fatal to the respondent's case.

50.3 I have in my mind the thoughts of the dismissing officer and that I must not substitute my view for her decision. I have also seen the claimant's statement in preparation for the disciplinary hearing. I accept the thought process of the dismissing officer in that the claimant had accepted that she had told the resident that she was a demanding woman. This in itself in my view given the context in which it was made may well be outside the grounds of gross misconduct as if the claimant's version is accepted it has been taken out of context. The respondent did not make any specific findings as to whether the claimant did tell the resident that she would take her bell away. This is in part supported by the resident's comments (provided by the claimant in her own statement) that the claimant had said that she would take the bell away. Had it been the comments to the resident alone then the respondent may have been in some difficulty.

50.4 The claimant accepted that she had failed to take the resident to the toilet when she was asked for assistance. The respondent's concerns in this regard are that the resident had asked for help and the claimant had failed to provide it. The resident had to ask another nurse and it was only some time later that the claimant assisted in providing that continence need.

50.5 Having a regard to the regulations and the definition of abuse set out above, I find that the respondent did have a genuine belief in the claimant's misconduct given her admissions in the statement prepared for disciplinary hearing alone. It is clear from the guidance of the CQC that not providing help and aid so that people can be supported to attend to their continence needs is degrading. This under Regulation 13 is prohibited and falls within the CQC

guidance as abuse. Mrs O needed assistance to go to the toilet which the claimant refused to provide.

Did the respondent hold that belief in the claimant's misconduct on reasonable grounds taking into regard the claimant's challenges?

That English is not her first language

50.6 The claimant did not require an interpreter for these proceedings or to perform her duties with the respondent. I do not find that failing to take the resident to the toilet could in any way be said to relate to the claimant's statement that English is not her first language. Whilst this may apply to the comment made it does not relate to her actions. I therefore find that the respondent did have reasonable grounds to conclude from the investigation that she was guilty of gross misconduct on this point.

She had not been warned that the resident who complained had an urinary tract infection.

50.7 It is not clear whether the resident did in fact have a urinary tract infection at the time. The claimant was however aware that she was prone to such infections. In my view the fact that the claimant did not know whether or not she suffered from a urinary tract infection at the relevant time is not a reasonable ground to conclude from the investigation that she was not guilty of gross misconduct. A resident should not need to have a urinary tract infection for her carer to take her to the toilet when requested. This is a basic requirement to provide care and the claimant should have taken Mrs O to the toilet.

The resident was confused and the medication may have cause confusion and the identification of the claimant should not be relied upon.

50.8 I do not accept this point by the claimant. The claimant herself accepts that she made the statement to the resident and indeed failed to take her to the toilet. It is therefore disingenuous to suggest that the resident was in some way confused and it was not the claimant that she was identifying. The claimant admits it was her that said Mrs O was demanding and that she made the conscious decision not to take her to the toilet that night.

The resident was prone to outbursts and to making complaints.

50.9 Again, I do not accept that the fact a resident makes demands of the carer's time means that they should ignore subsequent complaints. Any complaints by a resident in a regulated environment ought to be investigated. In the situation of this case, it was the claimant's own admissions which led to her dismissal. It is irrelevant even if Mrs O complained daily about treatment by

carers, in this instance the claimant accepts that she neglected to take her to the toilet as she should have done.

There were other members of staff interacting with the resident at the same time.

50.10 As outlined above concerning the identification of the claimant, the claimant herself accepts that it was her that made the comment and failed to take the resident to the toilet.

A member of staff who reported the claimant was motivated by the fact that the claimant had reported that person for a misdemeanour.

50.11 Whilst this may well have been the rationale for the complaint, it does not take away from the fact that the complaint was originally recorded by another colleague Anna Gren. Further, it does not take away from the claimant's own admissions that she was the one who cared for the resident, made the statement alleged and failed to take her to the toilet. She accepts her own conduct so I cannot accept that motivations of a colleague to raise this point mean that she should not be disciplined for something she accepts she did.

She was entitled to leave work early because she was being bullied.

50.12 In this respect I find that the respondent did not have reasonable grounds to conclude from the investigation that the claimant was guilty of gross misconduct. In any event, despite the dismissing officer's evidence that she considered this to be gross misconduct, the respondent has labelled this conduct as misconduct in the letter dismissing the claimant and it would not have warranted dismissal in this case. Had the claimant been dismissed solely for this allegation the dismissal would have been unfair. The respondent's failure to deal with the statements made by the claimant in the investigatory and disciplinary meetings that she was being harassed and bullied, and how this may have impacted on her mind at the time is relevant in respect of this allegation.

50.13 For the reasons set out above this failure to investigate this matter does not undermine the charge of gross misconduct for abuse of a resident.

50.14 In addition, the fact that the claimant possessed a handwritten statement contemporaneous from the evening in question which was signed by the registered nurse who was the only person who could provide the claimant with authorisation to leave is clearly relevant and the respondent has failed to investigate this matter. As such I find that the respondent did not have reasonable grounds to conclude from the investigation that the claimant was guilty of misconduct on this point.

Was the decision to dismiss a fair sanction, ie within the range of reasonable responses for a reasonable employer?

50.15 The respondent found that the claimant was guilty of an act of gross misconduct. It also found that the claimant was guilty of a further act of misconduct. Dealing solely with the allegation of gross misconduct, the respondent had a number of options open to it at that time. It is not a question of whether I would have dismissed the claimant for the same "one off" event. It is a case of whether the respondent's actions fall within the range of reasonable responses of a reasonable employer.

50.16 It is my view that any employer who finds an act of gross misconduct in respect of the verbal or psychological abuse of a resident in the nature of the business in which it is engaged would take the same decision to dismiss. It may also make other decisions, but I cannot say the decision to dismiss fell outside the range of reasonable responses of a reasonable employer. Dismissal for this allegation of gross misconduct was within the range.

If the dismissal was unfair, did the claimant contribute by culpable conduct requiring the respondent to prove the claimant committed the conduct alleged?

50.17 In this regard I find that the claimant was not unfairly dismissed, and so I do not need to consider this further. I am however bound to say that had I found the claimant was unfairly dismissed on a procedural or other matter, I would have awarded a high contributory fault in this case. The claimant accepts the conduct alleged, the resident was over 90 years old and unable to toilet herself at night. As such a high degree of culpable conduct would have been relevant in this case in any event.

Wrongful dismissal

Did the claimant commit an act of gross misconduct?

50.18 The claimant decided that Mrs O did not need to be taken to the toilet as she had been earlier and returned to her chair. She neglected her duties to assist an elderly lady with her continence needs when she was unable to go herself. This is strengthened by the continued desire of the resident to go to the toilet that the claimant then had to assist with. Following this, the resident settled for the night. Whilst I can appreciate that the claimant may have felt others needed her and Mrs O was demanding as her justification for her action it does not take away from her decision to walk away and leave Mrs O and not in fact assist others but go and sit in her chair.

- 50.19 It is clear from the guidance of the CQC that not providing help and aid so that people can be supported to attend to their continence needs is degrading. This under Regulation 13 is prohibited and falls within the CQC guidance as abuse. Mrs O needed assistance to go to the toilet which the claimant refused to provide.
- 50.20 I accept given the claimant's admissions in the statement prepared for the disciplinary that the claimant was verbally and psychologically abusive to a resident. Given the findings of fact above and the Regulations it is clear that this is an act of gross misconduct. This was what the respondent dismissed her for having drawn those conclusions and I can see why it came to that conclusion on this allegation. I find that the claimant was guilty of gross misconduct in this respect.
- 50.21 With regards to whether the claimant left work early without permission which was the second charge upheld against her to justify her dismissal. I do not find that the claimant is guilty of misconduct. In my view she had a good reason to leave shift on the night in question, namely the bullying by her manager. This was partially acknowledged by the respondent in the grievance that was investigated subsequently but which ought to have been investigated at the time.
- 50.22 Further, it came to light in evidence before the tribunal that the registered nurse was the person to whom the claimant had to go to for permission. I find it highly relevant that this was the person that signed the statement written by the claimant on the night in question. As such, I am bound to find that the claimant was not guilty of the conduct of leaving the site without permission. It was highly probable that she had that permission but the respondent did not investigate this further.
- 50.23 I do not find that the claimant committed an act of gross misconduct in respect of leaving the shift early. I do however find that she committed an act of gross misconduct in respect of her treatment to the resident on 1/2 March 2017 for the reasons set out above.
- 50.24 As such the claimant's claim for wrongful dismissal fails and is dismissed. It is trite law that an employee can be dismissed for gross misconduct and that dismissal is summary i.e. without notice. Given that she had committed an act of gross misconduct in her treatment of Mrs O, there has been no breach of contract by the respondent in failing to pay her notice and this element of her claim fails.
51. In light of the above the claimant's case for unfair dismissal and wrongful dismissal fails and is dismissed.

Employment Judge S King

Date: 2 / 5 / 2018

Sent to the parties on:

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For the Tribunal Office