EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104624/2017

Held at Glasgow on 24 and 25 January 2018

Employment Judge: W A Meiklejohn (Sitting alone)

Miss Natalie McQuillan	**Claimant** **Represented by:** **Dr T Berry - Representative**
Mr Andrew Barclay Fitzsimons and others trading as Buckredden Care Centre	**Respondents** **Represented by:** **Mr E Mowat – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Claimant was not unfairly dismissed by the Respondent and her claim of unfair dismissal fails and is dismissed.

REASONS

1. The Claimant asserted that she had been constructively dismissed by the Respondent and that her dismissal was unfair. The Respondents denied that the Claimant had been dismissed.

2. I heard evidence from the Claimant and, for the Respondents, from Ms J Hanvey, Deputy Care Manager, and Mrs T Fitzsimmons, a partner in the Respondents and their Care Manager. I had a joint bundle of productions extending to 94 pages (to which I will refer by page number).

3. A number of other employees and former employees of the Respondents were referred to in the course of the evidence. They were –

Ms C Russell, formerly employed by the Respondents as a Care Assistant (or Carer)
Ms M Wright, employed by the Respondents as a Carer
Ms C Haswell, employed by the Respondents as a Carer
Ms J McCollum, employed by the Respondents as a Carer
Ms M Wilson, employed by the Respondents as a Senior Carer
Ms C Haxton, employed by the Respondents as a Personnel Officer

4. There were also references to the SSSC. This is the Scottish Social Services Council which is the regulator for the social service workforce in Scotland (including the Claimant and other employees of the Respondents).

Evidence and Findings in Fact

5. The Respondents operate a care centre providing care to adults. They also operate a children's nursery. The care centre comprises two units which are divided into corridors. The Respondents employ some 180 staff of whom around 80 are carers. The carers are assigned to a particular corridor. Care is provided to residents in line with their individual care plans.

6. The Claimant was employed by the Respondents as a Care Assistant (or carer). Her employment commenced on 30 August 2004. At the time of the events described below she was working night shift and was assigned to a particular corridor. She worked alongside Ms Russell who had much shorter service.

7. While working night shift the Claimant and Ms Russell would start work at 8pm and finish at 8am the following morning. They were required to look after some 30 residents, most of whom were incontinent. Each resident had a care plan which would typically include the frequency with which their position and skin condition should be checked. The care plan for the particular resident involved in the events described below ("the resident") required such checks to be carried out at intervals of three hours.

8. There was a Repositioning and Skin Inspection Chart for the resident (the "chart", pages 49-50). On this the carers attending to the resident's personal care would record certain information – the date and time of each inspection, the repositioning carried out and a comment on the resident's skin condition. The repositioning was recorded using codes – for example "from PR to B" meant from prone right to back. Each incontinence pad contained an indicator which allowed the carers to see at a glance whether the pad needed to be changed. The chart did not record expressly when the resident's incontinence pad was changed but this could be deduced from the carers' comments on the chart.

9. Where the chart recorded "sacrum red" at 20.00 on 27/3/17 and "skin intact" at 23.30 on 27/3/17 and "sacrum slightly red" at 01.00 on 28/3/17, this indicated that the resident's incontinence pad had been removed to allow the skin condition to be observed. It was standard practice not to reuse an incontinence pad which had been removed so these comments indicated that a new incontinence pad would have been applied. Where the chart recorded "skin not seen" at 02.20 on 28/3/17, this indicated that the resident's skin condition had not been observed which indicated that a new incontinence pad had not been applied. There were further entries on the chart at 05.00 on 28/3/17 – "sacrum slightly red" – and at 07.50 on 28/3/17 – "skin intact" – both of which indicated the application of a new incontinence pad. All of these entries on the chart were initialled by the Claimant and Ms Russell with the exception of the entry at 08.00 on 27/3/17 which bore only Ms Russell's initials.

10. Pages 76-77 were a copy of the Claimant's training record. This included an entry dated May 2016 described as "Continence", indicating that the Claimant had undertaken training on dealing with the incontinence aspect of personal care at that time.

11. According to the chart, Ms Haswell and Ms Wright attended to the resident's personal care at 12.05 on 28/3/17. There were no entries on the chart between those timed at 07.50 and 12.05 on 28/3/17. Ms Haswell and Ms Wright observed that the resident had two incontinence pads on. This was described as "double padding" which was not an acceptable practice (and was a practice for which the Respondents had in the past dismissed members of staff). The potential advantage to carers in double padding a resident was that the frequency of incontinence pad changes being required might thereby be reduced. However this entailed an increased risk of damage to the resident's skin.

12. While Ms Haswell and Ms Wright were attending to the resident's personal care, Ms McCollum entered the resident's room. Ms Haswell and Ms Wright told her about discovering the resident double padded. Ms McCollum then reported the matter to Ms Wilson as senior carer and she in turn reported the matter to Mrs Fitzsimmons.

13. Mrs Fitzsimmons spoke to Ms Haswell, Ms Wright, Ms McCollum and Ms Wilson individually on 28 March 2017. She asked them about the timing of the resident's personal care, noting that it had been a busy morning and that the resident's change of position was some fifty minutes later than scheduled. Mrs Fitzsimmons also asked them whether anyone else had given assistance and was told that no one else had been in the corridor and that they had not asked for assistance. She asked them each to prepare a statement and to pass the statements to Ms Hanvey. Page 45 was Ms Haswell's statement, page 27 was Ms Wright's statement, page 43 was Ms McCollum's statement and page 42 was Ms Wilson's statement. Mrs Fitzsimmons also checked the chart.

14. Mrs Hanvey showed the statements to Mrs Fitzsimmons during the afternoon of 28 March 2017 and they discussed how to progress matters. They decided to speak with the Claimant and Ms Russell the following morning as they (the Claimant and Ms Russell) would be working night shift from 8pm on 28 March 2017 until 8am on 29 March 2017. Mrs Hanvey prepared two letters addressed to the Claimant (being a letter of suspension – page 41 - and a letter inviting the Claimant to a disciplinary hearing on 31 March 2017 – page 53). Similar letters were prepared addressed to Ms Russell. These letters were all dated 29 March 2017 but were prepared on 28 March 2017 as the Respondents' administrative staff worked normal daytime hours and so would not be available before the time when the night shift ended on 29 March 2017.

15. Mrs Fitzsimmons and Ms Hanvey spoke to the Claimant and Ms Russell together on the morning of 29 March 2017 at the end of their night shift. By this time the Claimant and Ms Russell had become aware of the allegation of double padding the resident. When asked about this, both the Claimant and Ms Russell denied any knowledge of it. The Claimant and Ms Russell were shown the chart and were asked by Mrs Fitzsimmons about the entries for 27/28 March 2017; they confirmed the accuracy of those entries.

16. The Claimant and Ms Russell were then handed the letters referred to in paragraph 14 above. Both letters referred to the matter as "wilful neglect of a resident". The letter inviting the Claimant to a disciplinary hearing (page 53) advised her of her right to be accompanied but did not enclose copies of the statements obtained by the Respondents nor a copy of the chart.

17. The Claimant's disciplinary hearing took place on 31 March 2017. The hearing was conducted by Ms Hanvey with Ms Haxton taking the minutes. Pages 54-55 were the minutes and these were agreed as being accurate. The Claimant denied that she had double padded the resident. She made the point that if she had done this on purpose, why would she do so when her shift was due to end? This was a reference to the fact that the last personal care of the resident recorded on the chart was at 07.50 and the Claimant's night shift was due to finish at 08.00 (although she in fact worked until around

08.15). In the course of her evidence the Claimant expanded on this by pointing out that if she had double padded the resident shortly before the end of her shift, this would inevitably have been apparent to the day shift staff when they gave the resident personal care.

18. Ms Hanvey told the Claimant that she had to make a decision based on the facts in front of her. She referred to the fact that the Claimant and Ms Russell had been the last staff to complete the chart (i.e. before the double padding was discovered) and that "she had statements from 3 other members of staff who discovered the resident was double padded". Ms Hanvey said in evidence that her reference to three other members of staff could have been a mistake as there were in fact four statements. However I believed it was more likely that Ms Hanvey had been intending to refer to the statements from the three carers who had observed the double padding, excluding Ms Wilson who had not been present at the time and to whom the double padding of the resident was subsequently reported.

19. According to the minutes, the Claimant responded to Ms Hanvey that "she understood why [Ms Hanvey] would think that given the charts and the statements but she had not seen the statements and can't speculated who or how the resident had two pads on but all she is aware of is she did not double pad the resident, she has been working here for many years and has never done anything like this before so why should she do it now."

20. The minutes then recorded Ms Hanvey's decision in these terms – "based on the evidence she has she would be issuing her with a final written warning and would expect [the Claimant] to complete a reflection account of this incident and complete skills booklet". I understood a "reflection account" to involve acknowledgement by the Claimant that she had done something wrong and demonstration of insight into why that was. I understood the reference to "complete skills booklet" to involve an element of retraining to be undertaken by the Claimant in relation to the area where her practice had been found to be inappropriate.

21. The Claimant was not willing to accept these conditions. The outcome of Ms Russell's disciplinary hearing, which took place after the Claimant's, was identical and she (Ms Russell) did accept the conditions Ms Hanvey attached to her final written warning (being reflection/skills booklet).

22. At the Claimant's disciplinary hearing there was a reference to the SSSC. Ms Hanvey told the Claimant that it was normal procedure to notify the SSSC where disciplinary action was taken against a member of staff but on this occasion it was not her intention to send a report to the SSSC provided the Claimant completed her reflection account and skills booklet.

23. The Claimant then told Ms Hanvey that she did not feel able to resume work and would be providing a self-certificate. The Claimant referred to having suffered stress in the past and that the present situation had caused her distress. The Claimant did not return to work and submitted medical certification of her absence (pages 67-73) until her employment ended. The reason for absence was variously stated as "stress", "anxiety and depression" and "stress, anxiety and low mood".

24. Towards the end of the disciplinary hearing Ms Hanvey advised the Claimant of her right of appeal, explaining (according to the minutes) that if the Claimant did appeal "a more in depth investigation would then be conducted". Ms Hanvey expanded on this by explaining that if the Claimant did appeal she (Ms Hanvey) "would then have to speak to every members of staff that was on shift that day from other corridors/groups and collect more statements".

25. Ms Hanvey confirmed the outcome of the disciplinary hearing in a letter to the Claimant dated 3 April 2017 (page 56). The Claimant exercised her right of appeal by submitting her letter to Mrs Fitzsimmons of 5 April 2017 (pages 57-58). This was acknowledged by Ms Haxton in her letter to the Claimant of 13 April 2017 (page 59) in which she advised that Mrs Fitzsimmons would hold the appeal meeting but was currently on annual leave.

26. The Respondents' Disciplinary Procedure (pages 31-39) provided (at page 39) that "An appeal hearing will be organised and held as quickly as possible, and, in any event, within 10 working days of the date on which the appeal was submitted". The Respondents did not comply with this timescale. By her letter to the Claimant of 26 April 2017 (page 60), Mrs Fitzsimmons invited the Claimant to attend an appeal hearing on 3 May 2017. The Claimant was again advised of her right to be accompanied. Copies of the statements and the chart were again not provided to the Claimant.

27. Mrs Fitzsimmons heard the Claimant's appeal on 3 May 2017. Once again Ms Haxton took the minutes (pages 61-62). The Claimant was critical of the accuracy of these minutes but I was preferred the evidence of Mrs Fitzsimmons that they were an accurate record of the proceedings. In the course of the appeal hearing Mrs Fitzsimmons addressed each of the Claimant's appeal points. Mrs Fitzsimmons issued an appeal outcome letter to the Claimant (pages 63-65) explaining her reasons for rejecting the appeal. This letter was undated but I accepted the Claimant's evidence that she received this on or about 28 May 2017.

28. In dealing with the Claimant's appeal Mrs Fitzsimmons did not conduct a more in depth investigation than that which had already taken place. She did however make enquiries about a suggestion that there had been a previous instance of the resident being double padded. She spoke to another member of staff who was alleged to have said "It's not the first time" but the member of staff was unable to say when this had occurred or which staff had been involved. Mrs Fitzsimmons did not believe there was a "pattern" as contended by the Claimant.

29. Mrs Fitzsimmons regarded the Claimant's suggestion that she should speak to the rest of the day shift staff who had been at work on 28 March 2017 as "impractical". She had already asked the day shift staff who were working in the resident's corridor on 28 March 2017 whether anyone else had given assistance and whether they had asked for assistance (see paragraph 13 above).

30. The Claimant submitted a letter dated 6 July 2017 (page 74) to Mrs Fitzsimmons intimating her resignation effective 29 September 2017. This was intended to reflect the notice provision in her contract of employment. The Claimant's leaving date was subsequently changed, by agreement, to 18 August 2017.

31. The Claimant commenced new employment with ASA Recruitment in late August 2017 in a similar role to her job with the Respondents but as an agency worker. She had applied for this position in June 2017. She decided to resign approximately two weeks before she submitted her letter of resignation. At the time she submitted her letter of resignation she had attended for interview with ASA Recruitment but had not received an offer from them. She was concerned that her prospects of securing fresh employment would be prejudiced by an adverse reference from the Respondents.

32. Under cross examination the Claimant described a number of reasons for her decision to resign. She was unhappy about the disciplinary process. She had spoken to her doctor and also to the Mental Health Team ("MHT"). The MHT had advised her not to return to the working environment with the Respondents. She said that the Respondents' escalation of matters to the SSSC "particularly made me decide to resign". This was a reference to the fact that the Respondents had submitted a report to the SSSC regarding the disciplinary procedure involving the Claimant when the Claimant had made it clear that she would not agree to the conditions Ms Hanvey had attached to her final written warning (reflection and skills booklet).

33. Mrs Fitzsimmons accepted that there had been no "clear cut and dried definition" between the roles of investigating officer, disciplinary officer and appeal officer in this case. Both Ms Hanvey and Mrs Fitzsimmons had been involved at the investigation stage. Thereafter Ms Hanvey had dealt with the disciplinary stage and Mrs Fitzsimmons had dealt with the appeal stage.

34. The terms of the Claimant's schedule of loss (page 93) were a matter of agreement between the parties subject to correction of the amount of the basic award to £1782.

Submissions

35. Dr Berry submitted that the Respondents had not had sufficient grounds to give the Claimant a final written warning. He criticised the blurring of roles at the investigation, disciplinary and appeal stages. He argued that the Respondents did not have proof of the Claimant's responsibility for the double padding. They could have carried out further investigation with the day shift staff but chose not to do so.

36. He criticised the Respondents' reliance on the chart. All that this showed was that the resident received personal care regularly. He stressed that the Claimant had at no time accepted culpability.

37. Dr Berry was critical of the procedure followed by the Respondents. I understood this to be a reference to a number of aspects – the preparation of the letters the day before the Claimant and Ms Russell were interviewed, the fact that the Claimant and Ms Russell were spoken to together on 29 March 2017 whereas the four members of staff who were asked to provide statements were spoken to individually, the lack of opportunity for the Claimant to arrange to be accompanied at the disciplinary hearing, the failure to provide the Claimant with copies of the documentary evidence (being the four statements and the chart) in advance of and during the disciplinary hearing and the appeal hearing and the failure to convene the appeal hearing within the timescale provided for in the Respondents' disciplinary procedure.

38. Dr Berry was also critical of the Respondents for placing the Claimant under the threat of further sanction (see paragraph 22 above).

39. Dr Berry referred to the Claimant's long service with the Respondents and her excellent record. The Claimant had behaved consistently throughout. She

had maintained her innocence of the allegation of double padding. There was no evidence of similar treatment of any other resident. All paperwork required of the Claimant had been completed correctly.

40. The Claimant had decided to resign because her trust and confidence in the Respondents was broken. She did not believe that, if she had returned to work for the Respondents, she could have faith that the same thing would not happen again. She had no choice but to resign.

41. Mr Mowat referred to section 95(1)(c) of the Employment Rights Act 1996 ("ERA") and to the case of **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221**. The claim could not succeed unless there had been a breach of contract by the Respondents going to the root of the contract.

42. The Claimant was relying on an alleged breach of the implied term that an employer should not conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee – **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 UKHL 23**.

43. Mr Mowat acknowledged that the procedure followed by the Respondent was not perfect. The Claimant should have been given copies of the statements and the chart. He noted however that the statements had been read out in the course of the Claimant's appeal and he questioned whether providing the Claimant with a copy of the chart would have made any difference.

44. Mr Mowat submitted that the Claimant had been made aware of the specific allegation at the investigation stage and had been given the opportunity to answer this at each of the investigation, disciplinary and appeal stages.

45. Mr Mowat acknowledged that there had been a lack of clarity of roles and that in an ideal world different people would have dealt with the investigation, disciplinary and appeal stages. There had clearly been a degree of overlap. He submitted however that it was not always the case that each stage would

be handled by a different person and he questioned whether this had made any difference to the outcome.

46. The Claimant had not complained at the disciplinary hearing that she had not had adequate time to arrange to be accompanied. Mr Mowat noted that the Claimant had chosen not to be accompanied at the appeal hearing despite having more time to arrange this.

47. Mr Mowat submitted that the Respondents' investigation had been adequate. It had been appropriate to speak to the day shift staff assigned to the relevant corridor. There was no evidence of anyone else being involved in the double padding of the resident. The Respondents had established that the day shift staff had not asked anyone else to help. It was unclear, Mr Mowat submitted, what further investigation could have had any impact on the outcome.

48. Notwithstanding the defects in procedure, Mr Mowat submitted that the main elements had been present – there had been an investigation, a chance to answer the allegation, the relevant facts had been taken into account and a right of appeal had been offered. There had been no breach of the implied term of trust and confidence.

49. Mr Mowat submitted that in reaching the conclusion that the Claimant was guilty of the allegation against her, the Respondents had taken account of the correct evidence – the documentation of the resident's personal care, enquiry of other staff on the same corridor and the fact that there was no expectation of another change of the resident's incontinence pad between the last personal care by the Claimant and Ms Russell and the next personal care by the dayshift. The question as to why the Claimant and Ms Russell would double pad the resident at the end of their shift applied equally to the day shift; it was a matter of speculation.

50. Mr Mowat pointed out that while the Claimant had refused to accept the conditions Ms Hanvey had attached to her final written warning, Ms Russell (who had been present at each of the instances of personal care recorded on

the chart) had done so. It was difficult when there were no eye witnesses but the Respondents had been entitled to conclude that, on the balance of probabilities, the Claimant was responsible for the double padding and, having reached that conclusion, they were entitled to discipline the Claimant.

51. Indeed, the Respondents might have dismissed the Claimant. Their decision to restrict the sanction to a final written warning had been explained and was appropriate. They had tried to approach the matter constructively by managing the Claimant's defect in practice rather than going to the Regulator. Disciplinary action could always damage the employer/employee relationship but it had been the reasonable and proper course in this case.

52. It had, Mr Mowat submitted, been wholly appropriate for the Respondents to submit a report to the SSSC when it became apparent that they were not going to be able to manage matters internally. It could not amount to a breach of the Claimant's terms and conditions of employment to submit a report to the Regulator.

53. Mr Mowat was critical of the various explanations given by the Claimant for her decision to resign. The Tribunal should look carefully at what the reason for the Claimant's resignation had been. He submitted that the most likely explanation was the Claimant becoming aware that the Respondents had submitted a report to the SSSC.

54. Mr Mowat acknowledged that, while an employee alleging constructive dismissal should not wait too long before resigning, it was not fatal to the Claimant's position that she had not resigned immediately. He referred to **Waltons & Morse v Dorrington 1997 IRLR 488**.

Applicable Law

55. This is found in section 95(1)(c) ERA –

> "(1) For the purposes of this Part an employee is dismissed by his employer if…
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

In the event that the employee is found to have been dismissed under section 95(1)(c) the terms of section 98 ERA are engaged. It is for the employer to show a potentially fair reason for dismissal and, if he does so, it is for the Tribunal to decide whether he acted reasonably or unreasonably in treating it as a sufficient reason for the employee's dismissal.

Discussion and Disposal

56. I reminded myself of what Lord Denning said in **Western Excavating** describing the contract test which he approved –

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

57. There are accordingly four elements in a constructive dismissal case –

- a breach of the contract of employment by the employer
- which is sufficiently serious that it goes to the root of the contract
- in response to which the employee resigns
- without waiting too long before doing so

58. The Claimant's position was that the Respondent had breached the obligation of mutual trust and confidence. Because of the way she perceived that she had been treated the Claimant had lost confidence in the Respondents. She did not believe that they would deal with her fairly if any difficulties arose in the future.

59. The Claimant was critical of the procedure followed by the Respondents in dealing with her disciplinary process. Her criticisms are summarised at paragraph 37 above. Mr Mowat sensibly acknowledged the imperfections in the procedure followed by the Respondents. The failure to provide the Claimant with copies of the statements and the chart in advance of her disciplinary hearing was a significant failing and was capable of being a material breach of contract. However I was not satisfied that the Claimant resigned in response to this.

60. It was to the Claimant's credit that she had maintained a consistent position throughout the disciplinary process. She asserted her innocence of the allegation of double padding the resident and was unwilling to accept the conditions Ms Hanvey attached to the final written warning because, in her view, to do so was an admission of guilt. She maintained her innocence throughout the appeal process. She did however acknowledge that she understood Ms Hanvey had to make a decision based on the evidence available to her (see paragraphs 18 and 19 above).

61. The Respondents had been entitled to carry out a disciplinary process involving the Claimant when the double padding came to light. It had not been a breach of contract to do so. They had been entitled to come to a decision

as to the Claimant's guilt or innocence of the allegation against her. Notwithstanding the procedural issues, the finding of guilt was not one which no reasonable employer could have reached based on the evidence available to the Respondents.

62. The Claimant did not resign immediately upon the outcome of the disciplinary hearing but that was not fatal to her case. She did not resign immediately upon the outcome of the appeal hearing but again that was not fatal to her case. She took steps to secure fresh employment with ASA Recruitment in June 2017 which was consistent with an intention to resign from the Respondents employment but this did not preclude her from arguing that a reason for her subsequent resignation related to the Respondents' conduct towards her.

63. While I could understand that the Claimant was unhappy about the disciplinary process and was influenced by the advice she received from her doctor and the MHT, I was satisfied that it was her becoming aware of the Respondents' report to the SSSC which caused the Claimant to decide to resign. There was considerable force in Mr Mowat's submission that the submission of this report could not be a breach of contract by the Respondents (see paragraph 52 above).

64. It was clear that the Respondents had sought to deal with matters in a way which avoided a report to the SSSC (see paragraph 22 above). It was also clear why this had not been acceptable to the Claimant as, in her view, acceptance of the conditions attached by Ms Hanvey to the final written warning involved an admission of guilt which she was not prepared to make. It was unfortunate that there was such a conflict between (a) a sanction which in all the circumstances the Respondents were entitled to impose and (b) the Claimant's unwillingness to accept that sanction (or rather the conditions attaching to it) as to do so, in her view, entailed an admission of guilt.

65. However, in my view the Claimant had not resigned in response to a material breach of contract by the Respondents and that meant that her claim of constructive unfair dismissal could not succeed and had to be dismissed.

Employment Judge: W A Meiklejohn
Date of Judgment: 01 February 2018
Entered in register: 01 February 2018
and copied to parties