Case Number: 3330825/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs O Adediran	**v**	Maria Mallaband Care Group

Heard at: Cambridge **On:** 18 January 2019

Before: Employment Judge Tynan

Appearances
For the Claimant: Mr Davey, Counsel
For the Respondent: Ms Mewies, Solicitor

RESERVED JUDGMENT

1. The claimant's claim that she was unfairly dismissed by the respondent is not well founded and is dismissed.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunal on 21 June 2018, following a period of early conciliation from 26 March 2018 to 26 April 2018, the claimant complains that she was unfairly dismissed by the respondent. The complaint is denied by the respondent. The claimant's pleaded grounds for asserting that her dismissal was unfair are summarised at paragraphs 13 and 14 of the particulars of claim that accompanied her form ET1 (though are not pursued in their entirety by Mr Davey in his written submissions). The respondent's grounds for opposing the claim are summarised at paragraphs 29 – 36 of the Grounds of Resistance that accompanied form ET3.

2. I heard evidence from the claimant and, on behalf of the respondent, from Susan Harbridge, a Senior HR Manager at the respondent who decided that the claimant should be summarily dismissed and from Rob Lake, the Regional Head of HR at the respondent, who heard the claimant's appeal against her summary dismissal.

3. There was a single agreed hearing bundle comprising 58 documents and running to 271 pages.

4. The start of the hearing was delayed until 10:35am as the claimant was delayed arriving at Tribunal and Mr Davey wished to have an opportunity to confer with her as they had not previously met. As I was unable to sit late there was a shortened lunch break to ensure all the evidence was heard, with submissions to follow in writing. I have read and carefully considered each representative's submissions.

Findings

5. The claimant was employed by the respondent as a Care Assistant at its Kent's Hill Residential Care Home in Milton Keynes ('the Home'). The Home is a purpose built care home offering elderly residential, nursing and dementia care. The claimant commenced employment at the home on 23 January 2011 and her employment ended on 9 March 2018 when she was dismissed for alleged gross misconduct.

6. The claimant worked night shifts as a Care Assistant. She was originally employed by Kent's Hill Care Limited pursuant to a written contract of employment dated 24 January 2011. There were no explicit duties in that contract, though under clause 5.2 of the contract the claimant was required to comply with the company's rules, policies and procedures in force from time to time as contained in the Employee Handbook. Following the respondent's acquisition of the Home in 2017, written particulars of employment were issued to the claimant in July 2017. It was not suggested by Mr Davey in the course of the hearing, nor is it suggested in his written submissions, that those written particulars offend against Regulation 4(4) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Clause 8 of the 2017 written particulars provide as follows:

   "All employees will be adequately trained according to their job role in the awareness of safeguarding vulnerable adults.

   It is a condition of your contract of employment that you are responsible for safeguarding service users in your care at all times."

7. The written particulars are accompanied by an 'Acknowledgement by Employee' which is intended to serve as confirmation that an employee has read and understood 25 named policies (page 53 of the hearing bundle). The copy in the hearing bundle is not signed or dated and accordingly there is no evidence before me that the claimant was provided with copies of the respondent's various policies prior to the incident in question. In any event, the two key policies referred to in the course of the hearing, namely the respondent's Dignity and Privacy Policy and its Safeguarding Adult Policy and Procedures are not referred to in the list of employment related policies at page 53 of the hearing bundle as they are policies relating to the treatment of service users rather than policies directly relating to staff terms and conditions of employment.

8. On 2 January 2018, the Home received a complaint from the family of one of the Home's residents, BB regarding the claimant's treatment of her. I return below, when dealing with the claimant's appeal against dismissal, to the issue of how those concerns were initially documented. In summary, however, the allegation was that during the night of 30 / 31 December 2017 BB had called for assistance as she wanted her incontinence pad to be changed, that she had initially been kept waiting and that when she had called for assistance a second time she claimed to have been met with verbal aggression and handled roughly by the claimant who then removed and waved the pad in front of her face and stated that it was in fact dry and did not need changing. BB was terminally ill at the time and died some weeks later. It is not in dispute that she was vulnerable. Although the complaint concerned events on the night of 30 / 31 December 2017, BB first raised the matter with her family on 2 January 2018 (possibly because this was the first time she had seen them since the alleged incident). They escalated the matter with the respondent the same day. The claimant was first informed that there were concerns on 5 January 2018 when she was called to a meeting with the Home's then Registered Manager, Ms Carol Wilson, at the end of her shift. Ms Wilson left the respondent's employment a week or two later. There is no suggestion that this was in any way related to these events.

9. The claimant alleges that she was not told the purpose of the meeting with Ms Wilson, namely that it was an investigatory meeting. The respondent's case is that the claimant was informed by Ms Wilson at the outset of the meeting that Ms Wilson wanted to talk to her about the night of 30 / 31 December 2017. I find that the purpose of the meeting was not clearly identified at the outset of the meeting, but instead that Ms Wilson had asked the claimant a number of open questions about residents at the Home before informing her that there had been a complaint in relation to BB. I am supported in that conclusion by the notes of the meeting at pages 106 and 107 of the hearing bundle. The minutes themselves are headed up 'Minutes of Investigatory Meeting', even if the meeting was not labelled as such to the claimant. I note that as Ms Wilson explored the events of 30 / 31 December 2017 with the claimant, the claimant asked her,

"Has BB raised an allegation?"

Ms Wilson responded,

"BB has alleged that when she rang for assistance, the staff member that attended flashed the pad in her face and was aggressive towards her."

10. Whilst it would, in my view, undoubtedly have been good practice to have informed the claimant at the outset of the meeting that there had been a complaint and that the purpose of the meeting was to discuss that complaint, I do not consider that Ms Wilson was trying to catch the claimant out or that

the claimant was disadvantaged by not being specifically informed that it was an investigatory meeting. It was an initial opportunity for the respondent to hear the claimant's explanation as to what may have happened and to reach a preliminary view as to whether the concerns that had been raised warranted further investigation.

11. The claimant was unaccompanied when she met with Ms Wilson on 5 January 2018. Section 8.1 of the claimant's disciplinary procedure confirms that employees have no right to be accompanied to any investigatory meeting. This reflects the statutory position. The procedure also states that no prior notice of the meeting is required.

12. Although the purpose of the meeting on 5 January 2018 was not notified to the claimant in advance or at the outset of the meeting, I find, and the meeting notes evidence, that in the course of the meeting Ms Wilson relayed the essence of the complaint to the claimant who confirmed that she had removed BB's incontinence pad and shown it to her and said,

"Look, it is dry."

The claimant also informed Ms Wilson that she had told BB that,

"It was a waste that we have to take the pad and throw it away when it was dry".

The claimant also disclosed that BB had started to cry when she said this.

13. I am satisfied that the claimant provided this account in the knowledge that her account was being sought following a complaint, even if this had not been clear at the outset of the meeting when they had talked about the Home's residents in more general terms.

14. The claimant's evidence in these proceedings is that her comment that it was a waste to throw away the pad had not been made to BB, but instead that she had left BB's room with the pad, shown it to the Nurse in charge and commented to the Nurse that it was a waste. At paragraph 15 of her witness statement she states that she explained this to Ms Harbridge during her disciplinary hearing. However, the detailed hearing notes do not support that she provided such an account to Ms Harbridge and I do not accept the claimant's evidence in this regard.

15. The respondent took the decision on 5 January 2018 to suspend the claimant on full pay whilst its investigations continued. The claimant was telephoned by Ms Wilson and informed that she was being suspended. Her suspension was confirmed in writing the same day. The respondent also submitted an Adult Safeguarding Alert Form to Milton Keynes Council.

16. The claimant had pre-booked annual leave between 8 January and 4 February 2018.

17. Following the claimant's suspension on 5 January 2018 it seems nothing further was done by the respondent until 16 February 2018 when Hayley King, who had been tasked with investigating the matter following Ms Wilson's departure, telephoned Sini George, the agency Nurse who had been on duty on the night of 30 / 31 December 2017. It was by then some seven weeks after the alleged incident. Nurse George informed Ms King that it had been a very quiet night during the whole of the shift and she had not received any report that a member of staff had been verbally or psychologically abusive towards a resident. When the specific allegation was described to Nurse George she stated she was not aware of it and that she would have called the Manager had she seen anything.

18. Ms King also spoke with two members of BB's family by telephone on 22 February 2018. The notes of that conversation are at pages 114 and 115 of the hearing bundle. I note that these record that Ms King started the conversation by referring to an incident "when a member of care staff allegedly waved a pad in residents face making BB very upset". Clearly the better practice would have been to invite their unprompted account of what they had been told by BB. Nevertheless, they went on to describe the incident in the terms they said it had been reported to them by BB. I am satisfied from the notes that they endeavoured to provide an accurate account of what they had been told by BB. I cannot conclude from the notes that their account was influenced by Ms King's opening remark. They stated that an unidentified member of the care staff had changed BB's incontinence pad after she had called the staff and requested for it to be changed. Later she had called the staff again and asked for her pad to be changed a second time. On this occasion it had apparently taken some time for her call to be answered and she was asked to wait. BB had perceived the member of care staff to be unhappy about being called again. On calling once more for assistance BB reported that she had experienced some verbal aggression. Her family said,

    "…the member of care staff was very rough with her when changing the pad and waved the pad in front of her eyes stating, 'look this doesn't need changing'".

    They also reported that this had apparently left BB in tears. I note that this last detail is consistent with the claimant's comment to Ms Wilson on 5 January 2018 that BB had become tearful when she had said that it was a waste to throw the pad away.

19. The two family members told Ms King that BB had been consistent in reporting what had happened. They speculated whether it might be a personality clash.

20. By letter dated 1 March 2018, the claimant was invited by Ms Harbridge to attend a disciplinary hearing to be held on 6 March 2018. The letter summarised the allegations and noted that the alleged conduct potentially contravened the respondent's Dignity and Privacy and Safeguarding policies as well as amounting to a potential breach of trust and confidence.

Ms Harbridge reminded the claimant of her statutory right to be accompanied at the meeting on 6 March and warned her that, if the allegations were substantiated, one outcome was that the claimant could be summarily dismissed. The claimant was provided with a copy of the respondent's Disciplinary Policy and Procedure and the notes of the three investigatory meetings / discussions. On 2 March 2018, Ms Harbridge wrote again to the claimant and sent her copies of the Dignity and Privacy Policy and Safeguarding Policy, as these had not been enclosed with her letter the previous day. However, I find that the claimant did not receive this second letter or the policies enclosed with it until after the hearing on 6 March 2018.

21. The disciplinary hearing notes are at pages 119 - 123 of the hearing bundle. They document (and for the avoidance of doubt, I find) that the claimant only received Ms Harbridge's letter of 1 March 2018 the evening before the hearing. Nevertheless, the claimant confirmed on 6 March that she was willing to proceed, notwithstanding her late receipt of the letter of 1 March and notwithstanding that she was without a companion or representative.

22. During the disciplinary hearing the claimant described BB as an emotional individual who often cried. In response to a question from Ms Harbridge the claimant had said that if BB's care plan was checked this would be likely to confirm that BB cried a lot. During the meeting the claimant also said BB complained a lot about people so that staff had to be careful with her. She said that all the respondent's staff found BB to be challenging. She stated that BB was crying when she responded to her call to change her pad for the second time, but that she could not recall whether she was still crying when she subsequently returned, removed the second pad and showed it to her. However, she described BB as crying when she left the room and that she went to Nurse George. She said that Nurse George had checked on BB who was, according to the claimant, crying and that Nurse George had given her a coffee and then reported back to the claimant that she would be alright. Nurse George seemingly did not recollect any of this when asked about the shift on 16 February 2018.

23. There was then a detailed exchange between the claimant and Ms Harbridge as to why the claimant had shown BB the pad and how she had done so. The claimant did not dispute that she had shown the pad to BB, but stated that she had not *"flaunted it"*. With the benefit of hindsight, the claimant stated she would have, *"just let it go".* The claimant stated that she had not asked BB why she was crying as she left her. Even if BB was prone to crying it is perhaps surprising that the claimant had not sought to understand whether there was a reason for BB's distress. The disciplinary hearing notes record that towards the end of the meeting the claimant said,

"I was speaking gently, even if I was talking aggressively it was not to BB".

24. When Ms Harbridge referred the claimant to the investigatory meeting note where the claimant seemed to describe BB as having started to cry after the claimant had told her that it was a waste to throw the pad away, the claimant accepted that they were the minutes of the discussion. I conclude from her

comments that she accepted the accuracy of the investigatory meeting note and accordingly, having been given a further opportunity to reflect on events, that she accepted on 6 March 2018 that BB's distress was potentially in response to her comments about the pad. I have noted already above that I do not accept the claimant's evidence that she told Ms Harbridge on 6 March 2018 that any comment about the pad having been wasted had been made to Nurse George.

25. Ms Harbridge wrote to the claimant on 14 March 2018 with her decision. It is a detailed letter that in my judgment fairly summarises the disciplinary case against the claimant as well as her comments and responses to the concerns that had been raised. The letter notes the potential conflict between what the claimant had said during the investigatory meeting and the disciplinary hearing regarding whether she was aware that BB was crying as she left BB's room after having removed the pad. Ms Harbridge noted that she had explained this potential discrepancy during the disciplinary hearing and noted that the claimant had re-read the investigation meeting notes and agreed their accuracy, namely that she had been aware the claimant was crying by the time she left her.

26. Ms Harbridge concluded that the claimant had been verbally abusive, causing BB to cry and psychologically abusive by removing the pad and showing it to her. I do not accept Mr Davey's submission that the evidence given at Tribunal supports that Ms Harbridge concluded that the pad had been waved in BB's face, but instead find that Ms Harbridge's letter of 14 March 2018 accurately reflects her finding, namely that in her view it was immaterial whether the claimant had waved the pad in BB's face, rather it was the act of removing the pad and showing it to BB to prove a point that was degrading and which in her opinion showed a disregard for BB's dignity and respect. Ms Harbridge concluded that the respondent's policies and trust and confidence, had been breached. She confirmed her decision to dismiss the claimant summarily from her employment. Her letter concluded by reminding the claimant of her right of appeal and that any appeal should be submitted within five working days.

27. By letter dated 16 March 2018, the claimant appealed against her dismissal. She stated that the decision was unfair for the following four reasons:

    a. The initial meeting on 5 January 2018 had been an informal chat;

    b. She disputed Ms George's description of the night of 30 / 31 December 2017 as having been a quiet shift;

    c. The respondent had not interviewed the other carer on duty on the evening of 30 / 31 December 2018;

    d. That she was *"psychologically down"* at the time of the disciplinary hearing and that her *"responses were from a point of duress".* She said her decision to attend without representation on 6 March 2018

was not thought through, but that she was suffering severe anxiety and stress and wanted the hearing to be over.

28. The detailed minutes of the disciplinary hearing evidence that none of these matters was raised by the claimant during the hearing itself. Points (c) and (d) do not feature in Mr Davey's written submissions.

29. The appeal was heard by Mr Lake. By letter dated 23 March 2018, he invited the claimant to attend an appeal hearing on 5 April 2018 to be chaired by himself. Amongst other things, he reminded the claimant of her statutory right to be accompanied. The timing of the hearing was subsequently delayed to enable the claimant to be accompanied by a trade union representative.

30. The minutes of the appeal hearing are at pages 130 - 136 of the hearing bundle. The claimant was accompanied at the appeal hearing by Lesley Pluck from UNISON.

31. The claimant confirmed to Mr Lake that the investigatory meeting notes were *"discussed and correct"*. In which case the claimant accepted once again, in the presence of her trade union representative, the accuracy of those notes. Ms Pluck observed that it was very unfair that the claimant had not been told it was an investigatory meeting. Asked by Mr Lake what difference this would have made, the claimant responded,

"I would not have said they are challenging or cried all the time but it would not have made a difference and I did not do as they said."

32. Mr Lake went on to explore the alleged incident with the claimant, including why the claimant had thought fit to show the pad to BB if she was already crying and whether the claimant had thought this would just serve to upset her more. The claimant said that she had shown the pad to Nurse George, but otherwise the hearing notes do not indicate that there was a specific discussion as to whether the claimant had said to BB and/or Nurse George that the pad had been needlessly wasted. The claimant told Mr Lake that Nurse George had taken BB a drink, *"to calm her down".* She stated that if something had been amiss BB would have told the Nurse.

33. In the course of the appeal hearing Mr Lake stated,

"Showing her the pad is not acceptable whether she was crying or not".

To which the claimant responded,

"I know it does not make it acceptable but it was to make BB calm, this is not enough to be dismissed, I have worked as a carer for eight years and had no other complaints".

34. The claimant acknowledged to Mr Lake, as she had done at the disciplinary hearing, that with hindsight she would not have shown BB the pad. But she maintained that she had shown the pad to BB to calm her down. As the hearing progressed Mr Lake disclosed that the record of the family's initial complaint on or around 2 January 2018 was not in the hearing pack as the handwritten note was illegible. Ms Pluck stated that the claimant must have access to all minutes etc., This was accepted by Mr Lake who said he would try his upmost to locate it. He informed Ms Pluck that Ms Wilson, whom he incorrectly identified as having kept the note, had left the respondent's employment in mid-January.

35. The appeal hearing progressed and the claimant confirmed that she had not informed Ms Harbridge on 6 March 2018 that she had been certified by her GP or that she was experiencing severe anxiety and stress. She confirmed again that she had been *"happy to continue"* on 6 March 2018.

36. On summing up at the conclusion of the appeal hearing Ms Pluck said,

"OA has held her hand up, she has learned from this and confirmed she would not do this again. Her dismissal is rather harsh against the alleged allegation, you call it abuse but abuse is an intentional act, this was a mistake, she did wrong. This lady has been an employee of yours for seven years, and in seven years this is one little mistake. Abuse is intentional and ongoing. There are mistakes in your processes, access to an original note, not telling our member that the original meeting was an investigatory meeting and a lot of weight is being put on what the resident said. The relatives were not present and you are getting your information third hand and not from your nurse on the events of that night. There is an awful lot of weight on the notes to which we have not seen. The lady is your employee of seven years good service. The resident was upset and she relayed this to her relatives. For this to be labelled as abuse is very harsh, it was a mistake. A lesson has been learned and obviously known not to be repeated."

37. Later that day, Mr Lake spoke with Cristina Ceretes, a Nurse who had been working on 2 January 2018 when BB's family had first raised their concerns. Nurse Ceretes had been asked to accompany another employee Kayleigh (Kat) Evans, when she spoke with BB and had kept notes of the discussion. Mr Lake also spoke with Kat Evans, who described the initial meeting with BB's family and the subsequent discussion with BB when Nurse Ceretes had been present to take notes. Ms Evans disclosed that the notes had not been written up at the time and that she had informed Nurse Ceretes that they would need to sit down to go through the notes together as she could not decipher Nurse Ceretes' handwriting. However, Nurse Ceretes had then gone on leave and thereafter the matter seems to have been overlooked. Neither Ms Wilson nor Ms King seem to have asked for the notes or requested that they should be typed up. Ms Evans told Mr Lake on 5 April that the notes themselves had been given to someone called Catherine but their whereabouts is otherwise unclear from the meeting notes (and they were not available to the Tribunal). Ms Evans went on to say to Mr Lake,

"I will also state, that when I was asking BB the questions about the incident, she was in tears and frightened of this carer".

Asked by Mr Lake how she knew BB was frightened, Ms Evans responded,

"BB told me. I asked her to describe the carer to me. BB said she was tall and black".

38. The claimant alleged for the first time in her witness evidence that Ms Evans deliberately withheld the handwritten notes from 2 January 2018. I agree with Ms Mewies' submission that there is no evidence whatever to support that allegation. The claimant conceded as much during her cross-examination.

39. Ms Evans' account of her conversation with BB was essentially consistent with the account provided by BB's relatives on 22 February 2018; though she had referred to the claimant as having "shoved the pad under [BB's] nose", whereas the relatives had referred to it being "waved … in front her eyes".

40. On 13 April 2018, Mr Lake wrote to the claimant to inform her that he was upholding the original decision to terminate her employment. His letter addresses each of her grounds of appeal clearly and in turn. In summary:

a. Mr Lake concluded that the fact the claimant had not been informed that the meeting was an investigatory meeting would have made no difference to the content of the meeting;

b. Mr Lake effectively considered afresh the issue of the claimant's interactions with BB on the night of 30 / 31 December 2017. He concluded that there was insufficient evidence to substantiate the allegation that the claimant may have raised her voice to BB. However, he concluded that the claimant's actions in removing the pad from BB and showing it to her constituted humiliation and intimidation. He clearly addressed his mind to the question of whether, as the claimant claimed, she had shown the pad to BB in order to calm her. In this regard he wrote,

"I fail to understand how removing a pad from a resident and showing it to them whilst they are already upset can have a positive impact";

c. On the basis that the other carer on duty that night, Florence, was not present when the claimant removed the pad from BB, Mr Lake concluded that her evidence would not assist in reaching an understanding and coming to a decision;

d. Regarding the fact that the claimant was suffering with severe anxiety and stress, Mr Lake noted that the claimant had been content to

proceed on 6 March 2018 and had not made Ms Harbridge aware that she was unwell.

41. Mr Lake went on in his letter to consider Ms Pluck's contention that the sanction was too harsh given the claimant's *"exemplary"* record. Mr Lake noted that the respondent's policy on safeguarding identifies that abuse may consist of a single act. He further considered that the claimant's record was not exemplary as there had been previous investigations regarding the claimant's conduct, including in relation to safeguarding issues, and that she had received at least one formal warning in the past. Having summarised his further enquiries following the appeal hearing, Mr Lake concluded his letter,

"I can only conclude on the balance of probability that it is reasonable to believe you did in fact wave BB's pad in front of her face which I can only conclude was in frustration, as I have stated above, I conclude that this is classed as psychological abuse in line with our policy and this is simply not tolerated by the company. I therefore have no option but to conclude that the original decision to terminate your employment still stands."

Law and Conclusions

42. Subject to any qualifying period of employment, an employee has the right not to be unfairly dismissed by her employer (section 94 of the Employment Rights Act 1996 ('ERA')).

43. In determining whether dismissal of an employee is fair or unfair, it is for an employer to establish a potentially fair reason for the dismissal (section 98 ERA). Conduct is a potentially fair reason for dismissal (section 98(2)(b) ERA). The claimant does not dispute that she was dismissed by the respondent on the grounds of her alleged misconduct. On the basis that there was a potentially fair reason for dismissal, the fairness or otherwise of the dismissal falls to be determined in accordance with section 98(4) ERA, namely 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, a question which is to be determined in accordance with the equity and the substantial merits of the case. I must also take into account the Acas Code of Practice on Disciplinary and Grievance Procedures in coming to any decision.

44. In the often cited Judgment of the Employment Appeal Tribunal in British Homes Stores Ltd. v Burchell [1978] ICR 303, Arnold J said,

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct), entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of

all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think, the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage on which he formed that belief on those grounds, and carry out as much investigation into the matter as is reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus in demonstrating those three matters, we think, they must not be examined further.

…the Tribunal has to consider whether there was a genuine belief on the part of the employer that the employee was guilty of the alleged misconduct, whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation, whether a reasonable employer would have dismissed the employee for that misconduct."

45. In paragraph 3 of his submissions Mr Davey reminds the Tribunal of the House of Lords' Judgment in W Devis & Sons Ltd v Atkins [1977] IRLR 314 as to the sufficiency of any investigation and the need for an employer, acting reasonably, to acquaint itself with the relevant facts.

46. In her submissions, Ms Mewies refers, amongst other authorities, to the Judgment in West Midland Co-operative Society v Tipton [1986] IRLR 112, that the reasonableness of the employer's decision is considered at the final decision to dismiss the employee, namely the conclusion of the appeal hearing.

47. In his written submissions Mr Davey refers to Ms Harbridge and Mr Lake's lack of professional knowledge and experience. This was not raised as an issue during the disciplinary proceedings or in the Particulars of Claim or the claimant's witness statement. Ms Harbridge and Mr Lake are experienced HR professionals. I consider that it was reasonable for them to conduct the hearings and come to a decision, and that this did not require specialist nursing or care knowledge or experience on their part. In my judgment it was entirely within their capability and experience to decide whether the claimant was verbally abusive and/or whether she had humiliated and intimidated BB by removing her pad and showing it to her, including whether, as the claimant claimed, this was done in order to calm her.

48. I am in no doubt that Ms Harbridge, and subsequently Mr Lake, genuinely believed the claimant to be guilty of gross misconduct. Unlike Ms Harbridge, Mr Lake was not satisfied that the claimant had verbally abused BB (which itself evidences to me that he came to the appeal with an open mind). Although Mr Lake considered that the pad had been waved at the claimant, it is evident from the second page of his letter of 13 April 2018 and from the appeal hearing notes that, as with Ms Harbridge, what mattered to Mr Lake was that the pad had been shown unnecessarily to the claimant and that this constituted abuse.

49. In which case I must firstly consider and determine whether their belief that the claimant was guilty of misconduct was arrived at following a reasonable investigation.

50. As regards the meeting of 5 January 2018, the Acas Code of Practice on Disciplinary and Grievance Procedures provides no specific assistance to the tribunal in terms of how any investigatory meeting with the claimant should have been arranged or conducted. Indeed, the Code recognises that the first meeting with the employer may be a disciplinary hearing. I do not consider that the respondent acted unreasonably in calling the claimant to that meeting without prior notice or that the meeting itself was conducted unreasonably. Ms Wilson was not seeking to catch the claimant out, but instead outlined the nature of the complaint and afforded the claimant a reasonable opportunity to provide her account of what had happened.

51. Paragraph 5 of the Acas Code states,

"It is important to carry out necessary investigations of potential disciplinary matters without reasonable delay".

52. The respondent spoke with BB as soon as concerns were raised by her family and discussed these with the claimant within 3 days. I am satisfied that there was no delay in this early part of the investigation. I confirm that I also consider that the respondent acted reasonably in suspending the claimant given that it was considering an allegation of abusive conduct towards a vulnerable adult in a residential care setting.

53. However, following the claimant's suspension, there was then a delay of approximately 6 weeks before Nurse George was spoken to and a further week elapsed before BB's relatives were spoken to again. Momentum was lost in the period leading up to and in the aftermath of Ms Wilson's departure, compounded by the fact the claimant was on leave. In my judgment, the investigation could and should have progressed on a more timely basis. However, ultimately I do not consider that the investigation was materially prejudiced by this delay. BB's relatives were spoken to and were able to provide an account of what they had been told by BB and the notes of this discussion were available to the claimant prior to the disciplinary hearing. She was able to consider the notes and to provide her own detailed account of the events on 30 / 31 December 2017 to Ms Harbridge (and subsequently to Mr Lake). Significantly, in coming to a decision, Ms Harbridge essentially proceeded on the strength of the claimant's own account as to what had happened on 30 / 31 December 2017, namely that she had shown the pad to BB and had commented to her that it was a waste to throw the pad away, and that BB had become distressed following this. In the circumstances I do not accept Mr Davey's submission that the decision was arrived at because the claimant's account was dismissed without enquiry and the family's account was accepted uncritically.

54. As regards Nurse George, Mr Davey suggests five specific issues that should have been explored with her. However, this is with the benefit of

hindsight. It was not identified during the disciplinary process and it is not part of the claimant's pleaded case in the Particulars of Claim that these issues should have been explored with Nurse George. On the contrary, at paragraph 14(iv) of the Particulars of Claim the claimant places reliance upon Nurse George's statement that it was a quiet night. It is not relevant whether the tribunal would, or might, have explored these issues with Ms George. In my judgment the respondent did not act unreasonably, or outside the band of reasonable responses, in failing to pursue these lines of enquiry with Ms George. The notes of Ms King's telephone discussion with Nurse George at page 113 of the hearing bundle evidence that even after she had relayed the allegation and Nurse George had told her that nothing had been reported on the night in question, Ms King persisted with further details of the allegation. Nurse George was very clear that she was unaware that a member of the care staff had allegedly been aggressive and waved a pad in a resident's face, and that nothing had been reported to her in this regard. In those circumstances I consider that Ms King reasonably brought her conversation with Nurse George to a conclusion. She could not reasonably be expected to have continued to ask Nurse George about the finer details of the claimant's alleged interaction with BB given that Nurse George was clear in stating that she was completely unaware of any issue that night.

55. At the first stage disciplinary hearing Ms Harbridge had the claimant's account from the investigatory meeting and she was, of course, able to explore what had happened on the night of 30 / 31 December 2017 with the claimant. She also had Ms King's note of her telephone conversations with Nurse George on 16 February 2018 and with BB's family on 22 February 2018. Ms Harbridge did not consider or look into how the matter had first been reported on 2 January 2018, with the result there was potentially a lost opportunity to secure Nurse Ceretes' handwritten notes of the initial discussion with BB's family (assuming these still then existed) or the follow up discussion with BB herself. It also seems that Ms Harbridge did not check BB's care plan to see whether this evidenced that BB was prone to cry. As I have noted already, it is not for the Tribunal to substitute its view as to how it would or might have conducted the investigation and disciplinary hearing. The question is whether there was sufficient evidence before Ms Harbridge such that she could reasonably proceed to reach a decision and whether in doing so she ignored or failed to follow up relevant matters which would, or might, have shown that there were insufficient grounds to conclude that the claimant was guilty of misconduct. Whilst Ms Harbridge did not look beyond the evidence that was presented to her and did not give active thought to how the concerns had first come to light, I am satisfied that she did have sufficient evidence before her to come to a reasonably informed decision as to the claimant's conduct on the night in question and that there was nothing on the face of the papers that would obviously have put her on notice that a copy of the original complaint ought to be secured. The claimant had not suggested this herself during the disciplinary hearing. At the appeal stage Mr Lake committed to try to find the original handwritten notes from 2 January 2018 when this was flagged as an issue by Ms Pluck, however in my judgment that does not mean that Ms Harbridge acted

unreasonably at the first stage in failing to do so (or in failing to identify a need to do so). To my mind what matters is that there was a reasonably detailed account available to Ms Harbridge and to the claimant of what BB had reported to her family. I also bear in mind that BB was a vulnerable individual who was in the final stages of her life and in those circumstances that it would have been unreasonable, and even potentially detrimental to BB's wellbeing, for Ms King or Ms Harbridge to have spoken to her again. I consider that, in investigating the concerns in relation to the claimant's conduct and ensuring that BB's account of what had happened was available to the claimant and Ms Harbridge, Ms King adopted a reasonable approach, namely by speaking to BB's relatives. Although 7 weeks had by then elapsed, they provided a reasonably detailed account of what BB had reported to them and this was available to the claimant and she was able to challenge it.

56. Furthermore, any criticisms in this regard were effectively addressed on appeal. Sadly, BB had died by the time Mr Lake heard the appeal, so it was never going to be possible for him to speak to BB himself and secure her account first hand. However, for the reasons above, I do not consider it would have been reasonable for Mr Lake or anyone else at the respondent to have spoken to BB again about the matter. In my experience and judgment it would be unusual for the chair of a disciplinary hearing or appeal hearing to interview someone in BB's situation. Instead it would be more usual for staff within a home, hospice or hospital to provide a second-hand account of what they have been told or seen or heard regarding the treatment of a resident or patient. Whilst BB's death may have deprived Mr Lake of the opportunity to speak to her, even assuming he had thought this to be an appropriate course of action, it does not in my judgment render any criticism of the first stage incapable of being remedied. In my judgment if, which I do not consider to be the case, there was any potential unfairness to the claimant this was rectified by Mr Lake speaking with Ms Ceretes and Ms Evans.

57. As regards the care plan, there is no indication in the letter of appeal or in the appeal hearing minutes that the claimant or Ms Pluck identified the care plan as a significant document. Likewise it is not identified as a material issue in the Particulars of Claim. I do not consider that the respondent acted unreasonably in seemingly failing to follow up and consider the care plan. It seems to me the issue was not whether BB cried a lot and whether the care plan might confirm this, instead it was, as Ms Harbridge identified, whether BB had been treated with dignity and respect in being shown her incontinence pad to prove a point when she was potentially already upset, even if that upset was unrelated to any conduct on the part of the claimant but was instead a manifestation of BB's ill-health or simply that she was a difficult person who was prone to cry. In which case the care plan was of no assistance to Ms Harbridge and it was not unreasonable for her not to have followed it up.

58. It is clear from both the notes of the disciplinary hearing on 6 March 2018 and the notes of the appeal hearing on 6 April 2018 and from Ms Harbridge's

and Mr Lake's respective letters confirming their decisions, that they each actively engaged with the issues; they explored them in detail with the claimant and gave very careful consideration to what she had to say, weighing all of the evidence before coming to a reasoned conclusion. In neither case do I consider that they came to an unreasonable conclusion, namely one that was unsupported by the available evidence or outside the band of reasonable responses. Ms Harbridge's letter of 14 March 2018 can be criticised in so far as it does not specifically address the claimant's disciplinary record and employment history before confirming her decision that the claimant should be summarily dismissed. The letter does potentially lend the impression that because the claimant's actions were considered to constitute gross misconduct dismissal must automatically follow. However, in my judgment any potential unfairness was addressed on appeal. Mr Lake's letter of 13 April 2018 evidences that he did have regard to the claimant's employment record, which he did not consider to be exemplary, and that he balanced her record and service against the fact that she had humiliated and intimidated BB by removing her incontinence pad and showing it to her when she was already upset. Mr Lake also had regard to the fact that the respondent operated a documented zero tolerance policy towards abuse even if this was a one-off act. I think it is unrealistic for the claimant to suggest that there could or should have been guidelines dealing with such situations and that the absence of such guidelines, as well as the respondent's subsequent failure to issue guidance to staff in the light of what had happened, might be considered a material mitigating factor or to provide evidence that the claimant was treated harshly.

59. In my judgment, having regard to all the circumstances, the respondent acted reasonably in relying upon the claimant's misconduct as found by it in dismissing her. Further, in my judgment, dismissal was within the band of reasonable responses in circumstances where the claimant had reasonably been found to have humiliated and intimated a vulnerable adult who she was supposed to be caring for. It is entirely possible that other employers would have imposed a lesser disciplinary sanction, but I do not consider that the respondent's decision to dismiss lay out with the band of reasonable responses. Accordingly, in my judgment, the claimant's complaint that she was unfairly dismissed must fail.

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Employment Judge Tynan

Date: 15 April 2019

Sent to the parties on: ....17.04.19.....

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For the Tribunal Office