EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

Barbara Komorowska -v- Woodland Healthcare Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 29-30 April 2019

EMPLOYMENT JUDGE P S L Housego

Representation

For the Claimant: Ms M Nieoczym

For the Respondent: Mr J French, of Counsel

JUDGMENT

1. **The claimant was unfairly dismissed by the respondent.**
2. **The case will be relisted for a remedy hearing.**

REASONS

Introduction and evidence

1. In this case the claimant Ms Komorowska claims that she has been unfairly dismissed. The respondent contends that the reason for the dismissal was 3 separate but related instances of gross misconduct, and that the dismissal was fair.

2. I have heard from the claimant. For the respondent I heard from Jane Delaney, a regional support manager (who heard a grievance lodged by the claimant about the way an investigatory meeting was conducted), from Helen Buncombe an operations manager (who dismissed the claimant), and from Jeremy Davies, managing director of the respondent (who dismissed the

appeal against dismissal). I was to hear from Pearl Jackson, who conducted the investigatory meeting, the claimant's conduct of which was said to be gross misconduct, but for personal reasons she was unable to attend. The meeting was recorded and the claimant has had a professionally prepared transcript prepared, so that the absence of her evidence is not as great as otherwise. The respondent prepared a bundle of documents. The claimant also prepared a bundle of documents which overlapped almost entirely with that of the respondent, with one significant additional document.

3. Most of the facts were not in dispute. There was a degree of conflict on the evidence about those that were not agreed. I found the following facts proved on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties. Some of the matters of dispute go to credibility rather than being importance by reason of substance.

Facts

4. The respondent runs a chain of nursing homes. The claimant worked at one of them. It is a home for people with dementia. She started as a cleaner. She is hard working and effective. She became the housekeeper. She also took on some work as a carer, working 2 shifts a week. She also had a part time job at a prestigious hotel in Torquay, as a waitress.

5. On 27 July 2018 she put a large laundry trolley into a lift. The lift failed and she was trapped inside for over 2 hours. Eventually she was released by a lift engineer. She was composed throughout the period of her entrapment, but soon after release dissolved into tears. She left work (it being time for her to go home). There was no visible injury to the claimant and at the time she complained of no injury. No one completed an incident form at any time. She was due to be off for an operation, and had that operation so was not at work for 2 weeks. One of those weeks was holiday leave. The operation was a gynecological one (and not relevant to these issues, save that Helen Buncombe considered that the claimant was not truthful about needing 2 weeks off, because she was herself a nurse and this was an investigatory procedure which she had herself undergone).

6. No one completed an incident form at any time. There was no report obtained at any time from the lift maintenance company. Jeremy Davies' oral evidence was that the lift has only recently been put back into operation.

7. This occurred on the claimant's last day at work before she was due to be off for an operation. She had that operation so was not at work for 2 weeks, until 13 August 2018. The operation was a gynecological one and so can have no connection with any neck injury or condition. At least part of her time off was pre-booked holiday[1].

8. On her return to work on 13 August 2018 she told the manager that she wanted to file an accident report. She was told to await the return of another manager, and the report was completed on 21 August 2018 (R:64). This stated that the lift shook side to side and dropped to the bottom of the shaft. It also stated that she started to experience the neck pain on 30 July 2018 and visited the GP because of severe pain on 01 August 2018.

9. On 10 and 15 August 2018 the claimant went to a physiotherapist (R:81-82). The first entry is of *"possible whiplash injury following fall of lift at work*".

10. On 17 August 2018 the claimant went back to work for the hotel, but her work was rearranged so that she was only on very light duties (C:90 refers).

[1] R115-5, Carol Meldrum

11. The claimant worked at the respondent's premises for 2 weeks, but on Monday 03 September 2018 provided a fit note (R:65) saying that she was not fit for work for 2 weeks, by reason of a neck injury. She has not worked again for the respondent.

12. The claimant spoke to the hotel who put her on light duties with effect from 03 September 2018 (letter dated 15 February 2019 C:69 confirms).

13. On 05 September 2018 Jane Delaney and her daughter visited the Imperial Hotel in Torquay, to explore the possibility of Jane Delaney's daughter having her wedding reception there. This was not pre-booked. They were met by the claimant who was working there. She had long worked 3 shifts of 4 hours a week, usually Thursdays, Fridays and Saturdays. The claimant showed them round.

14. Jane Delaney told the respondent's managers and Pearl Jackson was asked to investigate.

15. On 11 September 2018 Pearl Jackson wrote to the claimant (R:116) requiring her to attend an investigation meeting on 20 September 2018 *"I write in order to invite you to a meeting to further investigate your absence from garden house, possible acts of fraud and deception which are indeed at of gross misconduct and may result in your dismissal as well as a police referral."* It also stated *"Clearly you are aware of Jane Delaney's visit to the Imperial hotel where you were actively working as a waitress in the restaurant. This was the day following your submission of a sick note to ourselves detailing "severe whiplash" from the delayed alleged report of the lift dropping down the shaft in our home with you inside now proven by the lift company not to have occurred. The fault was only to the doors."*

16. On 12 September 2018 the claimant attended for work at 07:30 but was denied entry by those there, they having been told not to let the claimant enter the building. After waiting there until normal office hours the claimant was told on the telephone that she was suspended, and left.

17. On 12 September 2018 Pearl Jackson confirmed the suspension of the claimant from work, by letter (R:117). This stated *"Further to our discussion today I confirm that as a result of the company's concerns regarding your probity and reliability you are suspended from duty until such time that the investigation process is concluded. Suspension is not a disciplinary sanction and does not in any way indicate that the home has made any decision regarding the outcome of the investigative process."* It also stated *"As the meeting is an investigation meeting there is no entitlement to be accompanied but I will consider any request to be accompanied on its merits."*

18. By letter of 13 September 2018 (R118) the claimant requested that her daughter, also an employee at the home, accompany her, particularly by reason of the language barrier. On 14 September 2018 Beverley Dumont at the home spoke to the claimant and to her daughter about this, and told her that this was not what happened at an investigation meeting.

19. By letter of 19 September 2018 Pearl Jackson wrote a letter to the claimant (R:120) *"Sadly, I reject your request to be accompanied by your daughter as it is not necessary at this stage …"*. She also wrote that she would provide in house Polish support if it became apparent that it was needed. That letter was handed to the claimant about 90 minutes before the meeting on 20 September. The claimant's daughter went to the meeting anyway. Pearl Jackson made her leave and when the claimant's daughter had left locked the door to the room.

20. On 20 September 2018 the meeting did not go well[2]. The transcript records Pearl Jackson telling the claimant on several occasions not to speak Polish, and there is very little recorded as being said by the other Polish employee there (the translation into Polish of things said by Pearl Jackson would not appear, plainly, as the transcript records only English). The

[2] R71-80 (notes), and C:103-126 (recording professionally transcribed)

professional transcript shows the very broken English the claimant was speaking. The notes of the respondent contains some commentary to the effect that the claimant was aggressive. The claimant does speak Polish at a high speed, and it is entirely possible that Pearl Jackson did not like the way she dealt with the interview. It is also clear from the notes and transcripts that the claimant was absolutely clearly trying to get across some very simple points. They were that the lift had fallen, that her neck had been injured, that the hotel had been very helpful in getting her onto light duties, and that as a cleaner and carer at the home she was simply unable to work there at the time.

21. At a meeting on 20 September 2018 between Pearl Jackson and the claimant, Pearl Jackson stated that *"the lift engineer has confirmed that the lift did not drop down the shaft"*. There has never been any formal report about the lift's failure, and nor was there any telephone note of such a conversation.

22. Later on 20 September 2018 the claimant wrote a letter (RR:111-3 and plainly written for her) protesting about the way the meeting had been conducted. She had not been allowed a companion, the interpreter was one sided, from English to Polish so that she understood the questions, but nothing was translated that was said by her. Yes, she had worked somewhere else, but this was intellectual hostess work, and not physical cleaning work which was work she could not do. She protested that Pearl Jackson had called her doctor *"a liar".*

23. On 24 September 2018 the claimant wrote to Pearl Jackson (C:90-91). This is an important letter but was omitted from the respondent's bundle of documents. It covers a number of important points:

    23.1. For 2 years and 4 months she had worked, latterly as head housekeeper in a responsible role, had never taken a day off sick, with exemplary timekeeping and had worked extra hours and was flexible, covering for carers as well if the respondent was short of staff.

    23.2. On 27 July 2018 she suffered an accident at work. She was then off work for 2 weeks by reason of a biopsy which caused her to be absent anyway. She had strong painkillers as a result of this operation, and when she reduced these she suffered pain in her neck. On 02 August 2018 she went to the GP who said it was whiplash caused by the accident in the lift. She went to a physiotherapist on 10 August 2018 and was advised to work only at light duties.

    23.3. On 13 August 2018 she showed that diagnosis to the respondent's deputy manager who said she should carry out any duties with which she was comfortable.

    23.4. On 17 August 2018 she told the hotel of this diagnosis when she returned to work there and her work was rearranged, so that she did nothing physical.

    23.5. On 31 August 2018 she discussed with the respondent's acting manager that she was finding her work too hard and that her pain was getting worse. The deputy manager suggested that she had returned to work too early. She returned to the GP on 03 September 2018 and he provided her with a sick note. Her GP had told her she could continue with light duties at the hotel but not physical work at the care home.

    23.6. She attended work on 12 September but would not be let in, and Pearl Jackson had then told her on the telephone that she was suspended and should await a letter. She then got a letter requiring her to attend a meeting on 20 September 2018, which she attended but she was not allowed her companion. She had not received minutes of that meeting. She did not think the ACAS procedures had been followed.

24. Ms Jackson replied on 26 September 2018 (R:124) stating that there was no right to be accompanied, that an interpreter was provided for her and she chose to speak in Polish throughout. Ms Jackson wrote that *“Your attempt to dictate the terms of the investigation meeting and impute the motives of the Home in holding such a meeting are rejected as untrue and unhelpful”.*

25. On 01 October 2018 the claimant’s GP (C:53) wrote a *“To whom it may concern”* letter for the claimant stating that the claimant had no previous history of neck pain, and attaching details of her medical notes relating to her attendance at the surgery relating to neck pain, and of her medication. That letter was seen by Jane Delaney during the course of the grievance process, but her file (with that letter) was not seen by Helen Buncombe or by Jeremy Davies.

26. Jane Delaney held the grievance hearing on 01 October 2018. By letter of 05 October 2018 (R:126) she dismissed the grievance, finding that there was no detriment to the claimant because her English was good enough and there was a Polish speaking colleague there. She said that the notes would be passed on to Pearl Jackson. The grievance papers were filed and were not part of the papers used in the disciplinary hearing or appeal.

27. On 05 October 2018, Pearl Jackson wrote (R127) to the claimant stating that *"During the investigation meeting you displayed un-checked anger and a complete absence of consideration for the person that you were abusing”* (herself) and that this would now form part of the investigation. Also *"I am also concerned that during the investigative meeting made a series of allegations regarding your health and abilities which you claimed to be able to substantiate by reason medical evidence… but you have refused access to your doctor and your medical records…and creates a suspicion that you are being less than candid…"* .

28. On 08 October 2018 the claimant wrote (R: 128-131) to Pearl Jackson stating that she had instructed her GP to prepare a medical statement covering health issues from the date of the accident until now. She said her health prior to the accident was not relevant to the dispute. She had already provided a letter from her physiotherapist. She requested a copy of the statement/accident/incident report from the person who opened the lift door after the accident - the person who let her out - and a copy of a statement or report from the lift engineer who investigated the lift at the time or afterwards, and details of the respondent’s insurer. She enclosed a GP record, a physiotherapist's note, a GP invoice and a letter from the hospital.

29. On 10 October 2018 the claimant wrote again to Pearl Jackson (R:130-131). She had by now received the letter of 05 October 2018. She said that she saw no point in appealing the grievance meeting outcome. She thought Pearl Jackson’s letter slander and malicious falsehood which would not help resolve the problem regarding her injury to work. She repeated her request for details of the workplace insurance company covering employee liability.

30. On 12 October 2018 Pearl Jackson replied (R:132). She said that the company did not use its insurer in claims such as this and therefore the insurance details *"are irrelevant".* She also stated *"I would suggest that the medical records sent to me is not full disclosure and a deliberate attempt to conceal medical information."*

31. On 13 October 2018 Pearl Jackson prepared an investigation report (R:93-97). The report ends:

    “I conclude that the disciplinary process should be adopted to cover the following areas of gross misconduct
    - a potentially fraudulent claim of an injury
    - a potentially fraudulent claim for SSP
    - unreasonable and abusive behaviour noted throughout the investigative process”

32. The disciplinary meeting was on 08 November 2018. A statement from Carol Meldrum, acting manager at the home, dated 30 October 2018 (R 115-1) was obtained. This stated that on her return from her 2 weeks absence it had been agreed that the claimant could do such work as she felt capable of doing, but that she had *"completely ignored"* attempts to help her, that there was no evidence of discomfort or pain, and that she had previously complained of back or neck pain previously. Helen Buncombe had spoken to Carol Meldrum on 06 November 2018 (R115-3) who stated that the claimant had mentioned back or neck pain about 3 weeks before the lift incident. A statement said to be of Louise Helliwell (R115-6/7) was provided, about the lift incident and also said that the claimant had complained of neck pain beforehand. It states that the claimant had asked her to complete an accident form about a month later. She was inexperienced in management and *"didn't dare question her motives"*.

33. Helen Buncombe had prepared some questions in advance of the meeting and went through them (R102 *et seq*). The claimant's daughter was present. While some of the questions are open questions, others are highly judgmental. A professional interpreter was retained by the respondent.

34. The letter of dismissal is dated 12 November 2018 (R135). It states that the decision was based upon the evidence available, including her own investigations. The account of being injured was found to be untrue based on contradictory evidence from other witnesses and varying accounts given by the claimant. This was gross misconduct. So was making an untrue claim for SSP, which was found proved for the same reasons. The conduct during the meeting of 20th of September was also found to be gross misconduct. It was stated to be abusive confrontational and totally lacking in respect and consideration for the colleagues she was abusing. There was a high degree of forethought and calculation and a total disregard for the feelings and dignity of the people being abused. The sanction was summary dismissal.

35. The claimant appealed by letter dated 16 November 2018 (R136-7).

36. Jeremy Davies took the appeal, on 17 December 2018 (R109 *et seq*).

37. On 19 December 2018 the claimant wrote to Jeremy Davies declining to provide her entire medical records. She wrote *"I have already provided Mrs Jackson medical report regarding my musculoskeletal system prior and post work injury (dated 27/07/2018). One of the reasons why I decided not to provide my full medical history is the fact, that during the investigation meeting dated 20/09/2018 Mrs Jackson used my gynaecological health problems and hospital treatment talking about it in an unprofessional way what upset me much. In addition to the above I believe that my health issues are discussed by Mrs Jackson with third parties that are not involved in our dispute. I was advised that I have a right to protect my dignity and to keep my private, not related to work injury, medical condition to myself."* She stated that she had come to the conclusion that her full medical history report, specifically gynaecological issues, were not related to their dispute.

38. Jeremy Davies' oral evidence was that the provision of full medical evidence might have altered his decision. He was not able to say why detailed information about gynaecological conditions might be relevant. He had not seen the letter from the GP stating that the claimant had consulted the GP concerning a neck problem. It would have made no difference to him, he said in his oral evidence, if he had seen it because *"we all know about the Polish work ethic".*

39. On 24 December 2018 Jeremy Davies emailed the claimant (R144). He stated that *"The appeal investigation is ongoing presently…"* He said *"I am extending to you an opportunity to provide that further information."* He did not specify what that information was, but it was a reference to medical information.

40. On 07 January 2019 Jeremy Davies wrote to the claimant dismissing her appeal (R145-147). He wrote:

40.1. *"There is no clear proof that the accident as described by you did occur." "Your claim took weeks to surface."*

40.2. *"You rejected any offer of assistance at the time and claimed to be fine throughout the experience"*

40.3. *"You claimed that the lift fell down the shaft quickly to the bottom, but you were already there as your statement confirms. The lift engineer disputes that the lift could have fallen down the shaft."*

40.4. *"A statement by another employee refers to your numerous complaints of back and neck pain prior to the lift incident… Unfortunately, the medical records are only provided from the date of the lift incident and you are refusing to provide a complete record".*

41. In dealing with the investigation meeting the letter states *"At the appeal meeting you were unable to expand on why you believe the investigator's meeting was conducted in an unprofessional manner".* He had made enquiries to verify that a Polish person remained with her throughout the lengthy investigation meeting.

42. That letter concluded the process and these proceedings were commenced. The claimant is now seriously affected by her neck condition, is unable to work at all, and has undergone MRI scans and other investigations to try to find out what may be done. The fact that she now has a very serious neck problem is not relevant to the assessment of the claim in which hindsight has no part.

Submissions

43. I made a full typed note of the lengthy submissions of both Mr French and of Ms Nieoczym, which can be read by a higher Court if required.

44. The submissions of Mr French focused on the *Burchell* test, and why and how it he said it was met by the respondent, and that if there was any failing *Polkey* applied, or 100% contribution by reason of conduct.

45. Those of Ms Nieoczym focused on the evidence considered, or not considered, by the respondent, and the way the respondent had not, in her submission, acted fairly.

Law

46. Having established the above facts, I now apply the law. No sophisticated legal analysis is required. Did the respondent have a genuine belief on reasonable grounds of misconduct by the claimant? If yes was it gross misconduct? Was dismissal within the range of responses of a reasonable employer? Was the dismissal procedurally fair? If not what were the the chances of dismissal if there was a fair procedure? If there was an unfair dismissal did the claimant cause or contribute to her dismissal by her conduct?

47. I have considered section 98 (4) of the Act which provides *"…. 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".* There is no burden of proof, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.

48. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code").

49. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."*

50. The compensatory award is dealt with in section 123. Under section 123(1) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

51. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: *"where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

52. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; , Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Sheffield Health and Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09; Bowater v North West London Hospitals NHS Trust [2011] IRLR 331 CA; London Borough of Brent v Fuller [2011] ICR 806 CA; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames water Utilities [2015] EWCA Civ 677, paragraph 61.

53. The reason given was misconduct which is a potentially fair reason for dismissal. It was the reason. The issue was whether it was fair, or not.

54. The starting point is the words of section 98(4) themselves. In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

55. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

Discussion and conclusion

56. The starting point for the respondent was that they had an employee who had gone off sick with an asserted whiplash injury 4 weeks after an incident in a lift. Then a couple of days later she was seen working at her other job. They thought that was highly suspicious, particularly as whiplash injuries are notorious for fabrication or exaggeration. It certainly calls for investigation and explanation.

57. Unfortunately what occurred was a classic example of confirmation bias, for the reasons that follow. The result was that while there was undoubtedly genuine belief in gross misconduct, there was neither a proper investigation nor reasonable grounds for that belief.

58. The witness statement tendered for Jane Delaney states that the claimant ran away from her when she saw her. In oral evidence Jane Delaney said that the claimant showed her round for some 10-15 minutes. The photographs taken by Jane Delaney's daughter do not show the claimant running away but coming towards Jane Delaney smiling. The drafting of the witness statement was not reflected in Jane Delaney's oral evidence which was limited to a feeling that the claimant was uncomfortable in seeing her. Plainly it was drafted for her. Pearl Jackson, Helen Buncombe and Jeremy Davies all viewed the matter in the way set out in the witness statement prepared for Jane Delaney (who played no part in the disciplinary process).

59. The letter calling the investigation meeting is couched in terms that indicate predetermination. Suspension is not a neutral act.

60. Pearl Jackson refused to allow the claimant's daughter to be present at the investigation meeting. This was on the basis that there is no statutory right to be accompanied at an investigation meeting. That is so, but the ACAS guidance on conducting workplace investigations is absolutely clear: it may be unfair to exclude a representative, and a representative may be particularly useful where the employee does not have English as a first language. That was the case with the claimant, whose command of English is limited. Her use of an interpreter in this hearing was not a device, nor was she able to converse in English other than at a basic level.

61. The respondent rejoins that another employee who is Polish was brought in to translate. Review of the transcript supports the claimant's account that she (the claimant) was told more than once not to speak in Polish. The presence of a Polish speaking employee did not materially assist the claimant. Pearl Jackson said at the beginning of the interview that she *"only expect her to actually correct the English so you understand it".* It seems this meant to assist in getting the claimant to understand the questions. Accordingly while the meeting included someone able to speak Polish, the claimant was not allowed to use her as an interpreter, and for the most part only what Pearl Jackson said was translated into Polish, and very little of what the claimant said (what the other Polish employee said in Polish is of course not set out in the transcript).

62. The claimant was locked into the room where the meeting took place. The claimant was locked in the room: her evidence to this effect is supported by the transcript which ends with the claimant saying *"Can you open for me door, please?"* and Pearl Jackson replying *"I will let you out, most certainly."* This clearly indicates that the claimant was, as she stated, locked in.

63. The claimant's daughter was an employee, and so a proper choice of companion. She did attend the investigation meeting, as the letter saying she could not attend was only 1½ hours before the meeting (itself unfair) but Pearl Jackson required her to leave.

64. Pearl Jackson stated in the interview that lift engineer had said that all that had happened was that the doors had jammed, but there is no report from the lift engineer, nor even a note of a

conversation between a lift engineer and Pearl Jackson. This is obviously a central point to the whole matter, but has been ignored by the respondent throughout.

65. The investigation report (R93-97) is replete with lack of objectivity. It commences somewhat curiously *"This investigation was instigated as a result of a claim for SSP made by BK, due to an incident at work?"* which appears to question the entire premise of the claimant's account. Perhaps it is no more than a stylistic idiosyncracy. (This is of significance as it is replicated in the witness statements of others.) But the report then goes on *"B claims that she was stuck in the lift at Garden House on the 27th July 18, and that the lift fell down the shaft which caused the injury to her neck."* The claimant did not claim to be stuck in the lift, she *was* stuck in the lift. Perhaps that again is a stylistic failing, conflating the claim of injury with the fact of being stuck in the lift. It then goes on to say that *"there was no accident form completed or any day log both open to the employee to report any harm"* as if it is the claimant's fault there was no proper documentation, which ignores the fact that the claimant had tried to do this on her return to work, and had been put off for a further week, until 21 August 2018.

66. The investigation report then states *"I have spoken to the lift company and requested a report with regard to the lift function as well as the incident log."* The report does not say who was spoken to, when, or what he or she said. There was no telephone attendance note. Nor was there any report from the lift company. Jeremy Davies said in his oral evidence that they were not keen to do so. That really is not a satisfactory evidential basis on which to base a decision that someone is making a fraudulent claim. The report then says that *"B made regular references to her health including a previous neck problem and "her cancer"?"* This report does not give an evidential basis for the assertion that the claimant had previously complained of neck problems, but some statements were annexed. None are signed. They must have been prepared by Pearl Jackson. There is no evidence that they were approved by the people whose names they bear, of that they had ever been shown them. The stylistic ideosyncracy of a statement ending with a question mark recurs in them.

67. The claimant had just come back from an investigatory biopsy operation, and plainly was worried that the underlying issue might be cancer. Even allowing for a possible tendency to phrase idiosyncratically, the only possible inference from the combination of the question mark and the inverted commas around the words *"my cancer"* is that the writer felt that the claimant was probably not genuine. This approach permeated the whole approach of all 3 people who dealt with the process.

68. The report then correctly states that the claimant did not complain of injury at the time, and was composed while in the lift. It records that the claimant went home after she was eventually freed. It does not record that while the claimant held it together while trapped she collapsed into a tearful heap when safely out. That was not disputed during this hearing.

69. It is then stated that the lift engineer stated that the doors were damaged and the lift needed repair. It is said that he subsequently confirmed that the lift did not drop down the shaft as suggested, nor could it have shaken from side to side. There was nothing more specific about the lift's failure.

70. The report then states that nothing more was heard until a 2 week certificate was received. The report states that it (the fit note) was unsigned and did not say why the claimant was absent. The fit note was not thought to be other than genuine, so the negative comments are gratuitous. The claimant was understood to be attending hospital for *"what she described as her cancer"* and had an operation relating to this. Since the respondent's managers knew that the claimant was going to hospital for a procedure and was worried about cancer this is remarkably insensitive. Any reader of this report will, even after making allowances for style, by now not consider this an objective and impartial document.

71. The report then refers to the claimant being seen at the hotel on 05 September 2018, and that she had tendered a sick note for 03-09 September 2018 and that the claimant returned to work on 12 September 2018, and had a sick note for 2 months for light duties. No account was taken of the fact that the claimant had returned to work on 12 September 2018, as previously arranged, to seek light duties, which is entirely consistent with her not being able to undertake her role unaltered, and that was the reason why she had gone off sick.

72. The evidence of the claimant is that the hotel were very pro active, and made sure that any physical element of her job was removed. She did not wait at table. She was there in a support role. Her English is very basic, and accented, but for basic tasks with a limited vocabulary would have been sufficient. The claimant said that the hotel got confirmation from her GP that this was within her scope. It is also noteworthy that the respondent took no step to see whether what the claimant said was confirmed by the hotel.

73. There is then a section in the investigation report dealing with the investigation meeting. It is stated that the claimant *"elected to complain that she could not understand English or spoke in Polish so that the interviewer (Pearl Jackson) could not determine the answer*". This was about someone who had asked for her colleague/daughter to attend because her command of English was not adequate for a disciplinary hearing, which request had been turned down and a Polish speaking colleague provided as an interpreter, who was then only allowed to turn English to Polish, but not the other way round. The unfairness of all this passed by Helen Buncombe and Jeremy Davies, who simply accepted all Pearl Jackson said.

74. There is then an extended passage dealing with the grievance, and with what reports that the claimant twice requested the company's insurer details and had retained a *"no foul no fee"* (sic) lawyer, and that only selected details of the medical notes had been provided. (This was that the claimant had provided all GP notes from the date of the lift incident but not anything beforehand, and the letter saying that the claimant had not sought help for any neck problem beforehand). The claimant had not enjoyed the meeting with Pearl Jackson and saw no reason to give her highly personal medical information that was nothing to do with her neck, a view which I find was entirely reasonable.

75. There follows a quasi medical passage in which (in my view entirely inappropriately) Pearl Jackson undertakes a critique of what gynecological condition the claimant may or may not have, basing her opinions on her nursing expertise *"As a nurse I would argue…".* But with no medical evidence about the claimant. This was not only unprofessional as a human resources person (and possibly also as a nurse) but also irrelevant to the question of whether the claimant had falsely claimed to have suffered a whiplash injury. It is designed (I so find) to make the reader think that the claimant was not truthful. The intended reader was, of course, a person who would make a disciplinary decision, and the whole tenor of the report is to get the claimant dismissed for gross misconduct. Since the meeting of 20 September 2018 Pearl Jackson had an animus against the claimant by reason of the way that meeting had gone.

76. Helen Buncombe clearly picked up on the impression that the claimant was someone who made the most of any issue of health, as she was (in her oral evidence) clearly of the view that the procedure undertaken was nothing that warranted 2 weeks off work. Her oral evidence was that she formed this view as she was herself a nurse and had undergone something similar. This was inappropriate.

77. The unfairness of the report and process to date impacted on the decision of Helen Buncombe, because it was not an unbiased report that was placed before her.

78. The matter was referred to a disciplinary hearing, but before it was heard the claimant lodged her grievance, heard by Jane Delaney, about the investigation meeting. It was not appropriate to have Jane Delaney hear the grievance given that her report was the genesis of the

disciplinary process. The respondent is a large nationwide company and it would have been possible to have someone independent to take the grievance.

79. The grievance was about the lack of her daughter as companion, the one sided use of a Polish colleague to translate, and that her medical certificate was that she should not undertake physical work, not that she could not be a hostess in an hotel. She said that Pearl Jackson had called her doctor *"a liar".* The grievance states that there had been a recommendation for a disciplinary hearing without a balanced investigation. (The grievance was well founded.)

80. Pearl Jackson responded to the grievance in a way that was inappropriate, by letter of 26 September 2018 (R124) – it was for the person hearing the grievance to decide whether the claimant had a point or not, and not for the person against whom the grievance was lodged. Instead the letter dealt with the points raised in the grievance before stating that someone would write to the claimant about it.

81. The letter of 12 October 2018 refusing to provide the respondent's insurance details appears not to comply with an employer's obligations under the Employers' Liability (Compulsory Insurance) Act 1969:

> *"1 Insurance against liability for employees.*
>
> *(1)Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business, but except in so far as regulations otherwise provide not including injury or disease suffered or contracted outside Great Britain."*

And:

> *"4 Certificates of insurance.*
>
> *(1)Provision may be made by regulations for securing that certificates of insurance in such form and containing such particulars as may be prescribed by the regulations, are issued by insurers to employers entering into contracts of insurance in accordance with the requirements of this Act and for the surrender in such circumstances as may be so prescribed of certificates so issued.*
>
> *(2)Where a certificate of insurance is required to be issued to an employer in accordance with regulations under subsection (1) above, the employer (subject to any provision made by the regulations as to the surrender of the certificate) shall during the currency of the insurance and such further period (if any) as may be provided by regulations—*
>
> > *(a)* ***comply with any regulations requiring him to display copies of the certificate of insurance for the information of his employees****;*
> >
> > *(b) produce the certificate of insurance or a copy thereof on demand to any inspector duly authorised by the Secretary of State for the purposes of this Act and produce or send the certificate or a copy thereof to such other persons, at such place and in such circumstances as may be prescribed by regulations;*
> >
> > *(c)* ***permit the policy of insurance or a copy thereof to be inspected by such persons*** *and in such circumstances as may be so prescribed.*

> *(3)A person who fails to comply with a requirement imposed by or under this section shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale."*

The Employers' Liability (Compulsory Insurance) Regulations 1998 contain provisions that enable the employee to know the insurer.

82. It is a concern that the respondent asserts that it is liable for the cost of dealing with the whiplash personal injury claim of the claimant which gives it a vested interest in that claim being unsuccessful. Dismissal for the reason that the claim is fraudulent is self evidently of assistance in defending such a claim, for which the claimant had retained a lawyer. While that does not necessarily mean that the dismissal was for the ulterior motive of avoiding the cost of a personal injury claim it is unsatisfactory.

83. This concern is increased by the fact that the respondent has not asked for any independent medical examination of the claimant. As the respondent asserts that the claimant has fabricated her entire claim (a serious allegation for which it dismissed the claimant), genuine belief on reasonable grounds after proper investigation is likely to have required such an examination. The claimant had provided supportive medical evidence, and a coherent explanation as to how she was able to work in a hostess role at the hotel (but not as a waitress, her previous work) but not as a cleaner at the respondent (she was housekeeper, but was, for example pushing a large linen trolley when the lift incident occurred).

84. Jane Delaney was in possession of the GP's letter of 01 October 2018, but neither Helen Buncombe nor Jeremy Davies saw it. Jeremy Davies said in his oral evidence that it would have made no difference. Asked why, he said that *"We all know about the Polish work ethic"* meaning that he believed the claimant had not complained about a preexisting condition which she was now exploiting by making a false claim. This combination of not considering proper information and stereotypical racial or national assumptions is not helpful to the respondent's case.

85. The claimant's grievance letter of 24 September 2018 (clearly written for her) was not taken seriously.

86. The assertion put in cross examination that the physiotherapy was all part of a fraudulent claim is not backed by any rational basis, but is predicated on the belief that the claimant was making it up for gain.

87. The matter came before Helen Buncombe to decide what to do. The framing of some of her questions is indicative of prejudgment. There was the evidence of Carol Meldrum (the second statement obtained by Helen Buncombe being the only one signed) and that of Louise Helliwell indicating a neck problem before, which the claimant denied ever having said. The implication that the accident report was a fabrication and only asked for a month after the event (Louise Helliwell R115-7) is highly misleading because it was accepted that the claimant asked another manager to do one the day she returned, but that manager did not know how to do it.

88. If the claimant had previous neck pain it was not such as to make her go to the doctor, but Helen Buncombe was not aware of the GP letter saying she had not visited the surgery about her neck. That was not the fault of the claimant. Nor was the possibility of the lift incident precipitating serious neck problems in someone who might have a predisposition to such problems considered. If there had been neck pain before it had not interfered with the claimant's work, and she had no time off for any reason before this. The respondent knew this.

89. A statement in the name of Paul Delaney, group maintenance manager, stated that the claimant had exited the lift where she entered it. The statement opined that it was the trolley

that had damaged the doors, without any evidence – it was not said that this was the opinion of a lift engineer.

90. The claimant has always said that she entered the lift the floor above, and that the lift had gone down a floor, and the jerks in doing so were what had caused her the neck problem. She has always been clear that she went to the laundry to get a trolley of linen, and the laundry is on the floor above (which it is), and it that she had the trolley of linen in the lift with her (which was the case). No attention was paid to this by Helen Buncombe, who accepted the statement in the name of the group maintenance manager (Paul Delaney) that the claimant left the lift at the level she entered it. He was not on site at the time. The claimant could not have been taking the trolley up, as it had fresh linen in it. The only way she could have such a trolley in the lift is if she had collected it from the laundry on the floor above. Helen Buncombe took her decision on the basis that the lift had not moved at all, and that the only issue was that the doors had jammed. The difficulty with the process, the decision and the appeal was that the account of the claimant was not examined carefully. It worked backwards from the assumed conclusion.

91. All the statements given to Helen Buncombe are typed with the same font. None are signed. Several have the stylistic quirk of an interrogatory "?" at the end of a sentence that is not a question. Undoubtedly these were all prepared by Pearl Jackson, and there is no evidence that any of the people to whom they are attributed have approved (or even seen) them (save that Helen Buncombe got a short statement from Carol Meldrum which was signed).

92. Helen Buncombe was, in her oral evidence, disparaging about the procedure undertaken by the claimant, and felt that its effect was greatly exaggerated. This was not a point relevant to the disciplinary decision (it was not any part of any allegation), but (along with Pearl Jackson's partisan report) clearly coloured her assessment of the matter.

93. There are several issues with the appeal:

    93.1. Jeremy Davies conducted his own further investigations after the meeting.

    93.2. The onus was put on the claimant to show that the injury occurred, when the allegation was that the claim was false. It was for the employer to show genuine belief on reasonable grounds after proper investigation that the claimant was faking it, not for the claimant to prove a personal injury claim. This is not a sterile lawyer's point about burden of proof, but a real difference in approach.

    93.3. There was insistence on disclosure of full medical records when there can have been no relevance in anything gynaecological, and an adverse inference drawn when they were not provided, even after a cogent reason was given.

    93.4. The GP letter stating that there was no consultation about back or neck problems was not given to Jeremy Davies.

    93.5. The view of Jeremy Davies was that the letter would have made no difference was by reason of stereotypical negative assumptions about Polish people (that she was likely to have a strong work ethic and so work through pain and so not go to the doctor, and then take advantage of an incident at work to make money out of a preexisting condition).

    93.6. There was no critical examination of the evidence: the claimant was clear about what had happened – the lift had descended one floor – but was disbelieved as the button she said she had pressed was the ground floor button and she was already there. There was in the hearing much question and answer about exactly what was on the lift buttons, but all from recollection, and it is all irrelevant: whatever is on the button, the claimant said it was the down button she pressed and she was on the ground floor, descending to the lower ground floor. What is written on the button is neither here nor there. There is reliance

on what the lift engineer is said to have stated: but the only record of that is one line in Pearl Jackson's investigation report.

93.7. Jeremy Davies accepted in his oral evidence that the meeting of 20 September 2018 was not professionally handled and that while he was critical of the claimant he thought they were as bad as each other. He knew no action was taken about Pearl Jackson, and yet thought the claimant deserved dismissal for gross misconduct.

93.8. He thought the SSP claim the worst aspect of the claimant's conduct. I enquired whether anyone had considered whether, if someone was fit for one light job but not for another and so was signed off work for one but not the other, SSP was payable in respect of the lost income only. The claimant worked over 40 hours a week for the respondent so there was a lot of lost income. No one had, and it is not for the judge to so enquire: but plainly that is a possibility that ought to have been considered.

93.9. No enquiry was made of the hotel to substantiate the claimant's account that they had moved the claimant to very light duties and insisted that the GP write to them to say it was acceptable for her to undertake that limited work.

93.10. How long does it take for a whiplash injury to emerge? It is a commonplace that symptoms can emerge after an accident and not be apparent at the time. That the claimant said nothing at the time means little. The claimant said that she was on strong painkillers by reason of the procedure she underwent very soon afterwards. Then she felt the pain as the painkillers she had by reason of that procedure were reduced and stopped. That is a coherent account, but was not considered at all.

94. Accordingly I find that the respondent has not shown that it had genuine belief on reasonable grounds after proper investigation of gross misconduct (or misconduct that could justify dismissal with notice).

95. I find that no reduction is appropriate by reason of *Polkey*. The whole procedure was flawed as for the reasons given. If a fair procedure had been followed it is unlikely that there would have been a dismissal.

96. I have considered whether a reduction for contribution is appropriate. That is to be assessed in the light of my findings of fact (and not any assessment of the respondent's actions). It would have been better for the claimant to have told the respondent that she was still able to work at the hotel, but it is not blameworthy of her not to have omitted to do so. Therefore I make no reduction by reason of any conduct of the claimant.

Employment Judge PSL Housego
Dated 16 May 2019